

IN THE HIGH COURT OF JUSTICE

[2023] EWHC 2823 (KB)

KING'S BENCH DIVISION

QB-2019-003549

BETWEEN

Matthew Grant Yelland

Claimant

v

Space Engineering Services Ltd

Defendant

Representation:

Claimant: Mr D.R. White instructed by Messrs Clarkson, Wright and Jakes Solicitors.

Defendant: Mr Alex Taylor instructed by Messrs DAC Beachcroft solicitors.

Authorities cited in judgment

Purser v Hibbs & Anr [2015] EWHC 1792 (QB)

Rules cited in judgment

CPR 3.15A

Plain language summary (this summary has a Flesch score in excess of 50 and does not form part of the decision but must be reproduced with it).

The Claimant argued that the Defendant had not acted promptly in applying to vary its budget for legal costs, after the Defendant had obtained surveillance evidence. The Defendant argued that any delay in applying was because if it had applied sooner, it would have revealed the existence of the surveillance evidence and defeated the purpose of that evidence. The court agreed with the Defendant. The question of promptness was context dependant.

The Claimant also argued that the Court Rules did not permit the court to vary the Defendant's costs budget to the extent that it included extra costs of surveillance incurred before the last Costs Management order. The Defendant argued that the rule should be interpreted to allow that to happen where the last costs management order did not cover phases relevant to surveillance. The court agreed with the Defendant.

Keywords: costs budget variation – meaning of promptness in application to vary budget – surveillance – interpretation of rule as to requirement to apply to vary budget - CPR 3.15A

JUDGMENT

1. I gave my decision and reasons at the hearing of this matter on 31 October 2023 but in the interests of ensuring that the approach taken here is accessible to others, I indicated that I would release a brief written judgment. The judgment concerns two matters of interest to costs lawyers and litigators. The issues are:

(1) What does ‘promptly’ mean in CPR 3.15A in circumstances where surveillance has taken place and a period of time has elapsed between the surveillance taking place and the commencement of the process to vary the budget; and

(2) What is the meaning of the bold text (emphasis is mine) in CPR 3.15A(6) which states “Where the court makes an order for variation, it may vary the budget for **costs related to that variation which have been incurred prior to the order for variation but after the costs management order**”.

The Claimant argues that the requirements of CPR 3.15A are not met and that the Defendant may not accordingly revise its budget. The Defendant argues to the contrary. I agree with the Defendant.

Relevant facts

2. This is a personal injury case. We held a CCMC on 30 June 2020 and I budgeted all phases save for PTR, Trial Preparation and Trial. The exclusion of those phases was expressed in the order. This was the first Costs Management order.

Between 21 July 2021 and 2 August 2021 surveillance was covertly obtained by the Defendant.

On 12 April 2022, a second CCMC took place. PTR, trial preparation and trial phases were budgeted and extra budget was added for anticipated expert evidence in respect of psychology / psychiatry. At this stage, the Claimant’s experts’ reports had therefore not been produced and the Claimant was unaware of the surveillance evidence (as were the experts). This was the second Costs Management Order.

On 4 November 2022, psychiatry evidence was exchanged, which was necessarily based on the presentation and facts in the Claimant's case and evidence without knowledge of the existence or content of surveillance.

On 1 December 2022, disclosure of surveillance footage took place by way of edited parts.

On 21 December 2022, disclosure of the full footage and surveillance logs took place.

On 16 January 2023, the Defendant applied to rely on the surveillance and sought a revised budget.

On 3 and 23 February 2023, the Claimant and Defendant respectively served proposed budget variations in the form of Precedent T.

On 23 February 2023, the Claimant applied to revise his budget (relying on the surveillance as a 'significant development' in the litigation for the purposes of CPR 3.15A).

On 23 March 2023, by consent I made an order for permission to rely on surveillance footage, and I made directions as to (eg) the Claimant putting in evidence in response to the surveillance, and directions for experts to put in joint statements dealing with the impact, if any, of the content of the surveillance on their opinions in the light of the Claimant's account. Variation of budgets was not dealt with.

On 3 July 2023, the Claimant responded to the Defendant's proposed budget variations.

On 14 July 2023, the variations not being agreed, the Defendant filed precedent T at court.

24 July 2023: Original listing for a Costs Management Hearing to vary budgets (re-listed to the date of this hearing).

31 October 2023: Today's hearing for Costs Management leading to this decision on budget revision. This was the third Costs Management hearing, leading to this decision and the third Costs Management Order.

