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Welcome to the latest edition of Summary Judgment – a round-up of key cases from the past few months, of significance to all dispute resolution practitioners.

For litigators, the past six months have been dominated by the arrival of the Jackson Reforms on 1 April 2013. Last minute amendments, and a significant capitulation on the mandatory imposition of cost management procedures, have made the transition challenging all. It is likely that we will see a range of corrections and clarifications to the rules in the Autumn.

In the meantime, responsibility for giving efficacy to the reforms now lies with the judiciary and practitioners. Fortunately, there are several cases already coming through the courts that are considering the budgeting requirements (Elvanite v AMEC, summarised in this issue) and enforcing the more robust approach to case management articulated by Sir Rupert Jackson.

Fortunately for all of us, there has been some more interesting and substantive judgments during the period as well. We have seen the Commercial Court attempt to quell concerns regarding one-way exclusive jurisdiction clauses (Mauritius v Hestia) and some welcome guidance on the challenging principle of piercing the corporate veil (Prest v Petrodel). And of course, BLP had a significant victory in the Supreme Court in May, in the Eurosail judgment, which provided clarification on the test for insolvency.

Enjoy this new, redesigned issue of Summary Judgment, and do get in touch with me or another member of the LDR KDL team if you have any questions about any of the topics covered here.

Nick Pryor
BNY v Eurosail 2007-3BL (Supreme Court)

Clarifying the test for insolvency, and rejecting the "point of no return" test
BNY Corporate Trustee Services Limited v Eurosail-UK 2007-3BL PLC [2013] UKSC 28

This case concerned proceedings seeking a determination of whether the Defendant, an issuer of interest-bearing loan notes, was solvent within the meaning of the Insolvency Act. The judgments of the lower courts had a significant impact on how ratings agencies approached similar transactions; and so the Supreme Court’s judgment was eagerly awaited by structured finance market participants. It also held broader implications for the balance sheet test for insolvency.

The facts

Eurosail issued loan notes that provided that a (potential) event of default may occur if the issuer is deemed unable to pay its debts within the meaning of Section 123(2) of the Insolvency Act 1986. commonly referred to as the “balance sheet test”. This provides that a company is unable to pay its debts if it is proved to the satisfaction of the Court that the value of its assets is less than the amount of its liabilities, taking into account its contingent and prospective liabilities.

As a result of the subsequent insolvency of Eurosail 3BL’s swap counterparties (being Lehman entities), the issuer’s currency hedge protection is currently non-performing, leaving it exposed to currency market fluctuations. When filing its last audited accounts, Eurosail 3BL applied the contemporary rates of exchange. Based on those rates, Eurosail 3BL recorded liabilities to noteholders substantially in excess of its assets. The Class A3 noteholders relied upon these accounts to contend that Eurosail 3BL had suffered an event of default (which, if correct, would result in more advantageous prioritisation for that class of noteholders).

In opposing this position, Eurosail 3BL relied on two separate arguments. First, within the meaning of Section 123(2), it is not appropriate simply to add up the total liabilities and total assets of the company; it is necessary to “take into account” a number of factors (explained in greater detail below). Second, Eurosail 3BL relied upon the existence of a post enforcement call option ("PECO"), under which the liabilities of the issuer, once the assets have been exhausted, may be acquired by the option holder for nominal consideration. Under the structure of the transaction documents, the noteholders are obliged to transfer the liabilities to the option holder in the event that the PECO is exercised and, as the option holder is a company in common ownership with the issuer, the expectation is that the liabilities will be forgiven by the option holder.

Supreme Court’s decision

The Supreme Court unanimously upheld the decision of the Court of Appeal in finding that Eurosail 3BL was not deemed to be unable to pay its debts within the meaning of section 123(2) of the Insolvency Act 1986 (and that, therefore, no event of default could be considered). Furthermore, the PECO would not have any effect on the question of whether Eurosail 3BL was deemed unable to pay its debts within the meaning of Section 123(2).

The effect of the judgment is two-fold. First, for Eurosail 3BL, it means that the transaction has not suffered an event of default and the vehicle is solvent. Second the PECO structure, which market participants had been relying upon to give effective limited recourse to this type of transaction, does not operate in the way that had been anticipated.
Significance of this judgment

The event of default that the Supreme Court was asked to consider is common to almost all PECO to UK based issuer securitisations. In considering the application of Section 123(2), Lord Walker stated that the issue of "whether or not the test of balance-sheet solvency is satisfied must depend on the available evidence as to the circumstances of the particular case". Given the relatively unique (non-trading) nature of Eurosail 3BL, Lord Walker considered that its present assets should be a guide of the company’s ability to meet its long-term liabilities.

