



Neutral Citation Number: [2025] EWHC 1063 (TCC)

Case No: HT-2023-000370

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
KING'S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 2 May 2025

Before:

MR ANDREW MITCHELL KC
SITTING AS A DEPUTY JUDGE OF THE HIGH COURT

Between:

BDW TRADING LIMITED

Claimant

- and -

ARDMORE CONSTRUCTION LIMITED

Defendant

JUDGMENT (COSTS)

UPON reading an electronic bundle of documents provided on 17 April 2025, further to a CCMC held on 7 June 2024

This judgment was handed down by the court remotely by circulation to the parties' representatives by email and released to The National Archives. The date for hand-down is deemed to be 2 May 2025.

Andrew Mitchell KC (sitting as a Deputy Judge of the High Court):

Introduction

1. This is my ruling on various costs issues arising from and subsequent to the CCMC.
2. At the CCMC on 7 June 2024, as well as making case management directions, I gave guidance and steer to the parties on the relatively few costs issues which were then in dispute; invited them to reconsider certain items accordingly; and ordered them to file by 27 June 2024 (hopefully agreed) revised budgets or indicate any issues of disagreement for me to resolve on paper.
3. Very unsatisfactorily, it was not brought to my attention that there existed any remaining disagreement between the parties for me to resolve, and relevant correspondence and budgets were not provided to me. As a result, no Costs Management Order was made at that stage. None would have been necessary if budgets had been filed as agreed budgets.
4. In March 2025, however, the Court referred to me applications filed by the Claimant to amend its June 2024 budget in respect of disclosure. It was through a consideration of those applications that I became aware that issues had remained unresolved from the budgets filed in June 2024.
5. I understand that the 27 June 2024 budgets and other relevant documents are not on the CE file, to which incidentally I do not have direct access, which is something of a mystery, because I am also told by the parties that these documents were filed. Though tempted to order a stewards' enquiry, I considered the best course would be to ask the parties to provide all relevant documents to me direct. I was helpfully provided with a draft bundle of documents by the Claimant on 11 April, and an agreed bundle with certain additions on 17 April 2025 shortly before the Easter weekend and vacation.
6. Having discerned the points of dispute from that bundle, it seems to me that I should first resolve the disputed issues arising from the budgets which were filed at the end of June 2024, as if they had been promptly brought to my attention at that time. That puts the parties in the position in which they should have been; ensures there is a proper record of what would have been considered appropriate at that time; and ensures that the Claimant's recent application for an increase in its budget for disclosure is seen in its proper context:

namely, in substance, a very substantial revision upwards of what had previously been filed with the Court, a revision which must in my judgment be justified, whether under CPR 3.15A based on an examination of circumstances said to have arisen since June 2024 or more generally.

7. The Claimant suggests that the Court has no power to (or should not) make a costs management order now in respect of budgets filed at an earlier date because this would be “retrospective”. Instead, it seeks a costs management order now in respect of its increased budget as it now is. In the alternative, however, it makes an application for a variation under CPR 3.15A on the basis that there have been significant developments since June 2024.
8. I do not accept that the Court is unable to make a costs management order now, setting out its view as to the reasonableness (or not) of budgets as at 27 June 2024. CPR 3.15(2) provides that a costs management order can be made at any time, and generally the Court has considerable discretion as to what to approve and on what basis in relation to disputed items as to the future costs. This would not be a retrospective order, moving the goalposts at a later stage or seeking to rule on what are now incurred costs, but one recording the Court’s view on estimates as they were submitted as at a particular date. Having a record of that is of value and allows a disciplined approach, even if I am prepared to allow a revision to aspects of the Claimant’s budget such that the original approved budget may prove to be largely of historic interest only.
9. Accordingly, I will first deal with and make a costs management order based on the materials apparently filed on 27 June 2024; and then I will consider the Claimant’s 2025 revisions as an application to vary that budget. In the result, I would have come to the same conclusion as regards the Claimant’s budget for disclosure whether looked at through the lens of CPR 3.15 or 3.15A.
10. I use round numbers below on occasions for convenience.

