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**LLOYDS/HBOS LITIGATION**

**IN THE HIGH COURT OF JUSTICE**
**CHANCERY DIVISION**

Rolls Building, Fetter Lane
London EC4A 1NL
Date: 21/12/2017

**Before** :

**CHIEF MASTER MARSH**

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**Between :**

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| **JOHN MICHAEL SHARP (and the claimants listed in the group litigation register)** | **Claimants** |
| **- and -** | |
| **(1) SIR MAURICE VICTOR BLANK**<br>**(2) JOHN ERIC DANIELS**<br>**(3) TIMOTHY TOOKEY**<br>**(4) HELEN WEIR**<br>**(5) GEORGE TRUETT TATE**<br>**(6) LLOYDS BANKING GROUP PLC** | **Defendants** |

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**Mark Friston** (instructed by **Harcus Sinclair UK Limited** ) for the **Claimants**
**Tony Singla** (instructed by **Herbert Smith Freehills LLP**) for the **Defendants**

Hearing dates: 6th and 12th December 2017

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# Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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CHIEF MASTER MARSH

## Chief Master Marsh:

1. By an application notice issued on 19 October 2017, the defendants seek the court's approval to a revised Precedent H costs budget. Revisions are sought on the basis that there have been "significant developments" in the litigation that warrant revision to the defendants' budget and they ask the court to exercise its powers under paragraph 7.6 of Practice Direction 3E (PD3E).

2. The defendants have identified what they say are seven significant developments. The claimants' object to any revisions being made to the defendants' budget on a number of different grounds. The claimants are not seeking revisions to their budget.

3. The hearing of the defendants' application has taken place during the course of the trial of this claim. Judicial pre-reading relating to the trial commenced on 9 October 2017 and oral opening submissions commenced on 18 October 2017. The trial is due to conclude on 2 March 2018.

4. As a starting point, it is convenient to provide a snapshot of the scale and complexity of this litigation which is important context for a consideration of the defendants' application. There are seven claims that are subject to a group litigation order. There are approximately 5,800 claimants who are making serious allegations against five former directors of Lloyds TSB Group plc ("Lloyds") and Lloyds itself in relation to the acquisition by Lloyds of Halifax Bank of Scotland plc ("HBOS") and its participation in the UK Government's Recapitalisation Scheme in 2008 and 2009. A shareholder circular in relation to the transaction was published by the board of Lloyds on 3 November 2008 and the Lloyds' shareholders voted in favour at an EGM on 19 November 2008. There are approximately 260 institutional claimants who account for approximately 80% of the value of the claim. Many of the remaining retail shareholders hold a modest number of shares.

5. The claimants' case is that the director defendants are liable on three broad grounds. It is alleged that:

    i. they omitted to provide the Lloyds' shareholders with (and in some cases deliberately concealed) information relating to the true financial position of HBOS;

    ii. they made a series of misstatements to the Lloyds' shareholders in relation to the acquisition of HBOS and Lloyds' participation in the Recapitalisation Scheme, and;

    iii. they incorrectly, and in breach of duty, advised the Lloyds' shareholders that the acquisition of HBOS, and Lloyds' participation in the Recapitalisation Scheme, was in their best interests and that they should vote in favour of both at the EGM.

    The claimants' case is that, but for the alleged omissions/concealment, misstatements and incorrect advice, the acquisition of HBOS and Lloyds' participation in the Recapitalisation Scheme would not have taken place. They claim damages and interest in the sum of approximately £600 million. The allegations are strongly denied by the defendants.

6. An idea about the litigation can be obtained from the following statistics:

   i. The statements of case are very lengthy. The claimants have served a 123 page re-amended particulars of claim and a 67 page re-re-amended reply. Their responses to Part 18 requests for information add in total a further 130 pages.

   ii. The claimants have disclosed approximately 12,100 documents. The defendants have disclosed approximately 38,000 documents, having initially harvested over 10.5 million documents.

   iii. The parties have served respectively 18 and 15 factual witness statements. The statements run to over 510 pages.

   iv. The claimants have served four main expert reports and five responsive expert reports running in total to approximately 1800 pages. The defendants have served seven expert reports running to approximately 1100 pages. There are ten expert joint memoranda running to approximately 450 pages. In addition, both sides have recently served supplemental notes from some of their experts.

   v. The claimants' written opening submissions for trial run to a total of approximately 320 pages and the defendants' opening submissions run to a total of approximately 720 pages.

   vi. The trial bundle comprises approximately 400 lever arch files.

   vii. The claimants' budget was set at a total of £17,601,025.49. The total of the defendants' budget is £19,141,377.54. Both budgets were agreed without any budget phases being set by the court. In aggregate, the budgeted costs, subject to the outcome of the defendants' application, amount to slightly less than £37 million.

7. It might be thought surprising given these statistics that costs management has played any part in the claim and some of the background to the making of a cost management order needs to be provided. On 23 July 2015 the claimants applied to the management judge for a direction that a costs management order should be made. The judge determined that budgets should be exchanged and that he would consider later whether a cost management order was appropriate. His judgment on that occasion set out the pros and cons of case management in this claim, the pros being "… the ability of the claimants to know what their exposure was for the defendants' costs ...", the cons being the additional expense that cost management would entail. He went on to remark:

   > "[28] I also accept that the requiring of a budget is not necessarily going to be the end of the process and that, if a costs management order is in due course made, that means that the budget will have to be revised and agreed or approved at every stage at which there are developments in the litigation. Indeed, even without a costs management order being made, there is not much point in requiring budgets to be provided if they are not revised from time to time in

> accordance with the litigation as it develops. So I accept that there are pros and cons in making an order."

8. It was not until the hearing of the second case management conference that an order was made for the exchange of costs budgets and it was not until a further hearing before the management judge on 27 January 2017 that a cost management order was made. In the course of his judgement at the hearing in January 2017, the judge remarked that the real value in a cost management order, so far as the claimants are concerned, was to bring much greater clarity to the costs exposure which they face. As at the date of that hearing the defendants' unapproved budget amounted to approximately £24 million of which £14.9 million was still to be incurred. The judge noted it was common ground between the parties that, in accordance with the CPR, costs management is only possible for costs that have not yet been incurred and nothing can be done to manage the costs which have already been incurred although the court can make comments on incurred costs. Directions were given by the judge for the parties to file and serve costs budgets "… calculated to today's date for incurred costs and estimated costs thereafter through to the end of trial." The parties thereafter exchanged budgets on the basis the judge had directed.

9. In the event, the costs management conference that was listed before me on 3 May 2017 did not take place because the parties reached agreement on the figures for each phase in their budgets. A consent order was approved on 2 May 2017. It recorded that the budgets had been calculated in respect of the parties' incurred and estimated costs as at 27 of January 2017. The order, in addition, recorded that neither party had agreed to the other parties' incurred costs and that the court made no comments about incurred costs. The incurred costs to which reference is made are those incurred up to and including 27 January 2017.

10. The procedure for costs management, as it is set out in the CPR 3.12 to 3.18 and PD3E does not easily apply to cases of this substance and complexity. Indeed, although this point was not raised by either party on the hearing of the defendants' application, and it does not form part of my decision, it is possible to discern from the remarks made by the management judge and the order requiring budgets to be set to a retrospective date that it may not have been intended the costs management of this claim should be dealt with strictly within the provisions of rules 3.12 to 3.18 and PD3E. There is, in my judgment, ample power pursuant to rule 3.1(2)(m) for the court to create a bespoke costs management arrangement for cases that require it. However, it is not suggested by either side that a bespoke regime was created in this case.

11. I pause in this introduction to observe that by the date of the order made on 2 May 2017, there was already a mismatch between the agreed incurred costs as set out in the budgets and the actual amount of incurred costs. In this case, the mismatch was a consequence of the costs management order made by the management judge. It is easy to understand that having made a costs management order relatively late in the litigation, it was important to ensure that estimated costs ran from the earliest possible date, namely the date of the order, because the court does not have power to control "incurred costs". The issue of a mismatch between the data that is contained in a budget and the actual position in relation to costs as the claim moves inexorably forward, with costs being incurred every day, is a subject to which I will return. Three initial points, however, are clear. First, the management judge intended that the initial agreed or approved budgets would contain costs described as estimated, some or all of

which would have been incurred by the date of the order approving the parties' figures. Secondly, the judge envisaged that there were likely to be revisions to the budgets and, indeed, he expected there to be revisions on more than one occasion. Thirdly, when the parties reached agreement about the budgets, they were acknowledging that the figures for incurred costs in their budgets related back to 27 January 2017 and were not treated as incurred costs at the date of agreement. Where the statement of truth on the budgets referred to incurred costs, it was intended to relate back to that earlier date.

