

from the budget, the court was required to take into account all the circumstances of the case;

(vii) A particular consideration was the function of the budget in ensuring costs incurred were proportionate and reasonable;

(viii) A further function of the budget to be considered was the benefit of the opposing party understanding what was being done and what it was going to cost; accordingly, a factor in the assessment is whether any requested increase would take the paying party by surprise.

Sony relied on the following factors when requesting the court to exercise discretion:

(i) The case was one of the type of cases normally regarded as too large for costs management, so the court should be more indulgent to errors in estimating the costs to be incurred;

(ii) Sony did get 'impressively close' to a correct predication of anticipated costs;

(iii) Sony was not seeking a total award above its total budget, so the opponent was not being asked to pay more costs than it agreed were reasonable and proportionate.

SSH did not agree and submitted the following factors should be taken into account:

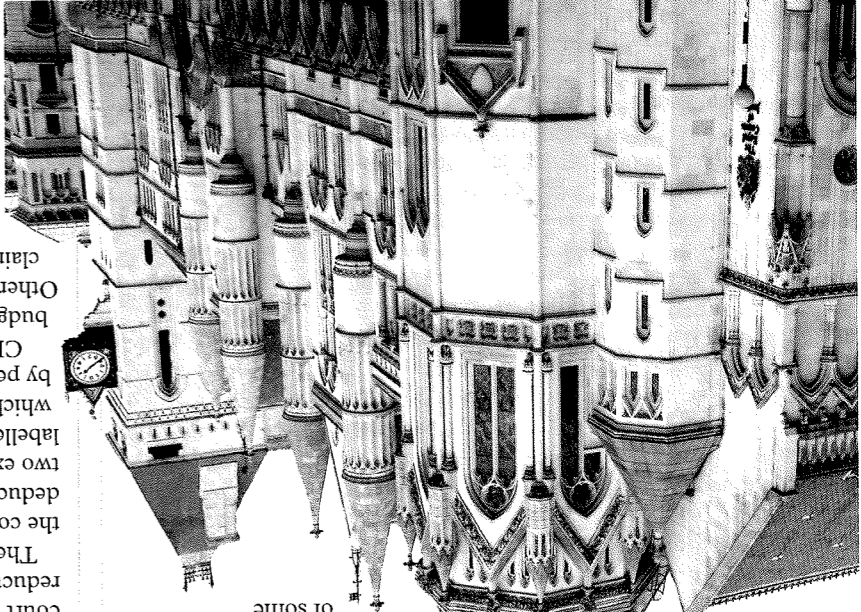
(i) SSH had sought a costs management order because of concern that Sony, with its greater resources, might make the litigation very expensive;

(ii) Sony had failed in its duty to keep the court informed as to variations from the agreed budget;

(iii) Sony had exceeded its budget and was seeking to recover costs as though there had been no costs management order;

(iv) Sony had failed to put forward any good reason to depart from

the budget. The judge identified three phases where Sony overspent, namely expert reports (£580,906 against the budgeted £215,426), trial preparation (£164,793 against budgeted £111,449) and trial (£336,274 against budgeted £380,325 – an underspend of some



£44,000). Dealing with the 'expert' phases, the judge was advised that SSH's budget for expert reports was some £100,000 more than Sony's at £323,269; counsel for Sony submitted a reasonable and proportionate figure would be 'half way between Sony's budget figure and the actual spend, ie, £398,166'.

The judge considered Sony had 'clearly' failed in its duty to seek to vary its budget when it became aware of the overspend, but took on board that it had not been suggested that SSH had been taken by surprise. The judge considered there was good reason to depart from the budget on the expert report phase. He increased the budget for the experts phase to £323,270, reflecting SSH's budget, which he deemed to be the 'best indication' of what SSH thought reasonable and proportionate.

Sony suggested two phases 'trial preparation' and 'trial' should be 'lumped together', referring to the 'arbitrary nature' of the split between trial preparation and trial, depending on whether the work was undertaken by counsel of the solicitors during the period immediately before trial, and the first day of the trial. Sony suggested that by merging both phases, the overspend was a modest £9,000.

SSH again resisted the submissions made, submitting that the rules made it clear that each phase was to be considered separately, and referring to the guidance notes to Precedent H which expressly stated that the trial phase includes 'dealing with draft judgment and related applications' and submitting that the Sony's post-trial costs of some £80,000 should be added to the trial costs.

The judge was not prepared to treat trial preparation and trial as one phase, and could see no good reason to depart from the budget for trial preparation.

With regard to the trial phase, the judge considered this should include consideration of the post-trial costs, but accepted that the post-trial costs were greater than could have reasonably been foreseen. The figure post trial was reduced to £70,000, allowing £406,274 for the trial phase.

The figures were subject to further consideration as to what, if any, reduction should be made to each phase to reflect the issues where Sony was unsuccessful. There were five phases where the claimant sought to vary the apportionment appearing in its budget, and the court dealt with each individually, with the judge applying a percentage reduction where appropriate.

The case raised an unusual issue in relation to the apportionment of the costs of the infringement issues, in order to make the appropriate deduction from the claimant's costs. The issue arose because of the two extra columns in Precedent H of the claimant's costs budget, labelled 'infringement' and 'validity' under a heading 'apportionment' which detailed an apportionment between infringement and validity by percentage for each phase.

CPR PD 3B did not intend any distinction to be drawn between budgets that had been agreed and those that had been approved. Otherwise, on realising that their apportionment was wrong, the claimant's solicitors would have to seek the defendant's approval to change it, and failing that would have to apply to the court for approval. However, the court's approval only related to the total figure for each phase, and the apportionment was outside the remit for the court's approval. Where it was apparent that the allocated apportionment was wrong, it would be invidious if the court could not, with the parties' assistance, make its own assessment.

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