Claimant’s budget (27.6.24)

11. Most of the Claimant’s revised budget was agreed. The points in dispute were:

- (1) The use of Leading Counsel for witness statements and expert reports.

- (2) Disclosure (solicitor time)
- (3) Updated incurred costs.

12. Taking each in turn.

13. *Leading Counsel*. At the CCMC I gave guidance (in the sense of expressing scepticism) about the proportionality of *significant* Leading Counsel involvement in the witness statement and expert report phases. At that stage, the Claimant sought some £70,000 for Leading Counsel for this work (on top of some £3,000 already incurred on expert reports).

14. I did accept however that it was reasonable for Leading Counsel to “have a look” at such evidence, by which I meant a reasonably high level review rather than active involvement in the preparation of the evidence itself (which, needless to say, should be led by the witnesses and experts themselves, and not by lawyers - of any description).

15. By its revised budget of 27 June 2024, the Claimant reduced the estimates for Leading Counsel by £36,500, which was roughly a 50% reduction from the costs originally claimed; but added some £10,500 for junior counsel and some £25,000 for solicitors. The Defendant objects on the basis that the Claimant has just moved the numbers around, taking £36,500 off Leading Counsel and redistributing increased costs of almost the same sum (£36,568) to the other lawyers.

16. I resolve this dispute as follows. I had in mind that costs should be reduced overall by not using Leading Counsel for any significant work on witness statements and reports. While I have no doubt that her input would be very valuable to her client, I do not consider such involvement to be reasonable or proportionate for the purposes of *inter partes* cost recovery. I do not see why the work of junior counsel and solicitors would increase significantly as a result of less involvement from Leading Counsel, who is still proposing to provide over £35,000 of her time, which is more than sufficient for strategic direction and overview, and this has not been explained to my satisfaction. I do not understand, for example, why the solicitor time for preparation of this evidence should jump by some 20% as a result of less silk time, unless it was said, rather inappropriately, that Leading Counsel was originally expected to prepare the evidence.

17. I can see that, in a case where expert evidence is important, her involvement, albeit high level and of a strategic nature, may be appropriate for that phase. I see very little basis for significant involvement with witness statements. I therefore approve the sum of £17,000 for Leading Counsel for expert reports (rather than the £20,000 now claimed) and £7,500 for witness statements (rather than the £13,500 now claimed). I do not mind if the Claimant wishes to allocate that particular total (£24,500) differently between those two phases, mindful that I have little visibility on where precisely her input will prove more necessary.
18. I will approve a further £4,000 for junior counsel for expert evidence because I can see that they might need to pick up some more in the absence of a leader; expert evidence is likely to be important in this case; and counsel involvement in expert evidence is likely to be more necessary (and permissible) than witness evidence. But otherwise I do not approve the increase proposed for junior counsel and solicitors for either witness statements or expert reports.
19. *Disclosure (solicitor time)*. The Defendant says these costs are too high bearing in mind the small amount of data then proposed to be reviewed (1.5GB), being only £50,000 less than the defendant's estimate which is based on a review of over 20GB. I agree that more information could have been provided by the Claimant to explain the budget, but I am not persuaded that there is a direct link between volume and cost. I would have approved the Claimant's budget for this aspect of disclosure (£64,020) as at 27 June 2024. I do note however that the incurred costs for this item rose from £34,594 to £40,183 between the CMC and the end of the month, without any reduction in the estimate. That might be a matter to be reviewed on assessment in due course. On the basis that this has been incurred, I will therefore reflect this by approving a budget as at 27 June 2024 for future solicitor costs of £58,500. I deal separately below with the Claimant's February 2025 application to increase the budget.
20. *Updated incurred costs*. The Defendant submits that where the amount of incurred costs has increased between the CCMC and the end of the month, June 2024, the amount of that increase should come off any future estimates, absent some explanation. As I have already said, I agree in relation to disclosure. I do not propose to make any adjustment in relation to witness statements or expert reports or ADR because those are *de minimis* increases.