12. It is ironic that the party for whose benefit the costs management order was made is opposing any revision to the defendants' budget, saying the issues must be left to a detailed assessment; and the party that did not wish a costs management order to be made is asking the court to exercise its powers to revise. The rationale for making the costs management order was to ensure the claimants were aware of their exposure to pay the defendants' costs. If the court has the ability to revise the defendants' budget, it might be thought that this would be desirable from the claimants' perspective.

13. The order for directions made by the management judge on 26 February 2016 directed there should be a trial of all issues, save for limitation and proof of the claimants' ownership of shares in Lloyds, to be listed before him not before 2 October 2017 with a time estimate of 12 weeks. The trial was subsequently fixed to commence with oral openings starting on 2 October 2017 with time prior to that date allowed for judicial pre-reading. It is clear from the parties' respective agreed budgets that they were prepared on the basis of a 12 week trial. In accordance with the original trial time estimate, the trial was due to conclude on 21 December 2017.

14. The defendants' application is supported by the 17th, 18th and 19th statements made by Mr Damien Byrne Hill from Herbert Smith Freehills. The claimants rely on the 25th witness statement of Mr Damon Parker from Harcus Sinclair. I am grateful to both counsel, Mr Friston for the claimants and Mr Singla for the defendants, for their assistance in illuminating some aspects of the costs management regime as set out in CPR 3.12 to 3.18 and PD3E. In this judgment I use the shorthand "rules" and "paragraphs".

**The seven significant developments**

15. The defendants rely upon seven significant developments that, they say, require them to revise their budget under paragraph 7.6 of PD3E. It will be necessary to look at each of them in a little detail. However, in summary, the developments are as follows (and setting out the additional budget figure claimed in each case):

    i. The assumption upon which the defendants' approved budget was prepared was that there would be a trial lasting 59 days between 2 October and 21 December 2017. The claimants' approved budget was based on the same assumption. The defendants say that due to events outside their control, the trial time estimate has been extended by 48 business days with the effect that the trial will last from a later commencement date, 19 October 2017 to 2 March 2018. They say that the trial timetable is therefore almost twice as long as it was assumed to be when the budget was approved and that this change is a significant development.

**Additional costs** - £1,210,215

ii. The defendants made an application for specific disclosure on 28 June 2017. It was heard by the management judge on 31 July 2017 and an order was made in favour of the defendants resulting in 984 additional documents being disclosed by the claimants. As originally put forward in their application, they relied upon the application for specific disclosure itself and the provision of additional documents as a significant development. However, they subsequently conceded that that only the latter could be a significant development.

**Additional costs** (as requested in the application) - £206,911

**Additional costs** (now sought) - £47,485

iii. On 22 June 2017, the claimants served a report from Mr Torchio who is an expert in the field of 'events study analysis'. The defendants say that, as a result of the service of Mr Torchio's report, it was necessary for them to serve a supplementary report from one of their experts, Dr Unni, in response.

**Additional costs** – £221,956

iv. The defendants applied for permission to serve Dr Unni's supplemental report on 20 July 2017. The claimants subsequently withdrew their objection on 24 July 2017 and permission was granted.

**Additional costs** - £4,648

v. The claimants issued a third-party disclosure application against the Department for Business, Energy and Industrial Strategy on 22 August 2017. The application was heard by the management judge on 11 September 2017 and resulted in 71 additional documents being produced to the parties.

**Additional costs** - £72,781

vi. The claimants sent a number of questions to the defendants' experts on 20 June 2017. The defendants say that the scope of the questions sent by the claimants went beyond what could reasonably have been foreseen under CPR 35.6. The defendants seek to increase their budget to accommodate the costs arising out of the questions put to 3 of their experts – Professor Persaud, Mr Deetz and Dr Unni.

**Additional costs** - £44,000

vii. On 15 September 2017, Mr Ellerton, who is one of the claimants' experts, sent a very long response to certain questions which the defendants had put to him under CPR 35.6. The defendants say that that the response contained new expert evidence which could not reasonably have been foreseen and ultimately led to the defendants having to respond through the provision of additional factual and expert evidence.

**Additional costs** - £124,629

16. Items 3 and 4 both relate to the service of Mr Torchio's report and there is no obvious reason to treat them separately.

17. The claimants oppose the defendants' application on three main grounds:

    i. Lateness: they say the application has been made too late and the court should not entertain it.

    ii. Oppression: they say the application is, and is intended to be, oppressive to the claimants due to their precarious funding position.

    iii. Jurisdiction: they make three points. First, they say that none of the matters relied upon can properly be classified as significant developments. Secondly, the court has no jurisdiction to deal under the costs management regime with any costs that were incurred by the defendants prior to the date of the hearing of their application. That would exclude any costs incurred before the application was issued and costs incurred between the date of issue and the hearing and mean they must be dealt with on a detailed assessment. Thirdly, they say the court has no power, in any event, to treat interim applications as being significant developments. They say interim applications are altogether outside the costs management regime.

18. The claimants accept that, if an event has happened, or is happening, that is properly classified as a significant event, and it is not an interim application, the court has power to vary the defendants' budget in relation to future costs. It is only in relation to such element of the defendants' application that the first two grounds are relevant. In other words, if the court has jurisdiction, the court has to consider, to the extent it has a discretion (it is not agreed that the court does) should the court exercise it?

**The law**

19. The application must be seen in the context of the costs management regime as a whole. There are fundamental issues between the parties about the proper construction of the relevant rules and PD3E. Broadly, Mr Singla for the defendants submitted that there was a difficulty in reading the provisions too literally because careful thought has not been given to their practical implications and, stepping back, the provisions have to be construed with a degree of licence (my expression, not his). Mr Friston hedged his bets and submitted both that the provisions are not drafted in such a way as to make the position clear or easy, but he later submitted the rules are very, very clear. To my mind, the drafting of the provisions is unhappy in a number of respects and an understanding of them has not been made any easier by the amendments that came into effect on 6 April 2017 that were designed to the correct the approach suggested by the Court of Appeal in *SARPD Oil International Limited v Addax Energy SA and another* [2016] EWCA Civ 120 ("SARPD").

20. The relevant provisions are contained in CPR 3.12 to 3.18 and in PD3E. The following are those that are material:

"3.12(2) 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 so as to further the overriding objective.

3.13 (1) Unless the court otherwise orders, all parties except litigants in person must file and exchange budgets –

(b) …. not later than 21 days before the first case management conference.

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 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.

(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.

3.16 (1) Any hearing which is convened solely for the purpose of costs management (for example, to approve a revised budget) is referred to as a "costs management conference".

(2) Where practicable, costs management conferences should be conducted by telephone or in writing.

….

3.18 In any case where a costs management order has been made, when assessing costs on the standard basis, the court will –

(a) have regard to the receiving party's last approved or agreed budgeted costs for each phase of the proceedings:

(b) not depart from such approved or agreed budgeted costs unless satisfied that there is good reason to do so; and

> (c) take into account any comments made pursuant to rule 3.15(4) or paragraph 7.4 of Practice Direction 3E and recorded on the face of the order.
>
> PD3E 7.3 If the budgeted costs or incurred costs are agreed between all parties, the court will record the extent of such agreement. In so far as the budgeted costs are not agreed, the court will review them and, after making any appropriate revisions, record its approval of those budgeted costs. The court's approval will relate only to the total figures for budgeted costs of each phase of the proceedings, although in the course of its review the court may have regard to the constituent elements of each total figure. When reviewing budgeted costs, the court will not undertake a detailed assessment in advance, but rather will consider whether the budgeted costs fall within the range of reasonable and proportionate costs.
>
> PD3E 7.4 As part of the cost management process the court may not approve costs incurred before the date of any 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.
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> PD3E 7.5 The court may set a timetable or give other directions for future reviews of budgets.
>
> PD3E 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.
>
> PD3E 7.7 After its budgeted costs have been approved or agreed, each party shall re-file and re-serve the budget in the form approved or agreed with recast figures, and next to the order approving the budgeted costs or recording the parties' agreement.
>
> …
>
> PD3E 7.9 If interim applications are made which, reasonably, were not included in a budget, then the costs of such interim applications shall be treated as additional to the approved budgets.
>
> [The emphasis is mine.]