However, he also found that there existed "three imponderable factors". These were: (1) potential currency movements; (2) potential interest rate movements; and (3) the UK economy and housing market. These factors, when combined with a period of more than 30 years to redemption of the notes in 2045, meant that the process of considering them in the context of balance sheet insolvency was "a matter of speculation rather than calculation and prediction on any scientific basis". The Court considered that it should proceed with the greatest caution in deciding that a company is balance sheet insolvent. Lord Walker concluded that Eurosail 3BL’s ability to pay all of its debts (whether present or future) may not be finally determined until much closer to the date for redemption in 2045.

The Supreme Court was also very clear to reject the "point of no return" test, adopted from academia by the Court of Appeal. Lord Walker categorically states that he considers that the phrase "should not pass into common usage as a paraphrase of the effect of section 123(2)".

Where do we go from here?

The profound and far-reaching effects of the first instance and Court of Appeal decisions for securitisation market participants have now been conclusively upheld; the contention that a PECO structure gives effective limited recourse is now discredited. UK based issuers who operate these structures will not be able to rely on the PECO to effectively discount the value of their liabilities to noteholders back to the level of their assets, at least until the conclusion of the transaction.

The second issue arising out of this judgment concerns insolvency law. Practitioners had been looking to this case to give some guidance on the issue of balance sheet insolvency. Lord Neuberger in the Court of Appeal went some way towards doing this with the adoption of the point of no return test, even if the parameters of the test itself were somewhat difficult to establish. The Supreme Court decision, however, takes us back to where we were at the outset of the Eurosail 3BL litigation, with a petitioner needing to satisfy a court that a company is balance sheet insolvent and that exercise being heavily fact specific. The manner with which the Supreme Court takes into account both the value of the prospective future liabilities and the assets of the company, goes some way to illustrating the latitude that will be afforded to a company when the question is considered.

“BLP acted for Eurosail 3BL in these proceedings. The Supreme Court’s judgment demonstrates the mix of factors and issues that must be weighed up when considering the concept of balance sheet insolvency. It is not just a question of taking a snapshot at a point in time and relying on that. The ramifications of the case for both securitisation parties and insolvency practitioners are significant.”
Prest v Petrodel (Supreme Court)

A welcome clarifying authority on the principle of piercing the corporate veil
Prest v Petrodel Resources Limited & Others [2013] UKSC 34

It is a fundamental principle of corporate law that a company and its members have separate legal personalities (Salomon v Salomon [1897] AC 22). However in exceptional circumstances it may be possible to “pierce the corporate veil” and apply liability to a “puppeteer” controller of a corporate body. Regrettably, however, the law in this area has become increasingly unclear; in large part due to the conflicting views expressed by the High Court and Court of Appeal in VTB v Nutritek and Alliance Bank v Aquanta, during 2011/2012. As a result, commercial practitioners have been eagerly awaiting clarification from the Supreme Court on the availability and scope of this legal principle.

Unfortunately the Supreme Court sidestepped the topic when giving its judgment in VTB v Nutritek [2013] UKSC in February 2013. This was widely regarded as a missed opportunity. Practitioners have therefore welcomed the recent judgment in Prest v Petrodel, which contains an intelligent and credible reconciliation of earlier authorities, whilst validating the existing potential for piercing the corporate veil in suitable cases.

Facts of the case

This judgment concerns divorce proceedings, in which the claimant sought an order for financial relief from properties owned by various corporate bodies controlled by her former husband. This may not be the typical factual matrix for considering a judgment of significance for corporate and commercial parties, but in fact the Supreme Court judgment was very careful to ensure that it explored the legal principle of piercing the corporate veil as it applies in a corporate context, as well as in the specific context of the Matrimonial Causes Act 1973.

Confirming the existence of the principle

Giving the leading judgment, Lord Sumption reviewed all the relevant authorities, and acknowledged that the law in this area had become “unsatisfactory and confused”. Nevertheless he concluded that there is a limited principle of English law permitting the court to pierce the corporate veil where a person interposes “a company under his control” in order to “deliberately evade” his legal obligations/restrictions, or to frustrate enforcement. He emphasised that this is a very limited principle, since in the majority of cases “there will be a legal relationship between the company and the controller which will make it unnecessary to pierce the corporate veil”.

