England and Wales High Court (Chancery Division) Decisions

Neutral Citation Number: [2021] EWHC 831 (Ch)
Case No: BL-2018-002520, BL-2019-001573

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (Chd)

Rolls Building
7 Rolls Building
Fetter Lane
London, EC4A 1NL
12/04/2021

B e f o r e :

MASTER KAYE

Between:

(1) PERSIMMON HOMES LIMITED **(2) TAYLOR WIMPEY UK LIMITED**	**Claimants**
- and -	
(1) OSBORNE CLARK LLP **(2) OSBORNE CLARK (a firm)**	**Defendants**

Zoë Barton QC and Daniel Petrides (instructed by Walker Morris LLP) for the Claimants
James Hatt (instructed by Norton Rose Fulbright LLP) for the Defendants

Hearing dates: 18 January 2021

HTML VERSION OF JUDGMENT APPROVED

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to BAILII. The date and time for hand down is deemed to be 12 April 2021 at 10.00 am

Master Kaye :

1. This was the hearing of an application by Persimmon Homes Limited and Taylor Wimpey (UK) Limited ("**the Developers**") to vary their costs budget. The application was issued on 21 December 2020 and is supported by the

second witness statement of Claire Acklam also dated 21 December 2020 and a Precedent T setting out the variations they are seeking. I have also had the benefit of Ms Acklam's first witness statement dated 21 August 2020.

2. The Developers claim the Defendants ("**OC**") were professionally negligent in relation to the drafting of two option agreements and ancillary advice relating to the development of land at Grove Airfield Oxfordshire (BL-2018-002520). OC issued a claim for unpaid fees against Persimmon Homes Limited (BL-2019-001573). The two claims are now being case managed together with combined costs budgets and will be heard together. The Developers say that the value of their claim is in the region of £10m and OC's fee claim is for a sum of in excess of £400K.

Procedural Chronology

3. The two claims came before Deputy Master Linwood ("**DM Linwood**" or "**the Deputy Master**") on 18 November 2019 for a combined costs and case management conference ("**CCMC**"). He adjourned the CCMC part heard until 3 December 2019. On 3 December 2019, he gave case management directions including in respect of disclosure and cost budgeting. The parties' costs budgets and the disclosure review document ("**DRD**") were finalised following the CCMC to reflect the Deputy Master's decisions. The CCMC Order was eventually sealed on 24 December 2019.

4. The CCMC Order directed disclosure by 9 April 2020 and recorded that:

> "the parties shall give disclosure of documents in accordance with Sections 1A and 1B of the Disclosure Review Documents ("DRDs") as amended by the parties and the Court and attached to this Order (in a composite form in respect of Claim No BL-2018-002520 and a full DRD in respect of Claim No BL-2019-001573). "

5. The DRDs approved by DM Linwood primarily required Model C request-led search-based disclosure.

6. The CCMC Order provided for a further CMC ("**the first further CMC**") after 8 May 2020. It also provided a timetable for the exchange of witness statements (July 2020) and expert evidence (to be completed by 18 December 2020). The trial was fixed for July 2021 with a time estimate of 11 days.

7. On 24 February 2020, OC served a Request for Further Information ("**RFI**").

8. Disclosure proved challenging, particularly for the Developers, and the timetable slipped. On 30 April 2020, by consent the date for disclosure was extended to 19 June 2020. The first further CMC originally fixed for 19 May 2020 was vacated and relisted. The date for exchange of witness evidence was extended to 4 September 2020 with dates for expert evidence extended to be completed by mid-April 2021.

9. The first further CMC eventually took place on 26 August 2020. On 18 August 2020, OC issued an application for further disclosure pursuant to PD51U. The Developers responded to the outstanding RFI on 25 August ("**RRFI**"). By 26 August 2020, it was apparent that a trial date in July 2021 could not be held. Orders were made in relation to the Developers' continuing challenges in respect of disclosure; the dates for exchange of witness evidence and expert evidence were extended. The first further CMC and OC's application were adjourned to 7 January 2021 ("**the second further CMC**"). The trial was relisted in May 2022 with the same time estimate.

10. The timetable set at the first further CMC directed that the Developers address the then outstanding aspects of their disclosure by 16 October 2020. However, additional issues emerged later which were not resolved until shortly before Christmas.

11. On 3 December 2020, the Developers submitted their Precedent T to OC and subsequently issued their application to vary on 21 December 2020.

12. By the second further CMC only three outstanding disclosure issues remained. No further disclosure directions were sought by either party. OC did not pursue their 18 August 2020 disclosure application save in relation to costs. The second further CMC dealt with some general case management issues but primarily with the costs of OC's disclosure application. The Developers application to vary their costs budget was relisted to be heard on 18 January 2021.

Jurisdiction:

13. CPR 3.12 to CPR 3.18 and the accompanying practice direction CPR PD 3E set out the procedural framework relating to costs management. Prior to 1 October 2020 when CPR 3.15A was introduced, the procedure to be followed when seeking to vary a costs budget was set out in CPR PD 3E 7.6.

14. CPR 3.12 (2) provides that:

> "The purpose of costs management is that the court should **manage both the steps to be taken and the costs to be incurred** by the parties to any proceedings (or variation costs as provided in rule 3.15A) so as to further the overriding objective." (my emphasis)

15. CPR 3.15 provides so far as relevant:

> "**Costs management orders**
>
> 3.15
>
> (1) In addition to exercising its other powers, the court may **manage the costs to be incurred (the budgeted costs)** by any party in any proceedings.
>
> (2) The court may at any time make a 'costs management order'. Where costs budgets have been filed and exchanged the court will make a costs management order unless it is satisfied that the litigation can be conducted justly and at proportionate cost in accordance with the overriding objective without such an order being made. By a costs management order the court will—
>
> (a) record the extent to which the budgeted costs are agreed between the parties;
>
> (b) in respect of the budgeted costs which are not agreed, record the court's approval after making appropriate revisions;
>
> (c) record the extent (if any) to which incurred costs are agreed.
>
> (3) **If a costs management order has been made, the court will thereafter control the parties' budgets in respect of recoverable costs.** (my emphasis)
>
> (4) Whether or not the court makes a costs management order, it may record on the face of any case management order any comments it has about the incurred costs which are to be taken into account in any subsequent assessment proceedings.
>
> …
>
> (8) A costs management order concerns the totals allowed for each phase of the budget, and while the underlying detail in the budget for each phase used by the party to calculate the totals claimed is provided for reference purposes to assist the court in fixing a budget, it is not the role of the court in the costs management hearing to fix or approve the hourly rates claimed in the budget."

16. The combination of CPR 3.12 and CPR 3.15 provides that where the court makes a costs management order in relation to "to be incurred costs", it considers the case management and the costs management together to ensure that the proposed case management steps can be conducted reasonably and at proportionate cost, so far as they relate to recoverable costs, having regard to the particular factors in a case including its value and complexity. Thereafter the court manages and controls both the conduct of the case and the "to-be-incurred recoverable costs".

17. The starting point on an application to vary a costs budget is CPR 3.15A which provides so far as relevant:

> **Revision and variation of costs budgets on account of significant developments ("variation costs")**
>
> 3.15A. (my emphasis in bold below)
>
> (1) A party ("the revising party") **must** revise its budgeted costs upwards or downwards if **significant developments in the litigation warrant such revisions**.
>
> (2) Any budgets revised in accordance with paragraph (1) **must** be **submitted promptly** by the revising party to the other parties for agreement, and subsequently to the court, in accordance with paragraphs (3) to (5).
>
> (3) The revising party **must**—
>
> (a) serve particulars of the variation proposed on every other party, using the form prescribed by Practice Direction 3E;
>
> (b) **confine the particulars to the additional costs occasioned by the significant development**; and
>
> (c) certify, in the form prescribed by Practice Direction 3E, that the additional costs are not included in any previous budgeted costs or variation.
>
> (4) The revising party **must submit the particulars of variation promptly to the court**, together with the last approved or agreed budget, and with an explanation of the points of difference if they have not been agreed.

> (5) The court **may approve, vary or disallow the proposed variations**, having regard to any significant developments which have occurred since the date when the previous budget was approved or agreed, or may list a further costs management hearing.
>
> (6) Where the court makes an order for variation, it **may** vary the budget for costs related to that variation which have been incurred prior to the order for variation but after the costs management order."

18. Prior to 1 October 2020 PD3E 7.6 provided:

> "**7.6** Each party shall revise its budget in respect of future costs upwards or downwards, if significant developments in the litigation warrant such revisions. Such amended budgets shall be submitted to the other parties for agreement. In default of agreement, the amended budgets shall be submitted to the court, together with a note of (a) the changes made and the reasons for those changes and (b) the objections of any other party. The court may approve, vary or disapprove the revisions, having regard to any significant developments which have occurred since the date when the previous budget was approved or agreed."