21. These extract from CPR Part 3 and PD3E reflect the changes that were made with effect from 6 April 2017. The explanatory note that is attached to SI 2907 No 95 (L.1) records cryptically that the reason for the amendment to rules 3.15 and 3.18 was "to ensure that costs management and budgeting operate as intended, in the light of the decision of the Court of Appeal in [*SARPD*] …".

22. The amendments to the rules and the practice direction were clearly intended to re-emphasise the distinction between costs that are to be incurred and those that have been incurred. Costs to be incurred are defined in rule 3.15 (1) as "the budgeted costs" and this expression is used in PD3E. It replaces references in rule 3.15 (2)(a) and (b) to "budgets". In addition, rule 3.15 (4) is new. Rule 3.18 was similarly changed so that references to the budgets were removed and replaced by the budgeted costs. The meaning of "budgeted costs" in PD3E, for example where it is used in paragraph 7.3, is plainly the same as in the rule.

23. The overriding objective comes into play in two ways. First, pursuant to rule 1.2, the court must seek to give effect to the overriding objective when it exercises any power under the CPR and when it interprets any rule (and any practice direction). Secondly, rule 3.12(2) expressly requires the court to manage the costs to be incurred so as to further the overriding objective.

24. There are a number of facets of the rules and PD3E that bear emphasis:

    i. The futurity of the words "costs to be incurred (the budgeted costs)" is not in doubt. However, it is less clear when the future commences for these purposes.

    ii. Rule 3.13(1) is the default rule that applies, unless the court orders otherwise, in relation to the timing for the service of budgets. They must be served not less than three weeks before the first case management conference. At one time the rule was drafted differently and provided a default period of seven days. A more recent innovation, set out in rule 3.13(2), requires the parties to produce an agreed budget discussion report and to file it not less than seven days before the first case management conference. The parties are required to engage with each other and to consider the extent to which the figures in their budgets are agreed, or not agreed. At the hearing the court has the fruit of this discussion about the figures in the budgets.

    iii. A budget, unless the court otherwise orders, must be in the form of Precedent H. It provides a format that is divided into budget phases and each phase requires the party to explain its incurred costs in one column and its estimated costs in a set of other columns. It must have a statement of truth stating:

        > "This budget is a fair and accurate statement of incurred and estimated costs which it would be reasonable and proportionate for my client to incur in this litigation."

    iv. There is nothing in the rules or PD3E that requires the parties to provide updated budgets for the case management conference so as to provide the court with information that is current at the date of the hearing. Such a requirement would in any event create practical difficulties.

    v. Rule 3.15 clearly distinguishes between costs to be incurred (budgeted costs) and incurred costs with the exception in 3.15(3) where it is stated that after a costs management order has been made the court will control

the parties' budgets in respect of recoverable costs. The reference to budgets read literally means the budgets as a whole (and not just budgeted costs) and the control is in respect of recoverable costs which will not be the same as the aggregate of estimated and incurred costs. The notion of costs that are recoverable as opposed to incurred or to be incurred does not appear elsewhere in the regime. Incurred costs and costs to be incurred may, or may not, be recoverable.

vi. Rule 3.18(b) in its pre-6 April 2017 form was considered by the Court of Appeal in *Harrison v University Hospitals Coventry & Warwickshire NHS Trust* [2017] EWCA Civ 792. The decision in *Harrison* is not directly relevant to the issue before me. However, the first instance decision in *Merrix v Heart of England NHS Trust Foundation* [2017] 1 WLR 3399, which was decided shortly before *Harrison*, was approved by the Court of Appeal and I will later refer to the judgment of Carr J in *Merrix*.

vii. The claimants say that paragraph 7.4 make it clear beyond any doubt that when the court is considering a revision to a budget in relation to a significant development, the court has no power to approve costs incurred. They reason that the hearing I have conducted is a cost management conference within the definition contained in rule 3.16 (1). Paragraph 7.4 specifies that the court may not approve costs incurred "… before the date of <u>any</u> cost management hearing". [my emphasis] "Any" is not well-suited to its context and could mean several different things. Mr Friston says it means "all". It could have been intended to mean "a" or, as Mr Singla submits, any in the sense that of "if there is one". It seems likely, however, that the paragraph was intended to relate to all hearings where costs management is considered whether the hearing is a "costs management conference" (rule 3.16(1)) or a case and costs management hearing.

viii. The management judge did not set a timetable or give other directions for future reviews of budgets although he plainly contemplated from the earliest stage at which cost management was under consideration that a review of cost budgets was very likely to be required.

ix. The language used in paragraph 7.6 is of critical importance because it provides the jurisdiction, on the defendants' case to make the revisions they seek. It is notable that the language is at variance with the remainder of the rules and PD3E. It refers throughout to the revision of a "budget" (not, in accordance with the new wording, "budgeted costs"). It is explicit, however, that revision is in respect of future costs. The final sentence of this paragraph gives the court a discretion to 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". On one view, such language points towards the last approved or agreed budget being the jumping off point for a revision because it is the budget that is being revised.

x. The principles set out in paragraph 7.3 will apply when a budget is re-considered. The court is only required to set figures that are within a range of reasonable and proportionate costs. A range suggests that the process is designed to produce figures for each budget phase in a way that is not a slave to arithmetical calculation. The court is approving, or the parties are agreeing, figures that are not 'right' as such, but rather figures that are within a range of acceptability.

xi. Paragraph 7.9 appears to have a restricted effect and it is only the costs of the interim application that are to be treated as additional to the approved budgets. This would suggest that costs resulting from, or are consequential upon, an interim application are outside its scope. By way of example, the costs of applying for specific disclosure would be within the provision, but the costs of dealing with the fruits of the application, if any, are outside it. Similarly, the costs of applying for permission to amend are within the paragraph whereas the costs that flow from the amendment are not.

25. Although the point is obvious, it is worth emphasising that incurred costs belong to a different conceptual species than costs to be incurred (budgeted costs). Incurred costs are actual. In signing the statement of truth on the budget, the solicitor acting for a party is saying that the client has incurred those costs; the solicitor is saying that the client has paid the costs or has a liability to pay them. By contrast, costs to be incurred are not actual or real; they are merely an estimation about the future. The party drafting the budget is conjuring with the unknown. Moreover, and importantly, there is no automatic transition between a figure described in a budget as costs to be incurred and incurred costs as a result of the passage of time. The whole, or part of costs to be incurred may, or may not, become incurred costs. To adapt Søren Kierkegaard's well-known words: *"Litigation can only be understood backwards; but it can only be litigated forwards"*.

26. There are pertinent notes in Civil Procedure 2017 (the White Book) at paragraph 3.12.3 under the heading "Problems concerning retrospective amendments to budgets":

> "Until February 2017 there was some controversy as to the power of the court to vary an existing budget so as to approve any extra costs which had been incurred before that approval had been sought and obtained (contrast the ruling as to this given by Warby J in Yeo … and the remarks attributed to Flaux J in the Commercial Court Update October 2015 …. It is arguable that the amendments made by the Civil Procedure (Amendment) Rules 2017 … with effect from 6 April 2017, have laid this controversy to rest. In r.3.15(1) as amended the term "incurred costs" is used in contradistinction to the term "budgeted costs". The former refers to the costs the parties place in the columns headed "incurred costs" in the first budget they submit in compliance with r.3.13(1). The term "budgeted costs" should now be understood to refer to the costs the parties place in the columns headed "estimated costs" in that budget. If, after the approval of that 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, 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. Practice Direction 3E, para. 7.4 …. provides that the court may not approve costs incurred before the date of any case management hearing but may take those costs [ie the incurred costs] into account when considering the reasonableness and proportionality of all budgeted costs. This paragraph makes little sense unless the words "those costs" are construed as costs previously placed in the incurred costs columns.
>
> For example, a party's budget may have been reasonably drawn on the assumption that no formal mediation would take place. Consequently, none of the budgeted cost relate to mediation. If, later in the proceedings, a real possibility of mediation arises, the parties need not seek prior approval in respect of it before incurring any expense. Of course, the party should not delay in seeking the agreement of other parties or, failing that, the approval of the court. Also, any costs incurred on mediation before agreement or approval is obtained are at risk that such agreement or approval might never be obtained."