Avoidance and evasion

One of the problems faced by earlier authorities when considering whether it is appropriate to pierce the corporate veil is the extent to which the puppeteer needs to be using the puppet company as a mechanism to achieve mischief. On the one hand, the legal construct of a limited liability company exists specifically in order to avoid personal liability for the company’s members; this has been so since at least the Limited Liability Act 1855. It is perfectly lawful to use a corporate structure in order to isolate liabilities, and any encroachment into this principle must be managed carefully, and confined to very specific circumstances.

Many earlier authorities focussed on considering whether the corporate structure was a “sham” or “façade” designed to conceal or avoid liability; “a mask which [the puppeteer] holds before his face in an attempt to avoid recognition by the eye of equity” (Jones v Lipman [1962]). This approach rightly focuses on the intentions of the puppeteer, but is linguistically imprecise. When is a corporate structure a “sham” as opposed to merely an efficient arrangement designed to limit/allocate exposure? What makes a controlled corporation a legally intolerable
“mask” rather than a legitimately separate legal enterprise? At its heart, the authorities have steered towards the conclusion that there must be some *impropriety* on the part of the puppeteer.

Impropriety is the important distinction between avoidance (a legitimate act) and evasion (a more pejorative term, imputing misconduct). The principle of piercing the corporate veil may be engaged only where the puppeteer has used the puppet corporate as a specific means of evading enforcement/liability. It cannot be employed where the controlling person/company has simply sought to avoid or mitigate its exposure. The distinction between avoidance and evasion is slight, but clear, as any tax lawyer will be able to confirm.

On the facts of this case, the husband had established the legal entities at the heart of this dispute for the purpose of "wealth protection and the avoidance of tax". He was not motivated by a desire to evade or frustrate any legal obligation to his wife. Accordingly, the corporate veil could not be pierced in these circumstances (though the claimant was ultimately successful in her action by another legal avenue, having established that the properties in question were held on resulting trust).

“This welcome judgment of the Supreme Court brings some much-needed clarity to this area of law. The principle of piercing the corporate veil is confirmed as a matter of English law, but confined in its application. It will only be engaged where the corporate entities are designed intentionally to evade liability or frustrate enforcement.”
FSA v Sinaloa Gold (Supreme Court)

FSA not required to give a cross-undertaking in damages to cover third party losses consequential on a freezing injunction
FSA v Sinaloa Gold plc and Barclays Bank plc [2013] UKSC 11

In December 2010 the Financial Services Authority ("FSA") made an ex parte application for a freezing injunction against Sinaloa Gold and PH Capital Invest, alleging that both companies had been involved in unauthorised promotion of share sales, and absent an approved prospectus. The terms of the injunction stated that the FSA gave no cross-undertaking in damages, but (inadvertently) also included an undertaking to cover third party costs and losses, which the FSA sought to have removed from the injunction.

Sinaloa Gold held six accounts with Barclays Bank; the Bank therefore intervened in the FSA’s application to amend the terms of the injunction. The FSA’s application was refused by the High Court, but the Court of Appeal reversed that decision in holding that the undertaking in respect of third party losses would be removed (though the undertaking in respect of third party costs remained).

Judgment of the Supreme Court

The Supreme Court unanimously dismissed the Bank’s appeal, finding that there was no requirement for the FSA to give a cross-undertaking in respect of third party losses. The Supreme Court (led by Lord Mance) noted as follows:

- The FSA was acting pursuant to its public law enforcement duties. Public authorities, in enforcing the law in the interests of the public as a whole, cannot generally be expected to back their legal actions with the public purse, since this may inhibit public officials from fulfilling their public duties.

- A pragmatic decision can be drawn between an undertaking in respect of costs and in respect of damages. The former is comparatively confined in scope, whereas the latter may be open-ended.

- Accordingly, it may be appropriate for a public body such as the FSA to give a cross undertaking in respect of costs, but (save in specific special circumstances, which were not evident on the facts of this case) not in relation to third party losses generally.

“The court’s rationale for excluding third party losses from the scope of the FSA’s indemnity is one of pragmatism. It is hard to argue against the view that the FSA – in exercise of its public duties – should not be left exposed to potentially open-ended liability towards third parties. Nevertheless, it is unfortunate that this decision leaves financial institutions – the acknowledged innocent third parties caught up in such circumstances – with a potential exposure against which they have no protection or recourse.”
Deferred Prosecution Agreements

Deferred Prosecution Agreements introduced in the UK
The Crime and Courts Act 2013, which received Royal Assent on 25 April 2013, has introduced deferred prosecution agreements (“DPAs”) into the UK for the first time.