19. The effect of CPR 3.15A is to clarify the procedure to be followed when seeking to vary an agreed or approved costs budget and to elevate the procedure from a practice direction to a rule. CPR 3.15A (1), (2), (4) and (5) reflect the wording of CPR PD 3E 7.6 with the mandatory nature of the requirements emphasised by the inclusion of "must" in place of "shall", in CPR 3.15A (1), (2), (3) and (4). In addition, CPR 3.15A makes explicit the requirement for promptness which had been implicit in CPR PD 3E 7.6 by the addition of the word promptly in CPR 3.15A (2) and (4).

20. The applicant must therefore first satisfy the court that there has been a significant development in the litigation since the last approved or agreed budget which warrants a revision (upwards or downwards) to the last approved or agreed budget; and second that the particulars of the variation have been submitted promptly both to the other parties and the court in accordance with CPR 3.15A (2) to (4).

21. It is only if the applicant can satisfy the court that it has met these mandatory requirements - the threshold test - that the court goes on to consider the exercise of its discretion in relation to the variation itself and the incurred costs caught by the application to vary in CPR 3.15A (5) and (6). An application to vary therefore involves a two-stage process.

22. Sub-paragraph (5) provides a discretion to the court which "may" approve, vary, or disallow the proposed variations.

23. In considering the exercise of discretion, the court must have regard to the overriding objective and all the circumstances of the case including the need to deal with cases justly and at proportionate cost. This includes considering the prejudice to both the applicant if the revision (including any relevant incurred costs) is not approved or allowed and the prejudice to the respondent if the variation is approved or allowed. The question of promptness and the nature of the development giving rise to the application may re-emerge as part of this exercise of discretion.

24. CPR 3.15A (6) provides a discretion to the court which "may" when varying the costs budget also vary it in relation to incurred costs since the case management order so far as the incurred costs relate to the significant development between the last approved or agreed budget and the order to vary.

25. In this way CPR 3.15A (6) sought to address the apparent difficulty identified by Chief Master Marsh in *Sharp v Blank* [2017] EWHC 3390 (Ch) ("*Sharp*") in relation to the treatment of incurred costs on an application to vary.

Variation Sought

26. The Developers last approved costs budget was in the total sum of £1.455m. At the time it was approved £426K had been incurred leaving approximately £1.025m of to be incurred costs ("**future costs**"). It was those future costs which DM Linwood approved in December 2019. He approved those future costs on a phase-by-phase basis and overall, as an exercise of his discretion. In doing so he will have had regard to what he considered objectively was a reasonable and proportionate sum for recoverable future costs having regard to the factors set out in CPR 44.3 (5) including the complexity and value of the negligence claim and the fees claim. He had had the benefit of a two-part CCMC during which he had considered the disclosure issues and approved a DRD based on Model C, determined and approved the disputed elements of the costs budgets and given case management directions. The CCMC Order recorded that disclosure was to be given in accordance with the DRDs attached to it.

27. The Developers now seek to increase their costs by c. £1.339m to c. £2.795m. This more than doubles the future costs approved by DM Linwood in December 2019 to £2.368m.

28. The prescribed form, Precedent T, is used to set out the proposed variations. It is confined to the additional costs occasioned by the significant development and includes the following certification:

> "I certify that the costs and disbursements included in this variation are not included in any previous budgeted costs or variation (including any contingency) whether agreed or approved by the court."

29. I summarise the information on the front sheet of the Developers' certified Precedent T and OC's offers in the table below:

Phase	**Incurred at date of last approved costs budget.** **3 December 2019**	**Estimated at date of last approved costs budget.** **3 December 2019**	**Total for phase at date of last approved budget** **3 December 2019**	**Variation Sought** (increase sought above the estimated figure in the last approved costs budget) **3 December 2020**	**Total "Estimated" costs after variation.** **From 4 December 2019**	**OC's Offers**
Pre-Action	£179,019.11		£179,019.11 All incurred			
Issue/Statements of case	£79,622.47		£79,622.47 All incurred	£72,559.50 RFI	£72,559.50 RFI	£7,500 For RFI
CMC	£64,316.00		£64,316.00 All incurred	£99,250.00 Further CMCs	£99,250.00 Further CMCs	
Disclosure	£40,951.50	£140,360.00	£181,311.50	£581,088.50	£721,488.50	£25,000 Additional hosting fees
Witness statements	£1,024.00	£122,500	£123,524.00	£69,900.00	£192,400.00	
Experts		£224,805.00	£284,472.00	£132,355.00	£357,160.00	£8,000 Additional meeting of experts not budgeted for
PTR		£36,015.00	£36,015.00	£10,000.00	£46,015.00	
Trial Prep		£208,030.00	£208,030.00	£301,020.20	£509,050.00	£15,000 for additional work on bundle preparation
Trial		£189,555.00	£189,555.00	£59,850.00	£249,405.00	£8,000 for additional expert attendance
ADR/Settlement	£1,920.00	£107,970.00	£109,890.00	£13,500.00	£121,470.00	
Totals	**£426,520.08**	**£1,029,235.00**	**£1,455,755.08**	**£1,339,523.00**	**£2,368,758.00**	

30. The Developers rely on three significant developments to support their application to vary.

RFI and costs budgets:

31. At the time of the CCMC on 3 December 2019, the costs of the RFI/RRFI were not anticipated or included in the Developers' costs budget.

32. The RFI was served on 25 February 2020. The RRFI was served on 25 August 2020 six-months later. The Developers say the service of the RFI was a significant development. OC argue that a 2-page RFI and a 4-page RRFI is not a significant development. Even if it was, the costs sought are excessive.

33. The Developers seek £72,559.50 for the RFI/RRFI costs against which OC have offered £7,500. The costs were included in the Precedent T submitted to OC on 3 December 2020. No application to vary the costs budget to address the costs of the RFI/RRFI was made until 21 December 2020; four months after the entirety of the costs had been incurred.

Further CMCs and the costs budgets:

34. The Developers seek an additional £99,250 to cover the costs of the first and second further CMCs which they say had not been anticipated when they prepared their costs budget on 25 October 2019.

35. The CCMC Order provided for the first further CMC in May 2020. It does not appear that either party asked the Deputy Master to adjust the CMC phase to take into account the first further CMC at the CCMC, nor did either party ask him for permission to amend their costs budgets before the CCMC Order was sealed to include the costs for the first further CMC. Both parties knew about the first further CMC from at least 3 December 2019.

36. The first further CMC was primarily focussed on disclosure. Between the CCMC and the first further CMC the Developers did not submit details of any proposed variation or seek to vary their costs budget in relation to the CMC phase.

37. Following the first further CMC, a second further CMC was fixed which again primarily dealt with disclosure related issues.

38. On 3 December 2020, 12 months after the CCMC, the Developers provided OC with their Precedent T seeking to vary the costs budget to include both the incurred costs of the first further CMC and the future costs of the second further CMC.

39. The Developers say that the first and second further CMCs are a significant development. OC accept that the second further CMC, which was not anticipated at the CCMC, might be considered a significant development but argue that the costs are primarily linked to the Developers' difficulties with disclosure and not in reality, CMC costs at all.

Disclosure and the costs budgets

40. Prior to the first part of the CCMC on 18 November 2019 the Developers and OC had been unable to agree the approach to disclosure. The Developers sought to limit their disclosure to non-search-based Models A and B whilst OC sought broader Model C and D search-based disclosure. Little had been agreed by 18 November. DM Linwood sent the parties away to do better, encouraging them to focus on Model C request-led search-based disclosure and relisting the CCMC for 3 December. No cost budgeting took place on 18 November 2019.

41. The original costs budgets reflected the parties' positions as at 25 October 2019. The Developers' original costs budget amounted to c. £1.32m and included c. £160K for disclosure of which only c. £26K had been incurred. The costs budget therefore assumed an additional c. £134K for disclosure based on the Developers Model A and B disclosure assumptions. OC argued that based on the limited disclosure proposed by the Developers the costs should be reduced and offered only £49K against the c. £134K sought for future costs.

42. In their original costs budget, OC assumed that there would be Model C and D search-based disclosure and sought costs of c. £142K of which they had already incurred c. £20.5K, leaving c. £120K for future costs. The Developers offered OC c. £104K for the future costs of this phase.

43. At the CCMC on 18 November 2019, neither the Developers nor OC believed that the others' costs represented a reasonable and proportionate sum for the disclosure exercise the other was proposing to undertake, and each sought a substantial reduction in the future costs.