27. Later at paragraph 3.15.3 in a commentary under the heading "Revising Costs Budgets" the editors make the following additional observation:

> "As to the court power on an application to revise budgeted cost, to approve an increase in those costs whether or not they were incurred before the application for revision, see the argument summarised in para 3.12.3 above. The argument in favour of allowing some retrospectivity in approving budgeted costs runs thus: costs incurred since the first budget (budgeted costs) should remain in the estimated costs column; Practice Direction 3E, para 7.4 … provides that the court may not approve costs incurred before the date of any case management hearing but may take those costs [ie the incurred costs] into account when considering the reasonableness and proportionality of all budgeted costs."

28. Paragraph 7.6 has received limited judicial attention. In *Yeo v Times Newspapers Limited* [2015] EWHC 2132 (QB) the provision was briefly reviewed by Warby J. He framed the question he had to decide in the following way:

> "Can PD3E 7.6 be employed to obtain approval for costs that, by the time of the revised budget, are incurred costs? Paragraph 7.6 itself refers to "future costs", and PD3E 7.4 provides that the court "may not approve costs incurred before the budget"."

29. Warby J concluded that: "… PD3E 7.6 is not an apt vehicle for obtaining the court's approval for costs incurred before the budget. The wording of that paragraph and of PD3E 7.4 point in that direction." He went on to say:

> "If the unexpected happens, and time does not allow for a revised budget to be approved before costs are incurred, then there will often, perhaps usually, be an unexpected interim application and PD3E 7.9 will apply. The fall-back position is CPR 3.18(b)."

30. That decision was considered by me in *Venus Asset Management Ltd v Matthews & Goodman LLP* [2015] EWHC 2896 (Ch) where written submissions about the court's ability to vary a budget retrospectively were considered. However, it was not a case

based upon significant developments. The decision follows the approach in *Yeo.* Both decisions pre-date the April 2017 revisions to the rules and the practice direction. They consider the practical consequences that arise from an inability to review costs that have been incurred. Those consequences are highlighted in this case with greater clarity given that the budgets themselves were, pursuant to the management judge's order, designed to include a good deal of work that was described as estimated costs but which had been incurred by the approval date. I expressed the view in *Venus* that the wording of PD3E 7.6 permitted the court to review a budget taking costs incurred as at the date a revised budget is prepared, rather than at the date of the hearing, because of the inevitable time-lag between the budget being prepared and the hearing taking place. The notes in the White Book 2017 suggest that the date of the original approved or agreed budget is the relevant reference point, not the date of the revised budget.

31. The reference in paragraph 3.12.3 of the White Book 2017 to the Commercial Court Update is to the minutes of a user group meeting. The extra-judicial remarks that are attributed to Flaux J (as he then was), made in the course of a meeting of users carry limited weight due to the context in which they were made and their informal nature, and I note they are not carried through to the recently revised Commercial Court Guide. They were, however, made in the context of the decision in *Yeo* and the note suggests that in the Commercial Court retrospective revisions are relatively common.

32. The two other legal issues overlap and concern first, what it is that amounts to a significant development and secondly, whether an interim application can fall within the costs management regime and may in some circumstances be a significant development. As to the first point, the language in paragraph 7.6 does not create difficulty. A party is required to revise its budget ("shall revise"). If the paragraph is engaged, it is not left to a party to choose whether to revise its budget and to takes its chances on a detailed assessment. A failure to apply under paragraph 7.6 for a revision may be relevant when the court is considering whether it is satisfied there is a good reason to depart from an approved or agreed budget. An application should be made promptly – see *Yeo.*

33. The circumstances in which paragraph 7.6 is engaged are fact specific. Significance must be understood in light of the claim – its size, complexity and the manner in which the litigation has unfolded – and also from the likely additional costs that have been, or are expected to be, incurred. The amount of the additional expense is not determinative, but it is difficult to conceive that a development leading to modest additional legal expenditure, that is modest in proportion to the amount in the relevant budget phase or phases, is likely to be significant development.

34. Curiously, paragraph 7.6 refers to developments in the plural as if to suggest that it is not engaged if there is only one significant development. However, to my mind that cannot have been the intention. In *Churchill v Boot* [2016] EWHC 1322 (QB) it does not seem to have been thought the adjournment of the trial could not of itself be enough to engage the court's power to revise the budget. It was considered, however, that on the facts of that case an adjournment was not a significant development. In *Asghar and another v Bhatti and another* [2017] 4 Costs LD 427 the lengthening of the trial was treated as a significant development that was sufficient to require a revision to the budgets. In *Yeo* the development relied upon in the context of a

defamation claim, the repeal of s.13 of the Defamation Act 1996 during the course of the litigation was found not to amount to a significant development.

35. One momentous event may be significant for these purposes, but a series of events that, taken singly or together, may not be. Use of the plural in the paragraph 7.6 suggests to me that the court should not over-analyse developments and break them down into smaller pieces before considering whether the test in paragraph 7.6 has been satisfied. Although it is likely to be helpful to consider developments by reference to the phases in the budget they affect, whether a development is significant must be looked in the way it affects the litigation as a whole.

36. PD3E 7.9 deals with interim applications. Such applications will often be subject to inter partes orders for costs which will be summarily assessed and if they were reasonably not included in the budget it is understandable that they are treated as being additional to the approved budgets. There is nothing in the PD to suggest paragraphs 7.6 and 7.9 are mutually exclusive.

37. Reference was made in argument to *Murray and Stokes v Neil Dowlman Architecture Ltd* [2013] 3 Costs LR 460 at [17] and *Elvanite Full Circle Ltd v AMEC Earth & Environmental (UK) Ltd* [2013] EWHC 1643 (TCC). Both cases related to the pilot scheme which contained quite different wording. It is obvious, however, that a mistake in the preparation of a budget, or a failure to appreciate what the litigation actually entailed, will not usually permit a party to claim later there has been a significant development because the word "development" connotes a change to the status quo that has happened since the budget was prepared. If the mistake could have been avoided, or the proper nature of the claim understood at the time the budget was prepared, there has been no change or development in the litigation. By contrast, if the claim develops into more complex and costly litigation than could reasonably have been envisaged, that may well be the result of one or more significant developments.

**Submissions on the law**

38. The headline issue on the law as between the parties concerns whether on an application to the court to approve revisions to a budget, the court has any power at all to approve costs that have been incurred by the date of the hearing. It is common ground between the parties that costs have been incurred in relation to each of the events which are said to be significant developments both before and after the application for approval was issued. If Mr Friston's construction of the rules is correct, the entire amount of expenditure incurred by the defendants up to the date of the hearing must be ignored and is left over to be considered on a detailed assessment.

39. Mr Friston has three headline submissions. First, he says that costs management is now an entirely prospective exercise. He says it focuses only on the costs that are to be assessed or incurred after the date of any costs management hearing. He points to the repeated references to costs to be incurred and budgeted costs in the rules and PD3E. It is specified in paragraph 7.3 that the court's approval will relate only to the budgeted costs, Secondly, he says the wording of new paragraph 7.4 prohibits the court from approving costs incurred before the date of <u>any</u> costs management hearing. He says paragraph 7.4 is conclusive on this issue and the hearing before me was a costs management hearing despite the description "costs management conference" in rule 3.16(1). He submits the approach adopted by the editors of the White Book in

their commentary is wrong and cannot find justification in the rules and the practice direction. Thirdly, he says "future costs" in paragraph 7.6 means exactly what it says.

40. Mr Friston relies upon one sentence in Carr J's judgment in *Merrix*. The judge held that rule 3.18(b) applies whether on a detailed assessment a party is seeking to increase or decrease the amount of the budgeted costs. At paragraph [16] Carr J concludes that costs management is to be prospective and refers to the April 2017 amendments which, at the date of her judgment, were yet to come into force. The paragraph concludes:

> "[The amendments] confirm that when setting a costs budget, a court is dealing only with prospective costs. There is an ability, but no requirement, to comment on the costs already incurred. Additionally, costs of the case management conference are to be treated as costs already incurred." [my emphasis]

41. It is not entirely clear from the judgment where the roots of that observation lie. In any event, it is a remark that is obiter and the issue for consideration by me relates to paragraph 7.6 that deals with significant developments rather than the first case management conference. Whilst having due regard to the source of the observation, it is not binding on me.