What are DPAs?
DPAs are formal written agreements between a company and a prosecutor in which the prosecutor agrees to defer prosecution of the wrongdoing company in exchange for payment of a fine or compliance with other conditions. They have long been used, to great effect, in the US.

Advocates of DPAs argue that their usage avoids the need for authorities to incur substantial costs in investigating and prosecuting companies and also encourages companies - aware of their wrongdoing and concerned about the likelihood of prosecution - to make a voluntary disclosure. They can also be a boon for cash strapped prosecutors – in the US it is estimated that they bring in US$2.5 billion a year in penalties.

When will they be used?
It is anticipated that DPAs will normally be used in cases regarding economic crimes such as fraud or money laundering. Advocates of the introduction of DPAs point out that, as well as such cases being difficult to bring in terms of establishing liability, the efforts involved in prosecuting large corporate entities can be disproportionately expensive and time consuming (in the Ministry of Justice’s (MoJ) consultation paper on DPAs, it was noted that investigating and prosecuting a case that results in a late guilty plea costs the Serious Fraud Office (SFO) approximately £1.6 million and takes around 8 years to conclude). In addition, such a long and drawn out process inevitably has a serious impact on the numerous employees, shareholders and communities who necessarily rely on the company for their livelihood.

Co-operation would vastly reduce the time and cost of bringing such cases but at present companies have little incentive to self-report. The introduction of DPAs provides such an incentive while still ensuring that justice is obtained as against the wrongdoing company, in the form of financial compensation or the imposition of conditions on the future behaviour of the company, or both.

Disadvantages of DPAs?
DPAs certainly have their sceptics. Of particular concern is that in the US the entire process lacks transparency as the judiciary plays no meaningful role in either the negotiation, formation or maintenance of a DPA.

The Crime and Courts Act seeks to address this concern by ensuring that the judiciary will play an active role in the implementation of DPAs. In direct contrast to the US, in which the final terms of the deal are thrash out between the prosecutor and the company behind closed doors, final agreement on a DPA will be required to be made in open court before a judge to ensure openness and transparency. In addition, there would be an earlier “preliminary hearing”, held in private rather than in public, at which a judge will be asked to review and approve the DPA package and could at this stage veto the entire deal.

How will the judiciary react to this new regime?
Historically the courts have taken umbrage at “done deals”. In R v Innospec Ltd [2010] EW Misc 7 (EWCC) the sentencing judge approved the terms of the settlement only reluctantly, and emphasised that despite this agreement, it was still the court that had the power to determine the penalty for the offence charged, and not the prosecutor. The case of R v Dougall (14 April
2010 (unreported)) also provides some indication of how the judiciary have previously viewed these sorts of deals. A former executive of a company that pleaded guilty in relation to certain corrupt payments was sentenced to 12 months imprisonment, despite the SFO’s recommendation that a suspended sentence would be more appropriate in the light of Mr Dougall’s co-operation with the investigation. The sentence was later amended on appeal but shows how the courts dislike this approach generally.

The MoJ’s response to the consultation, dated 23 October 2012, emphasised that the role of the judge would be to provide independent scrutiny of the process in order to instil confidence and public certainty. The judiciary would not be trying the offence or sentencing the organisation and they would not have powers to amend the DPA themselves. This may be the intention behind the implementation of DPAs, but how the judiciary react to DPAs in practice is something that will need to be tested over time. The importance of this reaction cannot be underestimated: ultimately it will be the judicial response to DPAs - and whether or not their creation and implementation are endorsed by the courts - that will determine whether they are a success.

**Will anyone be willing to self-report?**

Until this has been tested, one has some sympathy for companies who will be unwilling to self-report until some comfort has been provided as to precisely how the DPA process will work in practice. Indeed, until such a test case has been brought many lawyers may feel uncomfortable advising their client to consider self-reporting. The Sentencing Council of England and Wales are due to publish guidelines in order to assist judges in exercising their role under the DPA regime and in tandem the SFO and Crown Prosecution Service (CPS) will produce further guidance on how DPAs are due to work in practice. It is hoped that this guidance will shed more light on how DPAs will operate.

