

Current Topics in Commercial and Construction Costs

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The divide between incurred and budgeted costs

13 July 2020
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Change to PD 3E 7.4 1 Oct 2019

- PD 3E 7.4 amended 1 October 2019 (109th PD Update)
- Updated Precedent H Guidance Notes published by MoJ on 7 October 2019

Amended PD 3E 7.4

- PD 3E amendment: *‘in paragraph 7.4 in the first sentence, for “before the day of any” substitute “up to and including the day of the”*
- And so PD 3E paragraph 7.4 now reads *‘As part of the costs management process the court may not approve costs incurred up to and including the date of the costs management hearing. The court may, however, record its comments on those costs and will take those costs into account when considering the reasonableness and proportionality of all subsequent budgeted costs’*
- The amendment simply applies from 1 October 2019

Amended Guidance para 10

- Amended para 10 of Guidance Definition of budgeted and incurred costs: see CPR 3.15 and PD3E para 7.4:
 - a) *Incurring costs are all costs incurred up to and including the date of the first costs management order, unless otherwise ordered.*
 - (b) *Budgeted costs are all costs to be incurred after the date of the first costs management order*
 - NB PD 3E para 6(b): Guidance is to be followed

Effect

- Now established in the PD and Guidance that first CMC costs should be included as incurred costs
- But the wording applies across all phases to move costs up to and inc date of first CMC from estimated to incurred (first??)

Effect

- So at the stage of preparing the budget, care must be taken to estimate (!) what further costs will have been incurred in each phase by the time of the CMC

Helpful that extent of incurred costs is increased

- If an automatic sanction is applied for failure to file/exchange a budget under CPR 3.14 (defaulting party is treated as having filed a budget comprising only applicable court fees) do the costs incurred up to the date of the CMO remain recoverable, either because agreed, or because absent agreement a CMO only relates to budgeted costs, see CPR 3.15 (Costs and Funding 6th edition)

Ali v Channel 5 Broadcast Ltd

- [2018] EWHC 840 (Ch); [2018] 2 Costs LR 373
- Court has to decide if limitation of 50% of recovery applies to all recoverable costs after the date of breach of CPR 3.13 (i.e. to costs incurred between breach and CMO) or only to the costs after the date of the CMO.
- Court decides that the restriction applies to all costs after the date of the breach, so to costs between breach and CMO
- Costs and Funding 6th edition: argument that sanction should be applied more narrowly, esp after revision to para 7.4 and Guidance Notes – court no jurisdiction over incurred costs

NB

- Don't forget that CPR 36.23 *Cases in which the offeror's costs have been limited to court fees* provides limited automatic relief from sanction of CPR 3.14 (CPR 36.13(5)(b) *D gets costs from end of relevant period*, 36.17(3)(a) *Costs following judgment* and 36.17(4)(b) *C gets costs on indemnity basis*)– offeror can recover 50% of the costs assessed for the costs o/wise subject to the sanction and any other recoverable costs (those incurred by time of failure/CMO)

Problems

- Substantial delay between budget and CCMC e.g. claims worth less than £50k where budget has to be filed with DQ, and incurred costs are + or -
 - Update budget before CCMC and seek permission to rely (esp where a long gap between budget and hearing date)? May be practical difficulties, inc Prec R and getting updated budgets to the court.
 - Simply leave it and put the higher incurred figures in the bill at costs asst? There will be DA of those costs anyway, but PP may object.

Problems

- What if the case management hearing proceeds first and costs management is put off to another day?
 - Amend the budget or leave it?
 - Problem with leaving it is that the Court needs an accurate picture at the time when it costs manages the estimated costs, see PD 3E para 7.4 *‘The court may however record its comments on [incurred] costs and will take those costs into account when considering the reasonableness and proportionality of all subsequent budgeted costs’*.
 - Ask the court for direction?

Inconsistency

- Clear inconsistency between PD 3E para 7.4 and the Guidance: ‘*date of the CM hearing*’ cf ‘*date of the first CMO*’;
- Guidance also has the ‘*unless otherwise ordered*’ escape clause. Not explored yet.
- CPRC minutes for April 2019 the agreed wording of PD para 7.4 was up to and including the date of the first CM hearing; NB Costs and Funding 6th edn at 4.17 wrongly says wording of 7.4 is ‘*date of any costs management hearing*’

What about revised budgets?

- No mention in the CPR themselves or in the Guidance Notes
- Court may only permit variation in respect of future costs, CPR PD3E para 7.6
- White Book guidance 3.15.4 if a budget is subsequently revised previous estimated costs do not turn into incurred costs: *'if after the approval of the budget, the party submits a revised budget seeking an increase in respect of any part of it, the costs previously shown in the incurred costs column should remain the same: unless and until the court approves any revision, the costs previously approved in the estimated columns (the budgeted costs) should remain in the estimated columns even if substantial amounts of them have now been incurred'*
- Also states that from Oct 2019 amendment to PD3E para 7.4 provides clearer guidance – cut-off is first CM hearing

Revision

- *Yeo v Times Newspapers Ltd* [2015] EWHC 2132 (QB)
Warby J:
 - PD 3E 7.6 permits court to approve, vary or disapprove revision of future costs, having regard to any significant developments which have occurred since the date when the previous budget was approved or agreed
 - Application to add £21,000 incurred costs since last CMO (Contingent Cost A considering a new issue) and £15,440 for future estimated costs
 - Warby J agrees that Practice Direction 3E para.7.6 is not an apt vehicle for obtaining the court's approval for costs incurred before the budget, and para 7.4 provides court may not approve costs incurred before the budget

Sharp v Blank

- *Sharp v Blank* [2017] EWHC 3390 (Ch) Master Marsh takes different view:
 - Huge group litigation; first CMO was made after the second CMC; there could have been a bespoke regime;
 - ‘futurity of the words “costs to be incurred” is not in doubt ... it is less clear when the future commences’
 - To adapt Soren Kierkegaard’s well known words, litigation can only be understood backwards but it can only be litigated forwards
 - Nothing that requires updated budgets for the CMC – would cause practical difficulties
 - The black hole: costs not in the budget as incurred but not part of estimated because already incurred. Would have to go to DA.
 - **‘future costs’ in PD3E para 7.6 is to costs after the last approved or agreed budget.**

- Costs and Funding 6th edition: court can only ever budget costs to be incurred, and disagrees with Chief Master Marsh; no retrospective approval of incurred costs relating to a significant development unless agreed, in which case CPR 3.15(2)(c) applies.
- Proposes 'future' is removed from PD3E para 7.6

CPR Committee

- October 2019 ‘issue is complex’, staged budgets, budget variations, **budget repair** and planned budgets
- Dec 2019 Senior Costs Judge present, discussion re budget variations, proposed revisions to CPR 3.15 and PD 3E, new Precedent T (for variations), a budget variation notice (BVN) and updated guidance notes, precedent T agreed in principle, resolved not to adopt BVN at this stage, revised draft rules to go to Feb 2020 CPRC meeting
- March 2020 CPRC agrees amendments CPR 3, newly drafted PD3E ‘*essentially replaces current PD3E*’, intro of Precedent T, ‘*will not be accompanied by the existing additional Guidance Note*’, subject to final drafting to go in Oct 2020 SI and PD Update

Questions?

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