Defendant's Budget (27 June 2024, as corrected in July 2024)

21. The only issue in dispute on the Defendant's revised costs budget, as submitted on 27 June 2024 (with formulaic errors affecting the summary page corrected on 24 July 2024), concerned the disclosure stage. Otherwise, that budget was agreed by the Claimant.
22. The Defendants sought approval of a revised and increased disclosure budget totalling some £223,000, made up of around £148,000 for future solicitor time cost; junior counsel cost of £27,500 and other disbursements (the cost of e-platforms and the like) of £47,500. The Claimant submitted that:
 - (1) This was a significantly higher sum than that included in the original budget which I reviewed at the CCMC (£133,000 including a small amount of incurred cost), which was broadly similar to Claimant's then revised estimate for disclosure and which was not in dispute.
 - (2) The inclusion of 190 hours of Grade A fee earner time was excessive.
 - (3) The total solicitor hours of 586 hours was excessive.
 - (4) Junior Counsel's hours, estimated as being 65 hours, was excessive.
 - (5) Other disbursements of some £47,500 were excessive.
23. I resolve these disputes as follows.
 - (1) It is correct to note that the Defendant's estimate has increased significantly since the CMC, but I note that the Defendant explains that the increase arises from a revised DRD which was agreed after the CMC, which in particular took account of the need to expand the Defendant's searches by a further 3 years as requested by the Claimant.
 - (2) I will reduce the estimated hours of the second Grade A fee earner (claimed at 190 hours) to 100 hours, because that is still equivalent to a full 10 days work and I would not expect the bulk of the solicitor time to be incurred at the grade of a Senior Associate; and indeed she will also have the support of two other fee earners who

are together estimated to spend a very considerable amount of time on disclosure (some 381 hours in total).

- (3) I appreciate those fee earners are trainees or paralegals, but an estimate for 381 hours for them is excessive. I will reduce that time to 350 hours, the reduction being applied to the more senior grade D fee earner.
- (4) That reduces solicitor hours by 121 hours, and the total therefore to 465 hours.
- (5) I will reduce junior counsel hours, since counsel input is assumed by the Defendant to be “limited to reviewing key documents” from the disclosure, and I cannot see that 6-7 days of work would be required for that. I reduce the counsel estimate to £10,000.
- (6) My understanding of the other disbursements is that they concern the cost of processing and hosting data on an electronic platform for up to 18 months, where it was estimated that some 28 GB of data would be loaded, of which some 22GB might find its way onto Relativity for review. I see no basis for disputing the Defendant’s estimate for those costs.

24. There is a dispute as to whether I should approve the Defendant’s budget in respect of Contingencies D-F. These contain alternative pricing for counsel disbursements if both a senior and junior counsel were used. The ‘main’ budget assumes only junior counsel, consistent with the Defendant’s position at the CCMC that a silk was not required. In those circumstances, and in the absence of any suggestion that a decision has now been taken to instruct a silk or of any relevant assumptions underpinning these contingencies, I am not persuaded that it is more likely than not that a silk will be instructed, and I decline to approve those contingency items which are duplicative (at least in part) of items in the budget itself.

Claimant’s application to increase budget for disclosure phase

25. By letter dated 14 February 2025, the Claimant seeks a very substantial increase for its disclosure budget on the basis of circumstances which are said to have arisen since 27 June 2024 when it filed its proposed budget.

- (1) As at 27 June 2024, the Claimant estimated the future disclosure stage would cost £80,000 (being solicitor costs of £64,000 and disbursements of £16,000), on top of already incurred costs of some £48,000, producing an overall expected spend on disclosure of around £128,000.
- (2) The Claimant now seeks an increase in the future estimate of £295,000, taking the estimated disclosure budget to £376,000 (on top of the £48,000 already incurred). This is made up of around £200,000 of additional solicitor cost (a roughly four-fold increase in hours), previously £64,000; and an increase of some £95,000 on disbursements, most of which (£90,000) concerns the costs of review software, the rest being an increase in counsel cost.