42. There are other observations in the judgement that chime more closely with the approach indicated by the management judge to which I have made reference earlier in this judgement. At [83] Carr J refers to what she describes as the clear intention of costs management as set out in rule 3.18(b) "… Namely to reduce the cost of the detailed assessment process by the treatment of agreed or approved cost budgets as binding, absent good reason to proceed otherwise. If this approach be right, the scope and cost of detailed assessment costs on a standard basis will indeed be reduced materially."

43. At [88] the judge observes that: "… real emphasis needs to be placed on the importance of certainty on costs in the context of access to justice." At [90] she goes on to say:

> "Fidelity to the clear words of CPR r. 3.18, as set out above, will achieve the dual purpose both of reducing the costs of the detailed assessment process and of securing greater predictability on costs exposure/recovery for the parties. Both the receiving and paying party have the benefit of the legitimate expectation. This is a central pillar of access to justice in a world where costs will always be a primary consideration for those contemplating or participating in litigation, and consistent with the overriding objective. The expensive costs of the detailed assessment procedure are reduced and the case is dealt with justly, with both parties knowing from an early stage what their potential cost liability is, absent good reason to depart from the budget."

44. Mr Singla submits that the approach shown in the White Book is plainly right. The approved budget figures for estimated costs in this case substantially pre-date the date of agreement and approval in the court order dated 3 May 2017. The judge specifically directed the budgets were to be prepared with estimated costs from 27 January 2017 onward. The budgets were intended to be a base reference point in the event of there being revisions (as the judge anticipated) and the right approach, it is

said, is for the court to undertake the exercise that is required by paragraph 7.6 on the basis that the figures in the incurred costs column in the approved budget has not changed. It follows that the court, although recognising the fact that costs will have been incurred since the date of the budget and up to the hearing at which the defendant seeks approval to a revision, it will ignore that fact and treat those incurred costs as estimated costs for the purposes of the review. The court is therefore required to undertake an exercise that is not a direct reflection of reality and he submits this is necessary to give the rules and the practice direction meaning and sense.

**Review of the parties' submissions**

45. It is possible to discern from a number of the sources cited in this judgment a number of policy considerations that underlie the costs management regime. Not all of them sit easily together. They include:

    i. The benefit for a party in knowing its exposure to costs.

    ii. Greater predictability in the costs that will be recovered.

    iii. A reduction in the cost of detailed assessment.

    iv. The need for the court to avoid undertaking a detailed assessment in advance.

    v. Significant developments should be reflected in the budgets.

46. To my mind the defendants' approach finds some limited support in the rules and the practice direction, but much stronger support in the principles that lie behind costs management and in the way in which they have to work in practice. Although paragraph 7.4 read literally prevents the court from approving costs incurred before the date of a cost management hearing, the requirements of the paragraph are impossible to implement in that way. Rule 3.13(1) requires the parties to file exchange budgets not later than 21 days before the first CMC. They are required after filing and exchanging their budgets to engage and produce a budget discussion report with a view to the court having the benefit of the fruit of that discussion at the CMC. In every case the budgets will be at least three weeks out of date (and often more out of date than that) and the estimated costs for the CMC itself will have been incurred by the time the hearing of the CMC has concluded. That is not to say, however, that the estimated figure will automatically become the figure for incurred costs. Whether the estimate for the CMC proves to be accurate can only be known by looking backwards in time. Moreover, there is plainly no point in requiring the parties to engage with each other and produce a budget discussion report in relation to costs that cannot be approved by the court.

47. A similar point can be made about the agreement of budget phases, or entire budgets by the parties. Agreement of a budget phase has the effect of removing the court's power to approve it. It is obviously salutary for the parties to agree as much as possible. They have a duty to help the court implement the overriding objective and agreement of the whole or part of a budget assists with this process. Yet it is axiomatic the parties will be agreeing costs described in the budgets as estimated that have, at least in part, been incurred. This is a necessary fiction. Some of the costs will

have, in the real world, made a complete or partial transition from estimated to incurred, but within the costs management world that transition has to be ignored. It is said in paragraph 7.4 that the court may not approve costs incurred before any costs management hearing, but it is, in practice, impossible to follow that requirement literally, if there is a hearing. And it does not apply to agreement between the parties which will not involve a hearing.

48. The reference to incurred costs before the date of any costs management hearing must mean the incurred costs as specified in the budget; that is the budget the rules have required the parties to produce some weeks prior to the hearing. The rules and practice direction do not contemplate revisions to the budgets on the day of the hearing and that would not in most cases be a practical option. If the hearing is adjourned, the court always has the option, if it considers that the budgets will be out of date to direct the parties to file up-to-date budgets. Subject to the exercise of that power, it seems to me that the court will always be assessing some costs which have been incurred prior to the cost management hearing. If that were not so, such costs would fall into a 'black hole'. They would not appear as incurred costs in the budget and could not form part of estimated costs because they have already been incurred. In every case there would have to be subject to a detailed assessment along with the costs that are shown in the budget as incurred. Such a fragmented approach to the assessment of costs seems to me to be deeply unsatisfactory and I do not consider that, properly construed, that is what the rules and practice direction can have intended.

49. I consider that a similar approach is required to make sense of paragraph 7.6. The overriding purpose of cost management is to enable the court to control costs to be incurred by the parties and their recoverable costs. Incurred costs are left to a detailed assessment without the parties having to show there is a good reason to depart from the budget, because the condition in rule 3.18(b) only applies to budgeted costs. It is notable that paragraph 7.6 speaks of revising a budget (not budgeted costs) in respect of future costs. I have already made reference to the final sentence of paragraph 7.6 which requires the court to have regard to significant developments since the date when the previous budget was approved or agreed. To my mind that language points towards taking the previous budget as a base reference point as Mr Singla has submitted. Future costs are considered by reference to the last approved or agreed budget. Mr Friston was forced to make the unattractive submission that it is unnecessary to include in a revised budget costs incurred since the last agreed or approved budget. He says those costs are outside the costs management regime.

50. I accept that a detailed assessment is needed for costs incurred up to the date of a costs management order and there may be elements of later costs that fall outside the costs management regime. However, I do not consider the rules and practice direction intended that only certain elements of the costs relating to significant developments must be dealt with as revisions with the other elements, those pre-dating the hearing or, on another view those pre-dating the application, being dealt with on a detailed assessment. This approach would run contrary to the purposes of costs management and lead to unnecessary fragmentation of the costs dealt with at a detailed assessment.

51. The approach proposed by the claimants can be tested in another way. If a significant development occurs, and a party affected by it recognises it at an early stage, and prepares a revision to its budget, paragraph 7.6 requires the revising party to submit a

revised budget to the other party for agreement. A reasonable time must elapse before an application to the court can be made and the period of time that will then pass before the 'hearing' takes place will be subject to the vagaries of court listing. There may be a time lag between issuing the application and the cost management hearing of many weeks and it would be most strange if the courts' power to manage costs is conditioned by the state of its lists at any given time or by whether or not a judge feels able and willing to deal with the revisions on paper rather than at a hearing. There is also the separate point that if the revisions are approved on written submissions, there has been no 'hearing' for the purposes of paragraph 7.4, only possibly a deemed hearing arising from rule 3.17.

52. In every case where a significant development arises, and a party prepares a budget to deal with it, there would be costs which cannot be considered by the court because of the requirements of the practice direction. Indeed, in some cases it may not be immediately obvious that a development in the litigation is significant development; a development which appeared at first sight not to be significant may change character.

53. The vagaries of the approach put forward by the claimants are demonstrated by the way in which the defendants' application was dealt with in this case. The hearing was listed for one day on 6 December 2017. The hearing did not finish within the agreed time estimate partly because the court service decided to hold an unannounced fire drill in the middle of the day. Even disregarding that unexpected development, the hearing was unlikely to lead to an extempore judgment. If Mr Friston's construction of paragraph 7.6 is right, it is not clear whether the operative date for establishing which the costs which have become incurred is the first hearing day, the adjourned date or the date when this judgment is handed down (or when consequential matters are dealt with). The answer is not obvious. In the meantime, during the period in which the application was before the court, the trial has continued and estimated costs have inexorably moved from an estimation about what may happen into incurred costs. It seems obvious to me that some degree of retrospectivity is inevitable if the costs management regime is to be made to work.