(a) Decision on approach to "Promptness" in CPR 3.15A

3. It was argued that the Defendant should have served its surveillance evidence before the second CCMC. That CCMC was, however, before the primary medical evidence was complete, albeit after witness evidence. In my judgment, to have revealed surveillance before the initial reports by experts in the main specialism had taken place would run contrary to established principles which allow surveillance evidence and it being withheld until the Claimant has nailed his colours to the mast. In this case, obtaining the expert evidence unaffected by knowledge of the surveillance was a part of that, since the Claimant's presentation and what was said and done in the presence of the experts is part of that 'pinning to the mast'. To have revealed surveillance by including it in the budget for the second CCMC would have defeated that.
4. This policy consideration is summarised by HHJ Moloney QC in Purser v Hibbs & Anr [2015] EWHC 1792 (QB) at paragraph 17(D):

The status of surveillance evidence is anomalous in relation to the costs case management and costs budgeting rules. Those rules do not make any express provision for what we are to do about the costs of surveillance evidence. They are obviously a special case. Most litigation is conducted on a "cards on the table" basis, and the costs budgeting system provides for each side to declare to the other in advance and to declare to the court what it proposes to spend so that the cost budgeting process can take place. Of course, some degree of cunning is required in the administration of surveillance, for entirely legitimate and understandable reasons, particularly given the appalling level of insurance fraud of which the judges become increasingly aware the longer they sit in that field. The court would not, I think, wish to do anything to discourage the judicious use of surveillance evidence or to alert actual or prospective fraudsters to the likelihood of it.

5. When we look at the chronology above the Defendant sought to agree variations and then sought an order for variations, very soon after the proper point at which the surveillance was disclosed. The notion of 'promptness' under CPR 3.15A must, in my judgment, be context dependant and in the case of surveillance the extent of the passage of time may well be, as in this case, longer than it might otherwise be after the significant development in the litigation. In my judgment, the obtaining of surveillance was a significant development known to the Defendant (only) initially, but it cannot be said that by waiting until the proper point when the Claimant had pinned his colours to the mast the Defendant acted other than promptly in this context. The disclosure of the surveillance was also a (later) significant development,

marking the point at which time started running (as to promptness) for the Claimant, about which no issue is taken.

6. My clear conclusion, then, is that for rule 3.15A 'promptness' is dependant on the context, and one may expect in some cases a delay where surveillance is the relevant, significant, development.

(b) Meaning of CPR 3.15A(6)

7. To repeat the quotation from this rule: "Where the court makes an order for variation, it may vary the budget for **costs related to that variation which have been incurred prior to the order for variation but after the costs management order**".
8. If one considers the chronology of this case, the costs relating to surveillance had, in part, been incurred before the costs management order made on 12 April 2022. So we are, in a strict sense, here considering costs incurred prior to the (sought) order for variation but before (not after) the last costs management order. The rule taken literally requires that the costs be incurred 'after' the costs management order if they are to be the subject of a variation. The Claimant took the point that those costs incurred on the (then undisclosed) surveillance were therefore not within the scope of the court's powers to vary the budget. Some of the surveillance costs were incurred after the second CCMC but by no means all.
9. The construction contended for by the Claimant was a strict one based on the wording: on that construction, for costs of surveillance incurred before the second CCMC, those would only therefore be claimable at the 'post hoc' stage of detailed assessment, if the court was satisfied that the test for departing from a budget was satisfied.
10. The Defendant's construction which was more purposive in nature. In this case, the only additional costs subject to a costs management order after the surveillance was obtained were the costs of the psychiatric evidence and those associated with PTR, trial preparation and trial, and not phases in which any costs relating to surveillance had been incurred at the time of the second Costs Management order. So, my previous costs management order had not engaged in budgeting of any phases in which costs relating to surveillance had been incurred at that point in time. It was not, in other words, a costs management order relevant to the costs of surveillance.
11. In my judgment, the purpose of the rule is clear enough, albeit its wording is less than ideal and perhaps assumes, incorrectly, that there will only be one Costs

Management Order in any given case or that it will always be possible to seek variations prior to the next forthcoming costs management hearing, as was not possible (for the surveillance evidence) at the time of the second CCMC, for reasons of policy and fairness (ie the non-disclosure of surveillance until the correct moment).

12. In this case, the second CCMC did not budget costs phases which were impacted by surveillance as at the date of the CCMC, ie phases of relevance to costs incurred for surveillance. The Costs Management order made at that CCMC did not and could not (given the phases budgeted) have covered incurred surveillance costs.

13. In my judgment, the rule must be construed as meaning that the restriction on the court's power to vary a budget only in relation to costs 'after' the Costs Management Order is a reference to:

- (i) costs relevant to the phases which were subject to costs management in that previous order;
- (ii) Whilst (i) is sufficient in this case, in any event it would not have been consistent with the public policy as to keeping surveillance secret until the appropriate moment, to construe the rule as meaning that where, for good reason, certain costs are not included in a proposed variation, the court is then debarred from making a later variation. Therefore, if it had been the case that phases relevant to surveillance had been costs-managed by the second CMO, I would have found that a purposive construction would allow the court to vary the budget nonetheless for those surveillance costs pre-dating the CMO.

14. I therefore decide that the surveillance costs, including, in particular, those incurred before the last CMO but not covered in the phases which were budgeted, can be subject to the court's power to vary. The Rules Committee may wish to address the issue in this case for clarity.

MASTER VICTORIA MCCLLOUD
Handed down 10/11/23