26. This is a very large increase indeed. The new circumstances (post 27 June 2024) are said to be:

- (1) There was protracted disagreement between the parties on the DRD, whereas the assumption had been that the claimant's draft would be agreed.
- (2) In particular, two new issues were added in November 2024; and different custodians and date ranges were agreed; and a significant number of new search terms were added to the Claimant's disclosure.
- (3) The original June 2024 budget had included only £7,500 as an estimate for future for e-disclosure/document management services (totalling some £14,000 including incurred costs) based on only 1.5GB of new data to process; 18 months of hosting and 2 hours of project management time per month. Whereas the Claimant now says that 58GB (perhaps some 50,000 documents) will need to be reviewed with the assistance of TAR software, a very substantial increase.
- (4) I also note the Claimant says that at the time of the original estimate the document searches had not been carried out, and section 2 of the DRD (which is the part which teases out the search parameters) had not been agreed in any material way.

27. The Defendant accepts that it was necessary to add two additional issues and extend various search parameters but does not accept that there was any protracted disagreement in respect of the DRD. On the information I have been provided with, I am not satisfied that there was any protracted disagreement or, at least, that any significant amount of the new estimate is down to that. The real point is not the cost of agreeing necessary changes to the DRD itself but rather concerns the consequential increased costs in terms of search and review time of the documents required by that agreed DRD.
28. The Defendant says that the Claimant has failed to explain its extra £200,000 in solicitor time cost but assumes that this is as a result of reviewing a larger document set. I agree that is a fair assumption and agree that very little substantiation for the increase has been put forward (other than an assertion of more hours).
29. The Defendant also criticises the adequacy of the Claimant's original search terms. It says that the Claimant was wholly unreasonable to have allowed for only 1.5GB of data (the Defendant having allowed for 20GB at the time). I agree that it does appear that the Claimant's approach was too narrow, and vastly underestimated the number of documents that would need to be reviewed. That does trouble me because it might indicate that costs have been unnecessarily incurred in preparing for a disclosure exercise on an inadequate basis. But it does not follow, in my judgment, that the Claimant is to be penalised for its assumptions in circumstances where it is apparent that the disclosure task is considerably greater than the Claimant originally anticipated. That is the purpose of preparing a budget based on assumptions.
30. Standing back, I am satisfied that the Claimant's assumptions have changed, and that it is appropriate to reflect that fact in a revised budget.
31. The question remains, what is a reasonable sum for disclosure bearing in mind all the circumstances, including the nature and value of the case. On the basis of the materials provided, I am prepared to approve:
- (1) An increase to the budget for future solicitor time costs, resulting in a new estimate for that line [row 13] of £120,000 (previously £64,000, which I would have reduced to £58,000, as above). I will leave it to the Claimant to decide how it wishes to allocate that across the fee-earners. I bear in mind, amongst other things, that this

is on top of some £40,000 already incurred for time costs; the increase recognises the increased volume of documents, but also that I would not expect costs to rise in direct proportion to volume; the revised sum would be greater than the amount allowed for the Defendant, but I do not accept that the difference should be as large as suggested. Generally, I have concerns about how the Claimant has gone about its disclosure scoping work, leading to such a radical change in work programming.

(2) £50,000 for Other Disbursements (previously £7,500) [row 19]. I cannot readily see (and none of this is explained) why the document management/platform costs should be materially greater, if at all, than that sought by the Defendant (£47,000) but I will allow an increase to take account of the increase in volume of potentially relevant documents.

(3) I will allow a relatively modest increase to £8000 (previously £5,625) for Junior Counsel. I am not persuaded that Leading Counsel's estimate should be increased.

32. To the extent approved above, I am satisfied that the Claimant's disclosure budget of 27 June 2024 may be increased pursuant to CPR 3.15A on grounds of significant developments since the budgets were filed at the end of June 2024. My conclusion on the amounts would be the same if I were looking at the reasonableness of the sums claimed, without the lens of significant developments.

33. I add that I consider both parties' budgets, as now approved, to be at the high end of reasonableness, given the amount at stake in this litigation.

Orders

34. The parties are to file (and also provide to me direct by email) revised costs budgets recording the position as at 27 June 2024/24 July 2024 reflecting the above rulings, within 7 days.

35. The Claimant is also to file (and provide to me direct) a revised costs budget as at 14 February 2025 reflecting the above within 7 days.

36. The parties are to file and provide to me direct a draft of the two Costs Management Orders that I propose to make, one dealing with the budgets as at 27 June 2004 and a further Order consequent on the Claimant's application.