54. If the operative date is not the date of the hearing, as a literal interpretation of the rules and the practice direction would suggest, there are a number of possible alternatives. It could be:

    i. The date of the last agreed or approved budget.

    ii. The date set by the court under paragraph 7.5 for a review of the budgets, if this power is exercised.

    iii. The date when the significant development is deemed to have occurred. This may be obvious in some cases but not invariably so.

    iv. The date a revised budget was served on the other party.

    v. The date after a reasonable time following service of the revised budget has elapsed.

    vi. The date when the application is made by the court.

55. In all cases where a costs management order is made, there will need to be a detailed assessment. As a minimum, the costs shown as incurred in the agreed or approved budget will be assessed in that way. It seems to me that the manner in which paragraph 7.6 is drafted not just encourages but requires the parties to revise budgets where there are significant developments. It provides a procedure which is informal and, no doubt, in routine cases is capable of leading to revisions being agreed or approved relatively speedily. The policy is clear. If there have been significant developments, the budgets must be revised. A claim for additional costs should not be left until a detailed assessment because the parties need to know what is their exposure to costs and the costs of detailed assessment should be minimised.

56. The approach put forward by the claimants would lead to a greater proportion of the costs of a claim being left to a detailed assessment. A budget would be set at the hearing dealing only with future costs leaving the other significant development work to be dealt with at a detailed assessment. A similar position pertains if any of the dates I have posited are taken, other than the date of the last approved or agreed budget (or in a case such as this the date the court has specified as the date to which budgets should be prepared). In a case where there is more than one significant development, there is a real likelihood of the detailed assessment becoming fragmented with the Costs Judge being required to work out what work is attributable to different periods. This cannot have been intended when one of the ideas lying behind costs management was the simplification of detailed assessments.

57. The other issue of construction concerns interim applications. Paragraph 7.9 contains as it appears to me mandatory language which requires that interim applications are to be treated as additional to the approved budgets. The issue I have to determine is whether interim applications may also be a significant development in the litigation and capable of being subject to a revision under paragraph 7.6. The answer, to my mind, is clear. The practice direction deals with significant developments and interim applications in separate paragraphs but that does not lead automatically to the conclusion that they are self-contained and mutually exclusive. It is hardly controversial to say that the provisions of the rules and the practice direction must be read together and construed as a whole.

58. It seems to me that the answer to this issue, on which there is no judicial guidance, lies in part in understanding how the budgeting system works by reference to Precedent H. A budget is prepared using that form by dividing work into 10 phases. There is space at the end of the form to include "Contingent Costs". The budget is to be prepared in accordance with the Guidance Notes on Precedent H which, amongst other things, help to explain the budget phase into which different types of incurred and estimated costs are to be placed. Paragraph 6 of the Guidance Notes deals with contingent costs:

> "The 'contingent cost' section of this form should be used for **anticipated costs** which do not fall within the main categories set out in this form. Examples might be the trial of preliminary issues, a mediation, applications to amend, applications for disclosure against third parties or (in libel) applications re meaning. Only include costs which are more likely than not to be incurred. **Costs which are not anticipated** but which become necessary later are dealt with in paragraph 7.6 of PD3E." [emphasis in the original]

59. Costs that fall outside the ten budget phases which are not sufficiently predictable at the time the budget was prepared can only be dealt with under paragraph 7.6. The essential point is that the Guidance Notes contemplate there will be applications of varying types that are dealt with under paragraph 7.6. There will be applications that are not capable of being included as contingencies which may be in themselves significant developments. And, conversely, there may be applications which in themselves are not significant developments, but which lead to work that may properly be characterised as such.

60. At the time the budget is prepared, for example, it might not be anticipated that the other party would apply for permission to amend its statement of case to make a substantial change to it. A consequence of giving permission to amend a statement of case could be to open up new lines of factual enquiry, further disclosure, a need to re-interview witnesses (or interview additional witnesses) and lead to a longer trial. It is likely that the additional work that is consequential upon the amendment would be regarded as a series of significant developments, affecting a number of budget phases. If the application for permission to amend is contested, it would be odd if the application itself which led to significant developments is to be treated differently to the consequences of the application. Such an approach is not warranted by the drafting of paragraph 7.9 and the position as it is explained by the Guidance Notes.

61. I would add, although there is little assistance in the practice direction on this point, that when the court is considering whether there have been significant developments, the court should look at the totality of the related developments. In my example, the fact that the application to amend was successful and it will lead to the sort of developments I have indicated, may be a good basis for concluding that the threshold requirement of paragraph 7.6 has been met. By contrast, the same application for permission to amend that does not succeed may not be a significant development. It is left to be dealt with in the detailed assessment, to the extent the costs have not been resolved by the court's order and summary assessment.

**Conclusion on the legal issues**

62. In summary my conclusions are:

    i. The court has jurisdiction when revising a budget under PD3E 7.6 to revise a budget taking the last agreed or approved budget as the base reference point.

    ii. Where, as in this case, the budgets were directed to be prepared to an antecedent date, the relevant date is the date set by the court.

    iii. Costs which have been incurred since the date of the last agreed or approved budget (or the antecedent date) that relate to significant developments are, for the purposes of revision, placed in the estimated columns of the revised Precedent H in one or more phase. In some cases, it may not be obvious where they go (for example a late application for security for costs) but I can see no reason why Precedent H may not be adapted as necessary to accommodate work that does not easily fit in.

iv. Interim applications may be significant developments as may the consequences that flow from an interim application.

**Discretionary factors**

63. The claimants rely upon two discretionary factors. The first is that the application has been made unreasonably late. They point to the fact that the hearing of the application took place during the course of the trial and, indeed, the application was issued shortly after the trial had commenced. They also point to the defendants' evidence in support of its application which they describe as being very substantial and "lavish". However, the position the claimants now adopt must be seen in the context of the correspondence that led up to the application. The defendants first raised the need to revise budgets in a letter dated 21 July 2017. They invited the claimants to agree that new precedent H budgets should be exchanged to take into account significant developments including, in particular, the extension to the trial timetable. A chasing letter was sent on 12 August 2017 and a further chasing letter was sent on 7 September 2017. The claimants did not reply until 22 September 2017. By that date the claimants had had the defendants' revised precedent H for two weeks. In that letter, the claimants rejected the need for budgets to be revised and this led to the application being issued (with a slightly altered revised precedent H).

64. In those circumstances, it is deeply unattractive for the claimants to complain that the application has been made late. In the witness statement of Mr Parker made in response to the application, the only reason for the long delay in dealing with the defendants' wish to revise budgets is that the claimant's legal team was engaged with other aspects of the claim. That is not an adequate excuse. In my judgement, the defendants have taken reasonable steps to ensure that their application was made in a timely fashion and to ensure that it was brought on for hearing as soon as reasonably practicable.

65. The second discretionary factor relied upon by the claimants is that they say the defendants' application fails to take into account the overriding objective because it disregards the fundamental inequality of arms between the parties. It is said the claimants have a limited and dwindling pot of funding available to them whereas the defendants have effectively unlimited financial resources. In his witness statement Mr Parker goes on to say:

> "This court will not need reminding that the claimants entered into costs management in order to try to level the playing field between the parties. Indeed, I believe that was the prime purpose of a cost management order being made. The claimant's concern is that, at this very late stage in the case, the defendants are now employing costs management as a tool to divert the claimants from the trial. Given the matters referred to in paragraph 6.2(a) - namely, the alternative course of action of relying on CPR 3.18 - this is a relevant factor. At the very least, the defendants ought to have limited their Application to future costs, and ought to have presented their case in a far less heavy-handed and document-heavy way."