44. Between 18 November 2019 and 3 December 2019 Ms Barton and Mr Hatt, substantially agreed Model C requests for the issues for disclosure. The Developers' solicitors, Walker Morris ("**WM**") recorded this proposed exercise their letter dated 19 November 2019 and then turned to the issue of costs:

> **"Estimated Costs for Disclosure**
>
> As clarified at the CCMC, the costs set out in our costs budget were based upon the Models of Disclosure we proposed at that stage. The costs set out section 2 of the DRD for the Negligence Claim were the estimated costs of conducting disclosure on the Models proposed by your client (i.e. a combination of Models C and D).
>
> As our Leading Counsel explained at the CCMC the estimate based upon your Models of Disclosure was based on the present volume of data we understand to be held by our clients' custodians, as a result of the enquiries undertaken by our clients' e-disclosure provider (Transperfect) and on the basis of various assumptions provided by it. **With focused search terms, and Model C requests we anticipate this estimated cost will be significantly reduced and it is abundantly clear that disclosure in line with Model C will result in very significantly reduced costs than under Model D.** Furthermore, to carry out Model C disclosure in the fashion set out above will not 'waste' costs in the event that further disclosure is required on a search basis.
>
> We are continuing to liaise with Transperfect to obtain further detail as to the volume of data held by third party custodians and to harvest the data in order for searches to be undertaken. This should provide

a better indication of the costs involved and we will provide an updated costs estimate in due course.

Costs Budget

Subject to the discussions between respective Junior Counsel and based on our assumptions set out for disclosure in our costs budget (which assumed Model A/B only) **we intend to file an updated costs budget in advance of the next costs and case management conference, with a revised estimate for disclosure costs** and the costs of attending a second hearing to conclude the CCMC.

Following the CCMC, it was agreed between respective Leading Counsel that any revisions to costs budgets should be limited to estimated costs which have not already been agreed. Where there is agreement, estimated costs should remain as set out in the current costs budgets."

45. The Developers had retained TransPerfect to assist with disclosure. TransPerfect had already begun to collect data and scope the disclosure exercise. WM and TransPerfect had considered the scope of the disclosure exercise if carried out on a Model C and D basis as proposed by OC. Based on that information WM had estimated that to undertake disclosure in accordance with OC's Model C and D proposals, they would incur costs in the region of £1m. They say that this puts into context the reference in the 19 November 2019 letter to a significant reduction in costs if only Model C were to be adopted. I note however, that the total costs now sought for the disclosure phase alone including those sought in the variation application amount to in excess of £750K.

46. The Developers filed a revised costs budget on 29 November 2019. Although the costs of disclosure increased to c. £172.7K, the future costs remained c. £134K. The total costs had increased to c. £1.39m. The Developers say that the revised costs budget was still based on the Model A and B disclosure assumptions as set out in the costs budget. It had not been revised to take into account the change to Model C despite the terms of the letter of 19 November 2019 and the fact that the DRD was now based on Model C requests.

47. OC's revised budget increased disclosure costs to a total of c. £194K of which c. £156K were future costs and their total increased to £1,466m.

48. On 3 December 2019, DM Linwood finalised and approved the DRD based on the Model C requests substantially agreed between Ms Barton and Mr Hatt. He conducted the balance of the costs and case management including carrying out a cost budgeting exercise setting the future costs for each phase including disclosure. The Developers' Costs Budget was approved by DM Linwood at £1.45m including £181K for the disclosure phase of which c. £140K was future costs. OC's costs budget was approved at £1.42m which included £189K for disclosure of which c. £148K were future costs. Pursuant to CPR 3.15 (8), the Deputy Master had approved the total allowed for each phase not the hourly rates or any other assumptions.

49. The parties finalised the DRD, and costs budgets based on the Deputy Master's decisions at the CCMC. The final DRD dated 19 December 2019 was to be attached to the CCMC Order. The revised costs budgets were filed on 20 December 2019. The CCMC Order was finally sealed on 24 December 2019. Neither party sought to vary or amend the costs budgets before the CCMC Order was sealed.

50. The Developers rely on their disclosure assumptions which were carried over into the costs budget filed on 29 November 2019 and the approved costs budget filed on 20 December 2019. They submit that the Deputy Master was determining their costs for the disclosure phase not on the basis of the DRD he had approved but on the basis of the Model A and B assumptions in their costs budget. However, by 3 December 2019 not only had the scope of disclosure changed to Model C but WM had written to OC saying they would file an updated costs budget before the resumed CCMC. There is no suggestion by the Developers that either the Deputy Master or OC were made aware that the 29 November 2019 costs budget was not based on Model C disclosure and would need further substantial revision.

51. Neither party asked DM Linwood to delay costs budgeting in light of what the Developers now say was such a significant change to the assumptions on which they had based their costs budget that it has resulted in an application to vary the costs budget upwards by c.£1m a year later. In relation to the disclosure phase alone they seek an additional c. £581K. The additional costs sought in relation to the later phases said to be costs occasioned by the significant development amount to c £585K. A total increase of c. £1,167m across the costs budget as a result of the change to Model C.

52. The Developers did not ask to defer consideration of the costs budgeting of the disclosure phase pursuant to paragraph 22 of PD51U. Paragraph 22 of PD51U allows parties to defer cost budgeting in respect of disclosure until the Issues for Disclosure, Models and scope have been finalised.

53. In determining a reasonable and proportionate sum for the disclosure phase of a costs budget it is clearly important that the court can consider the scope of disclosure against the likely cost, and overall impact, of the exercise to be undertaken.

54. It is difficult to imagine circumstances in which the Deputy Master would not have looked critically at the disclosure phase of the costs budget and the DRD if he had been told that the impact of the change to Model C was to increase the costs of the disclosure phase by c. £581K. He would, I suspect, have been even more concerned if he had been told that in addition the effect of the change to Model C would be an increase in the costs across the future phases of c. £585K.

55. Disclosure progressed. As recorded in WM's letter dated 3 April 2020, by 27 February 2020, Transperfect had completed the data collection exercise save for documents from Eversheds Sutherland. The 3 April 2020 letter records that following the data collection exercise TransPerfect had by April 2020 collected some 849 GB and had advised WM that the volume of data collected equated to c.2.2m documents. This was a substantial reduction on the initial indication available in advance of the CCMC of c.3TB and on which the estimate of £1m was calculated.

56. At paragraph 15 WM say:

> **Amendments to costs budget**
>
> "As we now have details of the volume of documents for review during the disclosure phase and since our assumptions were based on Model A/B disclosure rather than Model C, we will soon be writing to you separately regarding proposed amendments to our costs budget."

57. Norton Rose Fulbright ("**NRF**") rejected the explanation. In their letter of 14 April 2020, they did not accept that the change to Model C was a significant development having occurred before the costs budget was approved and identified the failure to raise the matter with the Deputy Master. WM were therefore aware from at least April 2020 that their contention that the change to Model C was a significant development would be opposed and the basis of that opposition. Despite this no indication of the likely increased costs nor a revised costs budget were provided in April 2020, nor was any application made to vary the costs budget.

58. With the letter of 3 April 2020, WM provided a disclosure report setting out the proposed review process. This identified that as a result of further work by TransPerfect the then current review population had been reduced to c.105K documents. WM sought an extension of time for disclosure to mid-July 2020. OC had sought an extension until the end of May for their own disclosure.

59. The parties reached agreement on an extension and each purported to give disclosure in accordance with PD51U paragraph 12 on 19 June 2020.

60. Between June and August 2020, it became increasingly apparent that the Developers' disclosure was incomplete, and their disclosure process had not been smooth. Further directions were given in respect of disclosure at the first further CMC. Further disclosure was due by 16 October 2020. Unfortunately, further issues were identified between August and October. This resulted in further disclosure queries and yet further disclosure. The majority of the disclosure queries were resolved by Christmas and by January 2021 only three issues remained outstanding.

61. No application to vary the costs budget was made at or in advance of the first further CMC. No application was made by 16 October 2020. No application was made after 16 October 2020 until 21 December 2020.

The submissions:

62. The substance of the Developers' argument as set out above was that the change to Model C in November 2019 was a significant development in the litigation that warranted a revision to their costs budget. It was so significant that it affected every subsequent phase of the costs budget. It could not have been anticipated or was not anticipated at the time at which the CCMC took place in 2019 when the costs budget was approved.

63. Ms Barton referred me the commentary in the third supplement to the White Book [2020] at 3.15A.1[148]:

> "The term "significant developments" is not defined. It appears to include any event, circumstance or steps which is of such a size and nature as to go beyond the events, circumstances and steps which were taken into account, expressly or impliedly, in the budget previously approved or agreed. A development is taken into account impliedly if it is something that was or should reasonably have been anticipated by the applicant for revision at the time of the previously approved budget. This paragraph and [Sharp] was applied in *Seekings v Moores* [2019] EWHC 1476 (comm) (Judge Worster)."