“Deferred Prosecution Agreements are culturally unfamiliar to this jurisdiction, and few organisations are likely to be willing to self-report until they have seen the regime bed down and operate effectively in practice. Forthcoming guidance will hopefully provide some clarification and comfort about the efficacy of the regime.”

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Mauritius Commercial Bank v Hestia (High Court)

One way or another: English court upholds one-way jurisdiction clause
Mauritius Commercial Bank Ltd v Hestia Holdings Ltd [2013] EWHC 1328

A recent decision by the French court invalidating a one-way exclusive jurisdiction clause in *Mme X v Rothschild* has led to much speculation about whether such clauses would be upheld in other jurisdictions.

This decision was unsettling since such clauses are widely used in finance documents (including within the ISDA Master Agreement) and had traditionally been considered effective across all EU Member States. Now the English High Court has declared its hand on the issue in *Mauritius Commercial Bank v Hestia*, by upholding such a clause.

The clauses and Hestia’s arguments

MCB entered into a loan agreement with Hestia; the loan agreement contained a jurisdiction clause in favour of the Mauritius courts, and Mauritian governing law. Following a default, the loan was restructured, and a new agreement was put in place. That agreement was later amended to contain clauses applying English law and giving exclusive jurisdiction to the English courts, but giving MCB the freedom to bring proceedings in any other jurisdiction – a fairly standard one-way exclusive jurisdiction provision.

After a further default, MCB sued Hestia in England under the latter agreement. Hestia challenged jurisdiction essentially on two grounds:

- that it had not been open to the parties to amend their agreement on choice of law, that Mauritian law therefore still applied, and that the clause was invalid under Mauritian law (which is based on French law).
- that the one-way jurisdiction clause was invalid, because it’s one-sided nature made it contrary to English public policy (essentially the same argument that was used successfully in the *Mme X v Rothschild* case).

The court’s response – freedom of contract prevails

Neither of Hestia’s arguments found any favour with Mr Justice Popplewell, whose overarching approach was to give effect to what the parties had agreed.

He could see no rationale or policy reason why the parties should not have agreed a change in governing law. They were free to do so, and the court would strive to give effect to their bargain. The choice of English law was upheld and the question of whether the one-way clause was enforceable under Mauritian law became moot (although the judge doubted whether the clause would have been invalid under Mauritian law in any event).

Under English law the court regarded the one-way jurisdiction clause as unobjectionable. It was noted that such asymmetric clauses have regularly been enforced by English courts in the past (for example in *Lornamead Acquisitions v Kaupthing Bank* in 2011). The reasons behind such clauses were endorsed: that they minimise risk to lenders by allowing them to take action wherever a borrower may have assets and so encourage banks to lend to foreign and multinational borrowers.

The court considered that there was no reason not to give effect to the bargain the parties had struck. Hestia could sue MCB in England, and MCB was free to sue Hestia in England or wherever else it could get a court to accept jurisdiction.
BLP Comment

One-way exclusive jurisdiction clauses are a market standard in all but the most sophisticated of finance agreements. Before the Rothschild decision it was widely thought that Article 23 of the Brussels Regulation required EU Member States’ courts to give effect to such clauses. In the uncertainty that follows Rothschild it is reassuring to know that the English courts at least will not be undermining parties’ freedom to agree asymmetric jurisdiction arrangements. But unfortunately the risk remains that some other jurisdictions will follow the French rather than the English lead.

Now that England has established itself as a “safe” jurisdiction on this issue, parties in MCB’s position may be best advised to seek judgment in England where possible and then take care over where the jurisdiction clause may be challenged in enforcement action overseas.

“By upholding the one-way exclusive jurisdiction clause in this case, the High Court has gone a long way to quelling the concerns which arose out of the Mme X v Rothschild case before the French courts.

Of course, this decision cannot avoid all risk of such clauses being struck down, particularly in relation to matters that have a nexus with France or any other jurisdiction that may object to such clauses. One-way exclusive jurisdiction clauses can be very useful, but should not be used without careful consideration and discussion with local lawyers (where applicable).”
Elvanite v AMEC (High Court)

**Approved costs budget cannot be revised after trial**

*Elvanite Full Circle Ltd v AMEC Earth & Environmental (UK) Ltd [2013] EWHC 1643 (TCC)*

These proceedings ran under the TCC Cost Management Pilot Scheme, which preceded the formal introduction of cost management across the High Court in April 2013. Notwithstanding that there were some minor differences between the pilot and the final rules now applying, the High Court used this judgment as an opportunity to clarify how cost management procedures generally should operate in the future, and in particular whether a party can be forgiven for exceeding budget; and/or whether a claim for indemnity costs (for example, as a consequence of having made a sensible Calderbank offer) can override a cost management order capping costs.