66. There seem to be two elements to this complaint. First, there is the manner in which the application has been made and secondly that the costs issues now raised are best left to a detailed assessment. It is right that the application was accompanied by a full witness statement made by Mr Byrne Hill but within the context of this application is

not especially lengthy. Indeed, I have found the way in which the defendants' case is set out in that witness statement to be helpful. It is right that five lever arch files of supporting documents were provided with the witness statement, but they are all documents with which the claimants are already familiar and were provided to assist the court. I do not consider there is any substance in the claimants' initial complaint. The second aspect of the complaint of oppression must be seen in the context of paragraph 7.6. The revision of budgets under that paragraph is not optional. It is a requirement placed on the parties. This makes sense because once a costs management order has been made, the court is under a duty to manage the costs to be incurred pursuant to rule 3.15(1). The practice direction contemplates that the application will be made in much simpler proceedings and could be done informally by the court considering the proposed changes to the budgets and determining what those changes should be without a hearing. Such an approach was plainly unrealistic in the context of these proceedings.

67. The claimants have chosen not to apply to the court to approve revisions to their budget. If I conclude there have been significant developments, it will mean (a) they have failed to comply with the obligation under paragraph 7.6 and (b) they have lost the opportunity with the costs management regime to level the playing field. I appreciate, however, it is possible to have genuinely different views about whether a development is significant. The fact that the claimants have taken one view, or merely decided to leave the issues to a detailed assessment, should not affect how the court deals with the defendants' application if the jurisdiction to make revisions is engaged.

68. The final sentence of paragraph 7.6 says the court "… may approve, vary or disapprove the revisions…". It appears to me that the scope of the court's discretion to decline to follow any of those options is quite limited. If there have been significant developments, and the parties asked the court to revise budgets, it would be unusual for the court simply to refuse to make any order at all. The logic of the cost management regime is that where there have been significant developments, the parties must apply for revisions and the court will normally wish to ensure that appropriate revisions are made to fulfil the objectives of costs management.

69. I am satisfied that there are no good reasons for the court to decline to exercise its jurisdiction under paragraph 7.6. It was the claimants who pressed for costs management to apply to this claim. They sought to obtain the benefit of knowing what their exposure to costs may be. The reasons for making the order hold good and it cannot sensibly be said it is oppressive for the defendants to have made this application either in the manner it is made or that it is made at all. I will now turn to consider each of the seven significant developments.

**The seven significant developments**

**(1) Extension to the trial timetable**

70. By far the most substantial of the developments put forward by the defendants is the extension to the trial timetable by a total of 48 business days.

71. As an initial point, I do not consider there is any substance in the claimants' submission that because by the time the consent order was made in May 2017, the defendants already knew there would need to be some revision to the trial timetable,

they cannot rely upon the later revision to the timetable as a significant development. It is correct that in April 2017, the claimants indicated that their leading counsel would need about six weeks to cross-examine the defendants' factual witnesses and I accept that by 2 May 2017 a revision to the trial timetable was likely as a consequence. There are two main reasons for rejecting the submission:

i. Pursuant to the order made by the management judge, budgets were prepared in February 2017 on the assumption that the trial would commence on 2 October 2017 and finish on 21 December 2017. It is not right to apply knowledge acquired later by the defendants, in April 2017, to the budgets because on both sides the budgets were prepared without that knowledge. The relevant date for knowledge that might preclude a party making an application to revise a budget will usually be the date when the budget was signed and served. That is the relevant date here.

ii. The revision to the timetable developed over a period of time and the revision I am now dealing with is only distantly related to the knowledge the defendants obtained in April 2017.

72. The trial period did not initially allocate time to the various stages of the trial. At the pre-trial review heard on 28th and 31 July 2017, a revised version of the timetable was approved by the management judge to take into account the additional period needed for cross examination. At that time Nugee J was the management judge. On 6 September 2017 the parties were informed by the court that Nugee J was no longer available to be the trial judge and that the start of the trial would therefore have to be delayed until the week commencing 9 October 2017. On 25 September 2017, the parties were informed that the new management judge, Norris J, would not be able to start his pre-reading until 9 October 2017 and that he would not be able to sit on 23 November 2017 or in the week commencing 4 December 2017. In light of those communications, the trial timetable had to be revisited. The claimants gave further thought to the period time needed for cross examination and as a result the period was reduced. The parties and the court agreed that the judge would carry out his pre-reading in seven days from 9 to 17 October 2017 and the trial would start on 18 October 2017 and finish on 2 March 2018. The parties also agreed that the deadline for filing written opening submissions would be postponed until 6 October 2016. The revised trial table timetable was finalised and lodged with the court on 6 October 2017.

73. In total, the revised timetable has added 48 business days over and above the 59 day timetable that was approved by Nugee J at the pre-trial review. The 48 days consist of:

i. An additional 12 business days due to the delayed start of the trial.

ii. An additional 2 sitting days due to an increase in the estimated time for cross examination of the defendants' expert witnesses.

iii. An additional 19 business days of non-sitting time of which 6 are due to Norris J being unavailable on certain dates, seven are non-sitting days and 11 are days when the court is not in session (between 22nd December 2017 and 11 January 2018).

iv. An additional 15 business days for the parties to prepare and review each other's closing submissions.

74. The defendants seek to increase their budget by a total of £1,210,215 comprising £587,000 for the counsel team and £546,015 of solicitors' costs and £77,200 for disbursements. The basis upon which these figures have been calculated is set out in detail in Mr Byrne Hill's 17th witness statement and further explanation is provided in his 18th witness statement. It is unnecessary to set out that detail in this judgement. I accept his evidence, which was not seriously challenged, that the counsel team were fully engaged on trial preparation in the 12 days by which the start of the trial was delayed. Counsel will attend court on two additional sitting days and the remaining days which have been provided in the revised budget will be spent preparing cross examination of the claimants' experts and working on closing submissions. Perhaps unsurprisingly in a case of this size, much of the work on closing submissions will take place at weekends but the figures in the defendants revised budget only assumes work carried out on non-sitting weekdays once the trial has started.

75. To my mind, there is little that can be said about the arithmetical basis of the revised budget so far as it relates to both counsel and solicitors. The basis compares favourably to that contained in the budget that was agreed. The aggregate cost per day of solicitors' time during the trial in the agreed budget was £15,254 and it is £11,375 in the revised budget. Looked at this way, the additional 48 days are being budgeted on the basis of an additional 36 days. Counsels' fees are being budgeted on the basis of the agreed refresher rates.

76. I also do not consider that the reasonableness of the additional disbursements can properly be questioned.

77. Mr Friston's starting point was to contend that the delayed start of the trial was properly characterised as an adjournment and that an adjournment would not normally be regarded as a significant development. I do not consider he is correct on either point. A slightly delayed start to the trial of this claim due to a change of trial judge was not an adjournment of the trial but merely a delayed start. Mr Friston went on to submit that the brief fees that have been agreed accommodated the entire period up to and including the first day of the trial, whenever that first day turned out to be. It was therefore wrong, he said, to charge refreshers for that additional period. He also queried what work the solicitors had undertaken. His overall submission was that nothing had changed. The trial period might be longer but that but the work that was required to be undertaken, the work that had been budgeted in the original budget had not changed. There was therefore no significant development and no basis for there being an increase to the budget. He submitted, in the alternative, that that it was open to the defendants to apply on a detailed assessment if they wanted to justify recovery of an additional sum.

78. He made similar submissions concerning the additional days for submissions. The original budget had provision for closing submissions and the fact that additional time was to be taken did not make additional charges reasonable or proportionate.

79. In my judgement, there is an air of unreality about the claimants' approach to the extended trial timetable. The evidence is that the additional time has been fully occupied with handling this very complex case by the lawyers acting for the

defendants. I am in no doubt that the extension to the trial timetable is a significant development. Indeed, if were necessary to do so, it could be broken down into a series of significant developments. I accept that the mere fact of a longer trial timetable, with a delayed start date and longer breaks is not, of itself, a sufficient basis upon which to approve an increase to the budget.

80. The outline statistics that I set out at the beginning of this judgement give a clear flavour of the scale and complexity of this claim and of the trial. The preparation for trial and conducting the trial are a vast enterprise on both sides that involves the legal teams, both solicitors and counsel, working very long hours. Although it would be simplistic just to say that because there is more time available the budget should increase, it is obvious in a case such as this one that having additional time before the openings were provided and as the trial proceeded will have been extremely welcome. And the court must bear in mind that costs management involves setting figures for the of total budget phases that are within a range of reasonable and proportionate costs. The court is determining whether the amount that is proposed by a party for a budget phase, or a revision to a budget phase, falls within that range. Moreover, it is inevitably part of setting a budget for prospective costs that there is uncertainty about the precise amount of work that is reasonable and proportionate. That uncertainty is inherent in budgeting.