64. Ms Barton seeks to argue that the change to Model C went beyond the events taken into account either expressly or impliedly when the costs budgets were approved. She argues that the Developers' costs budget neither expressly nor impliedly took into account the Model C exercise subsequently undertaken nor the additional disclosure undertaken between June and October.

65. The Developers say that Model C disclosure was considerably wider than the Model A and B disclosure originally budgeted for. The budget assumptions assumed no search-based disclosure at all on the part of the Developers. Ms

Acklam's evidence sets out in detail the disclosure exercise in fact undertaken. She explains the increases in costs and the problems that were experienced including processing resulting in the inadvertent exclusion of some electronic data, an issue with the review of CAD files, and the late identification of hard copy documents. Ms Acklam says that these problems simply would not have occurred if there had been no search-based disclosure. She says that OC's disclosure was also more extensive than allowed for in the Developers' assumptions.

66. Thus, Ms Barton argues that the relevant comparison when assessing whether the change to Model C disclosure was a significant development is between a world in which the Developers would never have had to search for and review any of the documents and one where they did.

67. She argues that it was neither reasonable nor realistic to expect the Developers to have fully recalculated their costs budget between 18 November 2019 and 3 December 2019. The adjourned period was used by the parties to work extensively on agreeing Model C although I note that it appears to have been primarily Ms Barton and Mr Hatt who undertook that task.

68. Ms Barton argues that it was therefore foreseeable that there would be a gap between the assumptions and the true effect of the CCMC Order. She sought to argue that provided that the true effect of the change to Model C had not been taken into account and it met the criteria for significant development the court still had jurisdiction to consider the variation. Further, that doing so after the event would still fulfil the policy aims of CPR 3.15 to manage the costs of the parties.

69. Here she says that the effect of the change to Model C was not just the expanded scope of disclosure but also its impact on the later phases of the costs budget. The effect of the expanded disclosure was that there were more documents, including technical documents that had to be reviewed by witnesses and experts. None of this additional work would have been necessary if disclosure had not been search-based.

70. These submissions did not seem to me to resolve the Developers' fundamental difficulties. They knew that disclosure was to be request-led search-based disclosure from 18 November 2019. They knew that they would need to revise their costs budget and told OC this on 19 November 2019. Thus, by 19 November 2019 at the latest the change to Model C appears to me to be something that was and should have been anticipated by them at the time the costs budget was approved and indeed its significance was and had been understood by 19 November 2019. They allowed the CCMC to continue on 3 December 2019 including the approval by the Deputy Master of a Model C DRD and their costs budgets which, they say, did not take into account the change to Model C. They allowed the Deputy Master and OC to proceed on what they say was the wrong basis. They did not seek time to amend the costs budget whether under PD51U or at all.

71. They did nothing between the 3 December 2019 and 20 December 2019 when they filed their costs budget to correct or update their costs budget. They did not raise the issue with OC or apply back to the Deputy Master.

72. Ms Barton submits that in December 2019, the Developers could not have accurately foreseen the scale of the disclosure exercise. She says it only began to become clear in April 2020. However, she says that the Developers only in fact understood the full scale of the exercise (and its likely consequences for the remainder of the litigation) following the completion of their further disclosure in October 2020. Thus, she argues that it is only when considering the disclosure exercise in retrospect that it is possible to accurately understand its costs and its impact on the later phases of the budget. For the reasons set out below this approaches the purpose of costs and case management from the wrong end. It is primarily a prospective not retrospective exercise.

73. Whilst these arguments may assist on a detailed assessment to support a contention that the Developers have a good reason to depart from the last approved costs budget, I am not persuaded that they assist on an application to vary pursuant to CPR 3.15A.

74. In any event, the Developers had already estimated c. £1m for undertaking a search-based disclosure exercise based on a Model C and D and involving, potentially, 3TB of data. They had therefore given some thought to the likely costs of an expansive search-based disclosure exercise. However, Ms Barton says that the Developers had no sense that the data universe on Model C would amount to some 2.2m documents although I note that the eventual review pool was substantially smaller. It was not therefore clear on what basis the Developers had said on 19 November 2019 that Model C was likely result in a substantial reduction against Model D.

75. I accept Ms Barton's broad point that it is not the output on disclosure that is the proper measure of the disclosure exercise, but the full extent of the work it is necessary to undertake to reach that output. A larger data universe may not result in a greater output but may have a significant impact on the time and costs of the disclosure exercise. She argues therefore that the change in disclosure was an obvious significant development warranting a revision to the last approved costs budget.

76. Ms Barton submits that the service of an RFI/RRFI was a further significant development which had not been anticipated at the time of the last approved costs budget. Further she argues that the first and second further CMCs

were also a significant development as they were not anticipated at the time of the last approved costs budget was prepared.

77. Ms Barton submits that the application to vary was made promptly once the Developers had a clear view of the scope of the disclosure exercise and its cost. She says that as a result of OC's continuing requests for further disclosure it was not possible to prospectively determine the likely costs.

78. She argues that had the Developers applied to vary speculatively in November 2019, February or April 2020, before they knew the actual costs it was likely that they would have had to make a further application. She says that even in August 2020 the Developers had not had an opportunity to assess the full impact of the disclosure exercise on future costs/phases.

79. Again, this seemed to me to be approaching costs budgeting from the wrong direction. Cost budgeting is primarily a prospective exercise and parties should by now be well used to providing costs for future phases based on the best information available. Indeed, the Developers had done so for every phase in their costs budget in December 2019 including an estimate based on a Model D disclosure exercise of £1m.

80. Ms Barton seeks to persuade me that the other phases affected by the change to Model C remain future costs and so the application to vary in relation to those future phases in the context of the case are prompt.

81. She submits that promptness is only one of the balancing factors the court considers when exercising its discretion. I do not agree. Promptness is a mandatory requirement although it may also come into account at the discretion stage.

82. She submits that even if the application could have been made more promptly, OC have suffered no discernible prejudice as a result. The delay has not hampered their ability to respond to the application and has not imperilled any hearing date or the ongoing conduct of the claim. There was, however, prejudice to the Developers who would face a considerably more difficult task in recovering their costs at detailed assessment if the variations were not allowed.

83. She says that the importance of revising costs budgets to take into account significant developments is emphasised by the mandatory language of r.3.15A(1) and further that the consequence of not approving the amendments would be to leave the Developers' costs budget in a state of manifest inaccuracy. This would make it more difficult for each party to predict their likely costs exposure. It would increase the complexity and costs of any detailed assessment following the conclusion of trial.

84. In considering the overall impact of approving/not approving the budget the court should take into account the policy purpose of the costs budgeting regime. Ms Barton reminds me of the Chief Master's summary of those policy considerations in *Sharp*:

    i) The benefit to the parties in knowing their potential exposure to costs/the enhanced predictability in costs recovery where there are accurate approved budgets;

    ii) The likely reduction in the costs of detailed assessment where accurate approved budgets are in place;

    iii) The inherent desirability of significant developments being reflected in the costs budgets.

85. Finally, in relation to incurred costs Ms Barton relies on CPR3.15A (6). She suggests that the wording of CPR 3.15 (6) might prevent or hamper a party in seeking to recover those incurred costs on detailed assessment if they did not first seek approval for those costs on an application to vary. She argued that it was far more attractive for the court to deal with the costs holistically.

86. Mr Hatt's submissions were commendably brief. He does not accept that there have been any recent significant developments in the litigation that would warrant the application to vary the Developers' last approved costs budget now.

87. The Developers knew of the change to Model C before the costs budget was approved by DM Linwood on 3 December 2019. They had indicated on 19 November 2019 that they intended to amend their costs budget in light of the change to Model C disclosure. They filed an updated costs budget on 29 November 2019, which they now say did not take into account the change to Model C. The reasons given for the need to amend the costs budget on 19 November 2019 before the costs budget was approved are the same reasons relied on now over a year later.

88. The change to Model C was not therefore a change which occurred after the last approved budget, and the reliance on the assumptions in the costs budget does not assist in light of CPR 3.15 (8).

89. He argues that all that has happened is that the disclosure costs have been more than the Developers budgeted for which is not a good reason for varying a costs budget. He refers to the notes in the 3rd Supplement to the White Book

(2020) at 3.15A.2, which makes clear that a variation to a budget is not intended to be used to enable a party to add in costs that they should have included in their original budget after the event.

90. He says the information contained in the 3 April 2020 letter was also not new and relies on NRF's 14 April 2020 letter. He raises doubt about the Developers' intentions saying that there would have been no point in asking the Deputy Master to approve their costs budget if they intended to seek to vary it after the hearing.

91. OC resist the conclusion that the first further CMC was a significant development as it was included in the CCMC Order. In relation to the second further CMC, Mr Hatt says that it was primarily as a result of the disclosure issues.