At the first CMC the court made a cost management order for the claimant in the amount of £317,000; and for the defendant in the amount of £265,000 (subsequently revised modestly by the court to £268,500). A month before trial the defendant filed and served a revised budget, doubling its previous figure to £532,000. The claimant objected to this increase, whilst also notifying the defendant of an increase to its own budget to £372,000. Crucially, however, neither side applied to the court for a formal increase/revision to their respective approved budgets.

Shortly before trial, the defendant made a Calderbank offer of £150,000. The claimant rejected this offer, and ultimately lost at trial (in fact owing the defendant £5,000 pursuant to a counterclaim). In this costs judgment, therefore, the court had to consider the following:

1. **Was the defendant entitled to indemnity costs?**

   The court concluded that this was not a case where indemnity costs were appropriate. Even though the claimant had ultimately lost its claim, the various issues in dispute were plainly arguable; and the case had not been conducted in a disproportionate manner. Nor was the court willing to award indemnity costs as punishment for the claimant’s decision not to accept the defendant’s Calderbank offer (in large part because the precise terms of the offer would have left the claimant out of pocket).

2. **If so, what is the relevance (if any) of the costs management order, which capped the defendant’s costs significantly below those actually incurred?**

   Notwithstanding that the court did not award indemnity costs, it went on to consider obiter what the impact would have been if it had found otherwise. The court observed that any cost management order must still remain the starting point when considering an award of costs. The circumstances that may entitle one party to indemnity costs may give numerous "good reasons" for considering a departure from the approved budget, but prima facie the budget should be accurate and be the relevant starting point for any assessment of costs, on whatever basis. This has the benefit of consistency and certainty for all parties.

3. **If costs can only be recovered on the standard basis, can the defendant seek retrospective amendment of his budget, or otherwise seek relief from the cap imposed by the cost management order?**

   The court stated conclusively that the cost management rules (under both the pilot, and the new CPR provisions), as well as the Court of Appeal’s comments in Sylvia Henry v NGN, are clear; parties will be held to their approved budgets unless those budgets are (a)amended, or (b) the court is persuaded that there is a good reason for departure.
The defendant argued that it had complied with Paragraph 6 of the Practice Direction (which allows the court to approve departures from earlier budgets) having filed and served a revised budget a month before trial. The court rejected this submission; it is clear from the rules that a party needs to formally apply to amend its approved cost budget, and cannot simply file the amendment at court.

As to when a party should seek revision to their budget, the court stated that it should be done as soon as it becomes apparent that the original budget will be exceeded. The defendant sought to argue that at this point it was deep into preparing for trial, and that it was unreasonable to expect them to substantive preparations in order to focus on an application for revision to their budgeted costs. The court did not accept this, observing that the defendant bore a considerable risk in proceeding beyond their budget without approval. In any event the application should have been made before trial, and could not be sought post-judgment (to do so would be “a contradiction in terms” since it would undermine the very concept of budgeting).

As to whether there was a good reason on the facts to depart from the approved budget (here, under Paragraph 8 of the TCC Pilot Scheme, and as replicated in CPR 3.18(b) of the post-Jackson rules), the court observed that there had been nothing unpredictable or unforeseen about the manner in which the proceedings had been conducted. In these circumstances there could be only limited scope for arguing that there were good reasons for departure. Furthermore, the defendant's reasons for exceeding their original budget at heart came down to an underestimation of the time it would take, rather than unanticipated acts. The spend on expert evidence, for example, was originally estimated at £30,500 but in fact exceeded £200,000.

The court was willing to consider a very slight increase above the original budget in relation to the costs of obtaining expert evidence on a planning issue not previously foreseen, but not in any other respect. Subject only to this slight exception, the defendant was held to its original budget, which was barely half of its actual costs.

“This case demonstrates how robust the courts are being on the question of submitting and revisiting budgets. There is a clear recognition on the part of the judiciary that the effectiveness of budgeting will be quickly undermined if parties are permitted to depart from those budgets without good reason. This case is also provides confirmation that even if a party is entitled to indemnity costs, this will not provide a ready escape from budgeted costs.”
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