81. I consider that the evidence supplied on behalf the defendants is both cogent and reliable. I am satisfied that the basis of calculation put forward on behalf the defendants produces a revised budget that falls within the range of reasonable and proportionate costs for the trial of this claim.

82. I would add that, although it is necessary for the purposes of looking at a revision to the budget to break down the extension to the trial timetable in order to explain it, it is right in my judgement to look at what has happened, and is to happen, at one remove from the detail and for the court to ask itself at a relatively high level the essential question, namely is this a significant development. Costs management has to be, at least in part, an impressionistic exercise. It seems to me that is the right approach when considering whether there have been significant developments.

**(2) Disclosure**

83. The defendants made an application for specific disclosure that was successful. It led to disclosure of 984 additional documents and the defendants seek an increase to their budget by a total of £47,485. Adopting a crude measure, that amounts to approximately £48 per document. The time is claimed as 15 hours of partner time, 80 hours of associate time and 40 hours of trainee/paralegal time. If the amount claimed is taken without any reduction, it amounts to about 0.25% of the approved budget. Budgeting in relation to disclosure is necessarily a rather hit and miss exercise and no doubt the budget as originally prepared had some margin in it. Nevertheless, it seems to me that if an application for specific disclosure results in a large number of documents that must be reviewed and assimilated, this may be a significant development in the litigation. If the application is not included as a contingency, it will fall outside the budget but may be itself a significant development. That point is not pressed here because an order for costs was made in favour of the defendants. The work in reviewing the documents produced as a result of the application is plainly separate from the application and, even in the context of this litigation, reviewing

nearly 1,000 documents is a major task. They have to be reviewed by lawyers at different levels of seniority as less important documents are weeded out. It is appropriate to have several fee earners involved in the process. This should be an efficient use of legal resources. In summary, I am satisfied that this is properly claimed as a significant development. I consider that the budget should be adjusted by a rounded figure of £40,000 rather than the sum claimed.

**(3) and (4) Work related to service of Mr Torchio's report**

84. The defendants say that the service of a report of Dr Torchio, who is an expert in events study analysis, on behalf of the claimants was a significant development. It is clear from the evidence that the claimants had not forecast that they intended to rely upon expert evidence of that type.

85. The claimants' case on damages is put forward in two ways. First, it is said that the shareholders overpaid for HBOS. Secondly, they claim the difference in value between the merged entity and the original 'vehicle'. The claimants consistently said that they only intended to rely upon four experts and that their accountancy expert would deal with all issues relating to quantum of loss. They confirmed that only four experts would be relied upon, one of those experts being their accountant, at the hearing before the management judge on 27 January 2017, in a letter dated 27 April 2017 and in their agreed budget. In a witness statement from Mr Parker dated 18 January 2017 the claimants had confirmed their accountancy expert would address all issues of quantum.

86. The defendants took a different position in relation to expert evidence and served reports from six experts including Dr Unni who himself is an expert in events study analysis. The claimants served their expert evidence at trial on 17th and 21 March 2017 (the order required sequential service) consisting of four experts in the fields of central banking, banking analysis, financial journalism and accountancy. The defendants served their expert evidence from six experts in response on 23 May 2017, including a report from Dr Unni. On 22 June 2017 the claimants served, without having obtained permission from the court, a report from Mr Torchio. The claimants are unable to contend that the defendants should have predicted such a report would be served when preparing their budget.

87. The defendants seek to increase their budget by total of £212,956. Leaving the amount of the revision on one side, I consider that service of Mr Torchio's report was a significant development. It was a change from the agreed basis upon which expert evidence was to be provided. It could not have been predicted by the defendants and plainly it was necessary for the defendants' expert in this field to respond to it and, thereafter, to engage with Mr Torchio in seeking to narrow issues and producing a joint statement. Mr Torchio's report is 72 pages long with 676 pages of exhibits and appendices. Not only was work occasioned on behalf of Dr Unni but it was obviously necessary in addition for that work to be reviewed by solicitors and counsel and for further work to be undertaken in connection with the preparation for trial. The figures for the additional work claimed to compare favourably with the figures in the claimants' budget for similar work.

88. The fourth item in the defendants list of significant developments is dealing with the claimants' application for permission to serve the supplemental report produced by Dr

Unni. Initially the claimants objected to permission being given but the point was then conceded. The amount involved is £4,648.96. I do not consider it is right to look at this item in isolation. It flows directly from the service of Mr Torchio's report which itself led to the preparation of Dr Unni's report. The significant development was the step taken by the claimants and all the costs that flow from it need to be regarded as one item.

89. Although in absolute terms the amount claimed under heads 3 and 4 is substantial, I do not consider this in the context of this litigation it is excessive and I am satisfied that the figures sought are within the range of reasonable and proportionate costs.

**(5) Claimants' third party disclosure application**

90. The need to make an application for third-party disclosure is common in the litigation. The application in this case was made by the claimants. The defendants point to the fact that it was first forecast in July 2016 but was not made until August 2017. It was heard on 11 September 2017 and an order was made against the Department for Business Energy & Industrial Strategy. 71 documents were produced by the Department on 15 September 2017 and a further hearing took place on 17 September 2017 before the management judge to resolve issues of confidentiality. Given that the application was made by the claimants, the need for involvement by the defendants was limited although the defendants were represented at the hearings in order to deal with confidentiality. It does not seem to me, however, that in the context of this litigation the application and the involvement of the defendants can be seen as a significant development. The application was part of the claimants' task in preparing the case of a trial and it did not lead to work that can properly be characterised as giving the court jurisdiction to revise the defendants' budget either by the sum claimed of nearly £73,000, or at all.

**(6) Questions to three of the Defendants' experts**

91. This item can be dealt with quite briefly. The defendants say that the questions put by the claimants to three of the defendants' experts, Professor Persaud, Mr Deetz and Dr Unni, went beyond what was reasonable and proportionate in the circumstances. Professor Persaud received an 11 page letter with 62 questions. Mr Deetz received a 10 page letter with 42 questions. Dr Unni received a 13 page letter with 52 questions. The defendants seek a revision to their budget by a total of £44,000 in disbursements. This sum must be seen in the context of the total amount allowed in the expert budget phase of £4,787,812. The former sum is less than 1% of the latter. There are inherent uncertainties and inaccuracies in the preparation of a budget. Allowance has to be made for future events and, as they unfold, there will be pluses and minuses; some items are more expensive and some lead to savings. It is not appropriate only to take work which has cost more than was originally anticipated and to say that there has been a significant development. There must be something more than merely a modest increase in the anticipated cost of the work to amount to a significant development.

**(7) Response to Mr Ellerton**

92. Mr Ellerton is an expert witness relied upon by the claimants. A letter was sent to him on 26 July 2017 regarding his second report served on 3 July 2017. It was not until after Mr Ellerton met his opposite number that he replied on 15 September 2017. The

defendants say that he used the opportunity to introduce an additional tranche of expert evidence that did not appear in his first report dated 21 March 2017 or his second report. Mr Ellerton said that the directors were aware of some of the impairment figures and that the board must have appreciated that the merged entity would fall below the FSA's minimum capital requirements.

93. The defendants, in response to the new approach adopted by Mr Ellerton, have produced a witness statement and supplemental notes from two experts. They say this has incurred expenditure of £68,839 in solicitors' fees and £55,800 in expert fees. Undoubtedly the new approach adopted by Mr Ellison was a development. It is more difficult, however, to characterise the development as significant. It appears to me that in the context of this claim, a modest adjustment to the claimants' case arising in the course of the exchange and consideration of expert evidence cannot properly be characterised as being significant. Even if the figures claimed by the defendants are taken without adjustment, although they are substantial, they do not indicate a development which amounts to a significant change of direction or adjustment that to the claimants' case. Although it is right to say that that this item is on the margins, on balance, I do not think it is appropriate to treat it as a significant development and an adjustment will not be allowed.

**Conclusion**

94. I will give directions in an order to be made on the handing down of this judgement, or on a convenient later date, permitting adjustments to the defendants agreed budget in relation to items 1, 2, 3 and 4 in the sums I have mentioned but not to items 5, 6 and 7.