92. Mr Hatt concedes that there may be some justifiable variations such as the RFI/RRFI but says that the sums claimed overall are excessive.

93. However, Mr Hatt's primary position is that the application is just too late. He says the application made in December 2020 is simply not prompt and the court's jurisdiction is not engaged.

94. The purpose of costs budgeting is to allow parties to predict their potential exposure to costs on the basis of the facts known at the time of the costs budgeting process. Cost budgeting is intended to provide prospective predictability and certainty. It allows the parties to be advised about the costs consequences of a dispute and assists with settlement. He argues that is the reverse of the position adopted by Ms Barton who wants to take a retrospective approach.

95. He submits that if the Developers have put forward their budget on the wrong basis and did not either ask the Deputy Master to put over or adjourn the question of costs budgeting or did not invoke paragraph 22 of PD51U that should weigh against them now.

Discussion

96. I have set out above the jurisdiction for an application to vary and the relevant background. When considering any application to vary a party's last approved costs budget the court's approach should be to first consider whether there has been a significant development in the litigation since the last approved costs budget.

97. However, even if there has been a significant development, not every significant development in the litigation will warrant a revision to the last approved costs budget. Not every development will be significant even if it has costs consequences. Whether a development is a development at all since the last approved costs budget, and whether it is significant and warrants a revision to the costs budget has to be considered in the context of each case. There may be matters which occur in the course of the litigation that do not justify an application to vary a costs budget or were not considered at the time they occurred to be significant developments, but which may still amount to a good reason to depart from the last agreed or approved costs budget on detailed assessment.

98. As the notes to the 3rd Supplement to the White Book (2020) make clear at 3.15A.2 [148]:

> "An order for variation cannot be made in order to remedy a budget in respect of developments which could or should have been covered at an earlier approval or variation."

99. If there has not been a significant development the court need not go further, the jurisdiction in CPR 3.15A is simply not engaged.

100. If there has been a significant development that warrants a revision to the costs budget the variations must be submitted promptly both to the other parties and the court (CPR 3.15A (2) and (4)). Promptness is a mandatory requirement and the second part of the threshold test. The purpose of costs budgeting is to enable the court to control the parties' recoverable costs prospectively not retrospectively. What is prompt will, of course, depend on context.

101. It is only if both these mandatory requirements are met that the threshold test is satisfied – significant development warranting a revision to the last approved costs budget and promptness - that the court goes on to consider whether as an exercise of discretion it should approve, vary or disallow the proposed variations pursuant to CPR 3. 15A (5) including incurred costs (CPR3.15 A (6)). It is at this point that the court will engage in a more detailed consideration of the quantum of the variations sought and to be allowed.

102. In carrying out that exercise, the court must have regard to the overriding objective and all the circumstances including the need to deal with cases justly and at proportionate cost. This includes considering the prejudice to both the applicant if the budget is not varied and respondent if the budget is varied. The question of promptness and the nature of the significant development may come back into consideration more broadly as part of all the circumstances if the court comes to consider the overall exercise of discretion.

103. Costs Management is the process by which the court seeks to ensure that the recoverable costs between parties are proportionate to the steps they have to take. In doing so, the court is looking to manage cases in accordance with the overriding objective, justly, efficiently and at proportionate costs. The primary role of costs management is however to manage prospective costs in the context of the proposed future procedural steps. It is a forward-looking exercise with a glance backwards to ensure overall proportionality.

104. It is not a prospective detailed assessment; it is a high-level exercise in determining what the court considers to be a reasonable and proportionate sum for the parties to incur inter partes on the standard basis for a particular phase of the litigation and overall, in respect of future costs.

105. Costs budgeting is about determining the total recoverable costs to be allowed for each phase. It does not involve descending into the ring and carrying out a granular exercise akin to a detailed assessment on a line-by-line basis. Nor is it for the court to direct how the phase total, once determined, should be spent whatever the detail of the costs budget or its assumptions (CPR3.15 (8).

106. Whilst CPR 3.15 makes it clear that the exercise the court carries out looks at the "to be incurred costs" costs budgets include three types of phases:

    i) Completed phases where all the costs have already been incurred. At the CCMC the court does not set any budget for these phases but may comment on the costs incurred and may take them into account when considering overall proportionality.

    ii) Mixed phases where there are both incurred costs and "to be incurred costs". The court only sets the budget for the "to be incurred costs" but has regard to both the incurred costs and the total costs for the phase including incurred costs when carrying out that exercise.

    iii) Future phases where the entirety of the phase is still to be incurred. The court sets the budget for these future phases.

107. When carrying out a costs budgeting exercise at a CCMC there is an inevitable risk and likelihood that when the court sets the figures for "to be incurred costs" for each of the mixed or even future phases that some of the "to be incurred costs" may have been incurred since the budget was prepared.

108. The reality is that the parties do not stop all work when costs budgets are filed. Not all the work undertaken after the costs budget has been filed will relate only to the costs of the CCMC. The court has always and continues to "approve" in the loosest sense some incurred costs when agreeing of approving mixed or future phases.

109. The rules and authorities have developed in ways that adjust to accommodate that reality and to ensure that cases are conducted in accordance with the overriding objective.

110. It was against that background that the Chief Master adopted the pragmatic and purposive approach in *Sharp* in relation to revisions to costs budgets. It is also why any application to vary a costs budget must start from the last approved costs budget rather than actual figures.

111. CPR 3.15A (6) was introduced to clarify that the court could and indeed should look at incurred costs since the last approved costs budget when considering a variation. It was intended to cater for the costs that would be incurred between identifying a significant development in the litigation that warranted a revision to the costs budget and being able to submit a revised costs budget (and subsequent application to vary) promptly, whilst continuing to carry out the work necessary to progress the litigation. It was a recognition that it is not always possible to determine applications instantaneously.

112. In the absence of CPR 3.15A (6) it was argued that a party either could not undertake any work in relation to the significant development until the costs budget was revised or did so at their own risk. Neither position was consistent with either the overriding objective, efficient case management or CPR 3.15(3). The corresponding difficulties that arose on detailed assessment were the existence of slices of incurred costs, which would need to be the subject of detailed assessment that had been incurred between the identification of a significant development and the application for approval of any varied costs budget.

113. The purpose of CPR 3.15A (6) was not and is not to undermine the purpose of costs budgeting and the court's control of future recoverable costs.

114. Of course, a costs management order and an approved costs budget do not limit the costs which either party can choose to spend on the litigation, but they do so at their own cost and risk where it exceeds the budgeted costs.

115. Parties who want to maximise their recoverable costs need to keep their costs budgets under review. If there is a significant development that means that the basis on which the costs budget was prepared has changed in a way that

warrants a revision the parties should follow CPR 3.15A. This case is an example of the difficulties that may arise when that approach is not adopted.

116. Although it depends on the circumstances of each case, some significant developments will be more obvious and easier to identify than others. Clearly, where the proposed variation is to add in a new phase such as expert evidence, where no expert evidence had previously been permitted, and connected to that to vary the trial phase to include, for example, expert costs of attending trial and the additional costs of an extended trial length, the court may require very little supporting information or evidence to be satisfied that the proposed variations to the costs budget relate to the significant development and do not interfere with the original cost budgeting exercise.

117. However, where the significant development is said to be a change to an existing phase, and in particular a mixed phase, such as disclosure it is necessary for the court to look more closely at whether what is contended for is a significant development at all since the last approved costs budget. Do the matters raised by the applicant, in fact, change the overall scope and likely cost of that phase? Were they, or should they have been, expressly or impliedly taken into account when the last costs budget was approved?

118. In such a case the court would need to be confident that the proposed variation related only to the additional impact of what is contended to be a significant development rather than an attempt to carry out a root and branch revision to the phases of the last approved costs budget. Whilst the court should not consider the costs at a granular level nor micromanage the costs it must be able to say that it is not interfering with the discretionary exercise carried out by the Deputy Master who approved the last costs budget. It is for the party seeking the variation to provide sufficient information and evidence with their application to satisfy the court that the variation is not simply an attempt to address a miscalculation or an overspend or to claw back previously disallowed costs. They would have to be able to satisfy the court that the variation only related to the significant development and did not interfere with the exercise carried out by the Deputy Master.

119. Here that is particularly acute given that the Deputy Master approved the DRD on a Model C basis at the same time as he carried out the costs budgeting exercise and the Developers seek to argue that the change to Model C is a significant development since the last approved costs budget.

120. CPR3.15A (2) requires the revising party to submit their particulars of variation to the other party for agreement. There is therefore a requirement both to submit and seek to agree the variations promptly but also to submit any application to vary to the court promptly (CPR 3.15 (4)). It seems to me that there are therefore two linked elements to the mandatory requirement for promptness.

121. In most cases the two aspects of the mandatory requirement for prompt submission in CPR 3.15A (2) and (4) will be closely aligned. However, there cannot be any hard and fast rule. It will depend on the facts of each case; the chronology and the nature of the variations being sought. Consistent with the overriding objective, if the parties are co-operating in narrowing the areas of disagreement in relation to the proposed variations, what constitutes "submitted promptly" may differ from what might be considered prompt submission if no such cooperation or engagement were to take place.

122. This process may give rise to incurred costs in relation to the variation that may fall to be considered under CPR3.15A (6).

123. I approach each element of the application to vary the costs budget having taken into account the broad principles I have identified, and the chronology and background set out above.

RFI/RRFI

124. The costs associated with the RFI/RRFI were not anticipated or included in the costs budget approved by the Deputy Master in December 2019. In principle therefore as they were not, and could not have been, expressly or impliedly taken into account when the costs budget was approved and fall outside the last approved costs budget, the RFI/RRFI and the associated costs are capable of consideration under CPR 3.15A on an application to vary.

125. However, I have considerable doubt as to whether in the context of these proceedings the RFI and the costs associated with it would have constituted a significant development in the litigation such as to warrant a revision to the costs budget.

126. I accept Ms Barton's broad point that it is not the output but the work that goes into the output that is key. Just because the RFI/RRFI were only a few pages long is not the sole measure for determining whether it was a significant development. The RFI was clearly a development but I have to determine whether it is a significant development which warranted a revision to the costs budget.

127. I was not taken to any evidence that the Developers had considered the RFI/RRFI to be a significant development in February 2020 when it was served that warranted a revision to their costs budget nor that the Developers had

indicated any intention to apply to vary their costs budget in relation to the RFI/RRFI prior to December 2020. Indeed, so insignificant was the RFI/RRFI compared to the disclosure issues that it is mentioned only in passing in Ms Barton's skeleton. Ms Acklam's second witness statement does no more than set out in one short paragraph how the £72,559.50 is broken down.

128. Further, in the context of the proposed variation of the costs budgets to increase the overall total to £2.795m of which the future costs sought would increase by £1.339m to £2.368m, the costs sought in relation to the RFI/RRFI phase of £72,559.50 are modest. OC say those costs are excessive and that a reasonable and proportionate sum for the RFI/RRFI is only £7,500 which if correct would reduce the costs in relation to the RFI/RRFI to a negligible sum in the context of the costs of these proceedings.

129. I do not need to determine what would be a reasonable and proportionate sum in relation to the RFI/RRFI unless I come to consider those costs at the discretion stage. However, it does seem to me for the purposes of this application that based on the information available on this application, which will differ from that which might be available on a detailed assessment, the figure of £72,559.50 is to my mind, not a reasonable and proportionate sum for the RFI/RRFI. Were I to determine a sum for the RFI/RRFI on the application to vary it would be substantially reduced and I take that into account when considering the nature of the significant development contended for in the context of this application. Beyond that I would not want to fetter the discretion of any judge considering those costs at a future date.

130. I am not persuaded that in the context of these proceedings the RFI/RRFI and/or in combination with the costs associated with them were a significant development in the litigation that warranted a revision to the costs budget.

131. It does not seem to me that the Developers considered the RFI/RRFI to be a significant development at the time it was served. I can well understand why, when making an application to vary their costs budget at a later date, they thought to include it in the application.

132. The costs of the RFI/RRFI were fully incurred by 25 August 2020 when the RRFI was served. Even if the RFI/ RRFI were a significant development that warranted a revision to the last approved costs budget I would have to be satisfied that the application to vary in relation to the RFI/RRFI has been submitted promptly for the threshold test to be met.

133. The Precedent T was not submitted to OC until 3 December 2020 and the application to vary was not made until 21 December 2020. This was four-months after the costs had been fully incurred and ten-months after the RFI was served.

134. I do not accept Ms Barton's argument that an application to amend a costs budget can be made after all the costs have been incurred and/or retrospectively after the full extent of the effect of the significant development is understood. That is not what the clear wording of CPR 3.15A says nor is it the actual or intended purpose or effect of CPR 3.15A (6). The proposed variations must be submitted promptly after the identification of a significant development said to warrant a revision in the costs budget.

135. Whilst CPR 3.15A (6) specifically recognises that there may be some incurred costs at the point at which an application is made, in respect of which the court may be persuaded to exercise discretion, the purpose of costs management is to provide the court with the ability to control costs not to enable parties to retrospectively adjust for any overspend or miscalculation in respect of budgeted costs. CPR 3.15A (6) was never intended to and is not open season to come back and vary a costs budget after the event.

136. Whilst conceptually I can envisage circumstances in which an urgent significant development might result in the costs the subject of an application to vary being substantially incurred by the time a prompt application is made or heard, I am not currently persuaded that where a phase, including the costs for which a variation is sought, have been fully incurred before the application to vary is made that there would be any jurisdiction to approve a variation to the last approved costs budget for those phases after the event. Thus, if no application to vary is made promptly, and the costs are then fully incurred such costs would, it seems to me, either be subject to the question of whether there was a good reason to depart from the last approved costs budget or the costs would be at large and in either case it would be a matter for the costs judge in due course.

137. The application to vary in relation to the RFI/RRFI is too late. It was submitted 10 months after the RFI was served. Service of the RFI was the development that resulted in the costs being incurred. The application to vary in relation to the RFI/RRFI fails the threshold test and it is not necessary to consider the exercise of discretion.

138. The discretionary consideration of whether to allow any incurred costs since the CCMC Order and any variation order cannot be used to salvage the position if the variations were not submitted promptly, and the threshold test is not met.

139. However, the RFI/RRFI was not an anticipated cost at the time the last approved costs budget. The costs are therefore at large and can be considered by the costs judge on detailed assessment in due course.

CMCs

140. As with the RFI/RRFI, it is not at all clear that the Developers considered either the first further CMC or the second further CMC to be a significant developments in their own right but as with the RFI/RRFI, I understand why they have been included in the application to vary when made.

141. The direction for the first further CMC was included in the CCMC order in December 2019. It appears to me that the costs of the first further CMC ought to have been included in the costs budget in December 2019 and permission sought from DM Linwood to amend the budget to include them.

142. There is no explanation from the Developers for not seeking permission to amend the costs budget at the CCMC or prior to the CCMC Order being sealed. There is no explanation for not seeking permission or agreement to amend the costs budget to cater for those costs at any point prior to the first further CMC nor for the absence of any application to vary the costs budget in August 2020.

143. If, however, it could be argued that the first further CMC was included in the CCMC Order with no prior notice to the parties, they may be able to argue that it was not something that could or should have or was taken into account, whether expressly or impliedly, in the last approved costs budget. It may therefore be susceptible to consideration on an application to vary. There will be occasions when at a CCMC the court imposes an additional requirement on the parties without prior notice, such as a further CMC or a Disclosure Guidance Hearing which was not anticipated or included in the costs budgets being approved by the court at that point. If the adjustments were not made at the CCMC, the parties would be well advised to seek permission to vary the costs budget to take those costs into account prior to filing their approved costs budget or perfecting the CCMC Order. If they do not they may find it harder to seek to vary at a later stage given the threshold test. The court would still need to consider if the change amounted to a significant development.

144. Again, although the issue of quantum is primarily a matter to be considered at the discretion stage it provides assistance in considering the question of whether a development is significant. The Developers seek £99,250 for the two further CMCs whilst that is a substantial sum it does not of itself make the development significant. Assuming c. £50K for each further CMC I compare that to the costs incurred up to the CCMC of £64,316 and the overall costs. As with the RFI/RRFI, the costs are towards the modest end of the scale in the context of the overall costs. The Developers' own Precedent T notes that the further CMCs were primarily to deal with outstanding disclosure issues. This raises further issues as to whether the further CMCs are significant developments in their own right, in this case, or whether they are simply an adjunct to the issues raised by the disclosure exercise.

145. As with the RFI/RRFI the evidence in relation to the costs of the CMCs is one short paragraph in Ms Acklam's second witness statement simply breaking the costs down between solicitor time and disbursements.

146. OC say that the first further CMC is not a significant development as it was included in the CCMC Order and make no offer in relation to the costs of it. They say the costs of the second further CMC should not be the Developers' costs as they relate to disclosure issues. As a matter of costs budgeting that is the wrong approach in relation to the second further CMC.

147. I consider the costs sought in the context of the overall costs when considering whether the first further CMC is a significant development warranting a revision to the costs budget and I consider the purpose of the first further CMC in the context of the issues in this case. I have the advantage, and the Developers the disadvantage of the costs having been incurred at CMCs that took place before me, and after the event we know what was in fact considered at those CMCs. As a consequence, it is possible to say that there is some merit in OC's contentions in relation to disclosure.

148. Taking those matters into account, it is arguable that the first further CMC and the costs associated with it are not a significant development since the last approved costs budget. However, in any event even if it was a significant development and impliedly not something that was taken into account in the last approved costs budget, the Developers knew at the time the costs budget was approved by the Deputy Master that a first further CMC was to take place. It was something that should reasonably have been taken into account at the time and or an amendment made before the costs budget was finalised.

149. An additional issue that arises from the late submission of the application to vary is that whilst prospectively in December 2019 the first further CMC may have justified some additional costs, I am not persuaded that the level of costs sought would have been considered reasonable and proportionate at that time.

150. In reality, looking at it retrospectively, the first further CMC primarily addressed disclosure issues arising from the Developers disclosure and OC's disclosure application. It would be difficult to retrospectively untangle those costs

and determine a reasonable and proportionate sum to allow for the limited part relating to the first further CMC.

151. For those reasons overall I do not consider the first further CMC can be characterised in this case as a significant development after the last approved costs budget. However, that is only the first part of the threshold test.

152. The application to vary was submitted four months after the first further CMC took place and all the costs were incurred. The application was not submitted promptly. The application to vary in relation to the first further CMC fails the threshold test and I do not need to consider discretion.

153. As the first further CMC was included in the CCMC Order the costs are arguably not at large. The Developers will have to seek to persuade the costs judge in due course that there is good reason to depart from the last approved costs budget. If however, the costs judge is satisfied that the costs of the first further CMC were not costs that should reasonably have been taken into account in the last approved costs budget then the costs will be at large.

154. The second further CMC was listed as a result of the order made at the first further CMC. A second further CMC was not anticipated in December 2019 and neither party will have included an allowance for it in their approved costs budgets. It was a development arising out of the first further CMC and the difficulties that had arisen in relation to disclosure. Its purpose was to address OC's disclosure application and any other outstanding issues in relation to disclosure and case management following completion of disclosure. It may not be significant in case management terms and in fact, the second further CMC, as set out above, primarily addressed the disclosure application costs.

155. Since the application to vary was made on 21 December 2020 in advance of the second further CMC, it was at least arguable that it was made promptly. However, prompt is contextual. The second further CMC was fixed at the first further CMC. If it was a significant development that warranted a revision to the last approved costs budget, I am not persuaded that the application to vary in relation to those costs made on 21 December 2020 can be said to have been submitted promptly. There is no explanation at all for waiting four months to make the application.

156. The second further CMC was not anticipated at the time the original costs budget was approved. The application to vary although made before the second further CMC took place was not issued until four months after the Order fixing the second further CMC. I do not therefore consider the application to vary to have been submitted promptly. The application to vary in relation to the second further CMC fails the threshold test and I do not need to consider discretion.

157. However, as with the RFI/RRFI it was not anticipated at the CCMC and was not included in the approved costs budgets. The costs of the second further CMC are therefore at large and will be a matter for the costs judge on detailed assessment in due course.

158. The absence of promptness in making the applications not only affects whether the application to vary meets the threshold test but has consequences from a practical perspective. In relation to each of the RFI/RRFI and the CMCs it may have been possible, had an application been made earlier in the year, to identify in advance of incurring all the costs factors which might have persuaded the judge prospectively that they amounted to a significant development that warranted a revision to the last approved costs budget. Prospectively it may then have been possible to persuade a judge that there were additional to be incurred costs said to arise from the RFI/RRFI and CMCs before the costs were incurred thus enabling the court to prospectively manage and control the costs. The very purpose of the variation process.

Disclosure

159. As set out above the Developers knew on 18 November 2019 that they were going to have to undertake disclosure on a different basis to the assumptions set out in their costs budget. On 19 November 2019, they confirmed that they intended to amend their costs budget to take into account the change to Model C and noted that the costs would result in a substantial reduction on the estimated £1m for Model C and D disclosure. This was two weeks before the resumed CCMC at which the Deputy Master undertook the costs budgeting exercise. Ms Barton says there was no time in that two-week period to fully assess the implications of the change to Model C from a costs budgeting perspective and prepare a revised costs budget.

160. The Developers say that the costs budget approved by DM Linwood was still based on Model A and B assumptions. This fails to appreciate the effect of CPR 3.15 (8).

161. Ms Barton argues that the change to Model C was a significant development which was expressly or impliedly a change of such a size or nature that it went beyond the events taken into account when the costs budget was approved. She seeks to persuade me that as a consequence a substantially retrospective, increase to the last approved costs budget of c. £1m, should be approved.

162. I do not agree. The change to Model C was expressly known about (the Developers had said in clear terms on 19 November 2019 that they were going to file an updated costs budget to take it into account) and could and should

have been taken into account by them in time for 3 December 2019. At that point the onus switched to the Developers to make their position clear to both OC and the Deputy Master rather than allowing the Deputy Master to cost and case manage, on their case, on the wrong basis.

163. The Developers' evidence is therefore that they knew of the significant development two weeks before the costs budget was approved. They knew it would have significant costs consequences. And yet, they allowed the Deputy Master to complete the cost budgeting exercise on the basis of an approved DRD based on Model C without telling him or OC that their costs budget had not been updated to take into account that significant development.

164. The purpose of the CCMC was to prospectively manage both the costs and the case in accordance with the overriding objective, on the basis of the claims as they were before the Deputy Master in 2019. The Deputy Master was determining the costs budgets on the basis of an agreed and approved DRD based on Model C.

165. On 18 November 2019, he had already made it clear that the case was one where some measure of search-based disclosure was required. He adjourned to allow the parties to seek to agree the Model C requests. It would have been surprising if he had then been prepared to costs budget on a different basis and one at odds with the basis he had indicated and the basis on which OC had prepared a costs budget.

166. Costs and Case Management are carried out together to ensure that consistent with the overriding objective the court manages cases so that there is some proportionality between the value and complexity of the case and its importance to the parties, the steps that need to be undertaken to ensure that it is ready for a trial and the costs associated with those steps.

167. Unless it had been specifically drawn to the Deputy Master's attention that the costs he was approving were for an entirely differently structured and simpler case, the court must proceed on the basis that the costs budget he approved reflected the case he understood he was case managing. It would undermine the entire purpose of combined costs and case management to conclude otherwise and it would potentially undermine or interfere with the Deputy Master's CCMC Order.

168. The fact that the assumptions set out in the costs budget had not changed does not seem to me seem to assist Ms Barton. During a CCMC, it is not unusual for assumptions and costs to be adjusted as the judge determines the case and costs management. For example, a change to trial length, limiting the number or length of witness statements, limiting expert costs, removing a PTR and consequent costs adjustments made during the CCMC. The assumptions the parties included in the costs budget as filed will not have changed but the approved costs budget would have been adjusted and approved on a different basis. It is difficult to understand why the Developers say the situation is different in this case.

169. It is simply not good enough for the Developers to say that not only did they not have time to address the revision to the costs budget in advance of the CCMC on 3 December 2019 but they did not tell the Deputy Master or OC that they had not done so. They did not seek to use the procedural tools available to them to postpone costs budgeting in light of what they say was a significant development either in its entirety, so they had time to amend or simply by deferring consideration in relation to disclosure under PD51U.

170. PD51U explicitly provides for the situation in which the Developers found themselves. If they were unable to amend their costs budget to include an estimate of future costs for the Model C disclosure exercise, they could and should have sought permission to defer costs budgeting in relation to at least disclosure.

171. Ultimately, they could have sought to defer the entire cost budgeting exercise if, as they now contend, they anticipated the change to Model C having such a significant impact on the overall costs. However, no application to vary the budget was made at the time (nor did the Developers seek to appeal or apply back to the Deputy Master either before or after the CCMC Order was sealed) and the additional costs, certainly in relation to the disclosure phase itself, have now been incurred.

172. This only serves to emphasise why CPR3.15A only applies to a significant development since the last agreed or approved costs budget. It further emphasises the need for the parties to keep their costs budgets under review and to use the tools available to them.

173. Given the chronology and the evidence, I find that the application to vary the last approved costs budget based on the change to Model C prior to the approval of the costs budget at the CCMC is not a significant development for the purposes of CPR 3.15A.

174. I need to consider in the alternative whether the Developers' argument that it took time for the full implications of the Model C disclosure exercise to become clear gives rise to a later significant development in the litigation which warrants a revision to the costs budget.

175. If it were only in February 2020 or even April 2020 that the Developers could say that the full implications of the Model C disclosure exercise were known can that amount to a significant development in its own right warranting a revision of the costs budgets in either February or April 2020?

176. Given the knowledge the Developers already had by the time of the CCMC, I have considerable doubts that the additional information obtained by February 2020 or April 2020 can properly be characterised as a significant development in the litigation that warranted a revision to the costs budget.

177. Even if one accepts the Developers' argument that it took time to understand the full extent of the universe of data, which would have to be searched, the size of the disclosure exercise was known by February 2020. By then the Developers knew that the pool of documents was likely to be c 2.2m. By April 2020, not only was the scope of the exercise known but further work had been undertaken by TransPerfect to refine and reduce the size of the review pool of documents to some c.105K.

178. It does not appear to me that the clarification of the review pool in February or April 2020 was a change of such a size or nature that it went beyond the change to Model C disclosure in November 2019 or the events taken into account by the Deputy Master when setting the Model for disclosure and the costs budgets.

179. The Developers say that the impact of the change to Model C was very significant. Yet the Developers had sufficient information and knowledge to be able to scope out a Model C and D exercise at c£1m by 25 October 2019 based on a larger universe of data of c. 3TB when they submitted their original costs budget.

180. By the time this application was made the Developers had incurred the majority of the additional £581K said to relate to the expanded disclosure exercise and anticipated that and additional £585K would be incurred on the future phases as a consequence of the expanded disclosure. Plainly, the costs consequences of the expanded disclosure exercise were significant. So significant that as I set out above, had the Deputy Master been made aware of the likely costs at the time of the CCMC, I have no doubt it would have affected his approach to the CCMC.

181. Here however, I am simply not persuaded that it can be said that the clarification of the implications of Model C was itself an independent significant development on which to base an application to vary. For the reasons I have given it follows that albeit Ms Barton argues that it would have been difficult to cost budget prospectively, the greater understanding of the full implications of the disclosure exercise in February and April are part of the same significant development i.e. the change to Model C, which occurred in November 2019.

182. However, if I am wrong and it is arguable that the information identified in February and April 2020 was of such a quality that it could be said to amount to a significant development in the litigation that warranted a revision to the costs budget (or even if the change to Model C could be said to be a significant development since the last approved costs budget) that is only the first part of the threshold test and I would need to go on and consider the question of promptness before considering the question of discretion.

183. Before addressing promptness, I address briefly one further issue. There were further issues that arose as part of the disclosure process. The Developers would argue that all the problems that arose as part of their disclosure process were unanticipated at the CCMC because the costs budget assumed no search-based exercise at all. I am not persuaded that once the search-based exercise had been directed that problems that subsequently arose in relation to the conduct/execution of that disclosure exercise would amount to a further significant development warranting a revision to the costs budget on a recoverable basis. I do not therefore consider that any of the disclosure issues that arose later in 2020 can be said to be a significant development. They either relate to the conduct or execution of the Model C disclosure exercise or they may relate to the OC disclosure application in which case they may be addressed by the costs orders made in respect of that application.

184. Turning to the question of promptness if the change to Model C were to be considered a significant development over which the court had jurisdiction it does not seem to me that a 12-month delay until 3 December 2020 before making an application to vary can be considered prompt. Neither do I consider that an application to vary made either ten or eight months after the implications of the change to Model C were said to be fully understood can be considered prompt.

185. Ms Barton sought to persuade me that the application was prompt because it was made relatively promptly after the full implications were understood in October 2020. She argued that to have made the application earlier would potentially have resulted in an additional application to vary the costs budget. However, this is the wrong way round and as set out above CPR 3.15A (1) and (2) and (4) are clear about the mandatory requirement for promptness. Costs and case management is a prospective not retrospective exercise.

Conclusions in relation to Disclosure:

186. The change to Model C in November 2019 was likely to have amounted to a significant development which may have warranted revisions to the costs budget prior to the CCMC or a deferral of part or all of the costs budgeting

exercise until the effect of the change to Model C could be clarified if sought. It would not have justified delaying the costs budgeting exercise for disclosure for 12 months or until after the costs had been incurred.

187. The Developers did not seek to adjourn or defer any aspect of the costs budgeting exercise at the CCMC. The Deputy Master made a CCMC Order by reference to a DRD based on Model C and costs budgeted accordingly.

188. The change to Model C was not a significant development since the last approved costs budget.

189. The application to vary was made over 12 months after the change to Model C. It was not prompt. It fails the threshold test, and this court has no jurisdiction in relation to the change to Model C and there is no need to consider discretion.

190. If the significant development is said to be the expanded scope of the disclosure exercise, which was said not to be fully understood until either February 2020 or April 2020, I still have considerable doubt as to whether on the facts of this case that amounts to a separate significant development in the litigation for the reasons set out above.

191. However even if it were a separate significant development the Precedent T was not submitted to OC until 3 December 2020 and the application to vary was not made until 21 December 2020 and was not prompt. The application to vary based on the expanded scope of the disclosure in either February or April 2020 would also fail threshold test and there is no need to consider discretion.

192. The Developers will need to seek to persuade the costs judge in due course that there was a good reason to depart from the last approved costs budget and/or that the costs are at large.

193. Although the application to vary seeks to vary the later phases of the costs budget, those are parasitic on there being a significant development in respect of disclosure. Although therefore the subsequent phases remain future costs which have not yet been incurred the court does not have jurisdiction to amend the last approved costs budget in respect of them for the same reasons.

194. Finally, if I were wrong in relation to the questions of significant development or promptness such that the application to vary had to be considered as a matter of discretion all the factors identified above re-emerge as part of the balancing exercise.

195. I have considered the nature of the significant developments contended for, the reasons why the costs budget was not amended earlier, the delay in making the application and the significance of the variation sought.

196. I balance the prejudice to the Developers in not permitting the application against the prejudice to OC of allowing the application. Costs management is intended to provide the parties with certainty and to enable the court to control costs and manage the litigation proactively and prospectively in a reasonable and proportionate way and in accordance with the overriding objective, balancing the costs of taking a particular step against the benefits of doing so.

197. Had the Developers provided a costs estimate of £750K for disclosure on Model C against £181K on Models A and B and an overall increase in the costs budget of in excess of £1m that might well have influenced the way in which the Deputy Master approached both the DRD, costs budgeting and overall case management. It is likely that it would have influenced the approach to both the CCMC, and the parties' conduct thereafter and may have affected any decisions about settlement.

198. Mr Hatt points to the advantages of prospective predictability that come with costs budgeting whilst Ms Barton argues that the need for such certainty and predictability is in favour of allowing the application to amend retrospectively.

199. The Developers have not acted promptly; they have delayed applying to vary until December 2020 over a year after they acknowledged that they would need to do so. There is no satisfactory explanation for that delay. It is not the function of an application to vary to enable the Developers to address any overspend or miscalculation after the event and after a large part of those costs are incurred. I agree with Mr Hatt that the prospective predictability and control of costs outweighs the retrospective correction of costs in terms of the exercise of discretion. It is here that the issues of promptness and significance of the development re-emerge in particular as part of the exercise of discretion.

200. The prejudice to the Developers in having to seek to persuade a costs judge after the event to allow them to vary their costs budget or to determine the costs that are at large is far outweighed by the prejudice to OC. OC have been entitled to conduct their defence of the claim on the basis of the costs budget approved in December 2019 and on the understanding that that included the costs of a Model C disclosure exercise.

201. As part of the exercise of discretion, I also consider the effect of the application to vary in costs terms. As I set out above the effect of the application to vary if permitted would be to double the future costs since the last approved costs budget and would add £1.339m to the overall costs. This is a very significant increase. It would after the event

affect significantly the position between the parties. Although I do not intend to consider the question of quantum in any detail having reviewed the costs sought by the Developers and considered both Ms Acklam's evidence and NRF's letter of 24 December 2020 it seems to me that the increases in costs sought by the Developers and said to be referable to the change to Model C are excessive and would fall to be substantially reduced were a costs budgeting exercise to be undertaken. They do not appear to me to fall within a range of costs which I consider to be reasonable and proportionate inter partes on a standard basis.

202. OC should have the opportunity to challenge the increased costs on a detailed assessment in due course if the opportunity arises. For the Developers a detailed assessment in due course may provide them with an opportunity of justify any increase in costs.

203. However, it seems to me on balance and taking all these matters into account that it would be inconsistent with the overriding objective to manage cases justly and efficiently and at proportionate cost to exercise discretion in favour of the Developers in relation to the application to vary in respect of disclosure. For the reasons set out in this judgment, I would not exercise discretion in favour of the Developers.

204. Cost budgeting is about setting prospective costs and CPR3.15A is to enable the court to approach the question of variations and amendments in a practical and purposive way not to oust the role of the costs judge.

205. I note that there are some limited aspects of the variations such as those relating to the hosting of the disclosure, which OC accept, are additional costs as a consequence of the relisted trial date and/or some expert costs for an experts meeting. The parties should seek to agree such of those types of variation as they reasonably can failing which those too will have to be addressed on detailed assessment in due course.

206. It follows that the application to vary the costs budget should be dismissed.

207. I invite the parties to seek to agree an order including in relation to costs.
