

1 This Transcript has not been proof read or corrected. It is a working tool for the Tribunal for use in preparing its judgment. It will be
2 placed on the Tribunal Website for readers to see how matters were conducted at the public hearing of these proceedings and is not to
3 be relied on or cited in the context of any other proceedings. The Tribunal's judgment in this matter will be the final and definitive
4 record.

5 **IN THE COMPETITION**
6 **APPEAL TRIBUNAL**

Case No. : 1351/5/7/20

7
8
9 Salisbury Square House
10 8 Salisbury Square
11 London EC4Y 8AP
12 (Remote Hearing)

Friday 22 October 2021

13
14
15 Before:
16 The Honourable Mr Justice Zacaroli
17 (Sitting as a Tribunal in England and Wales)
18

19
20
21
22 **BETWEEN:**

23
24 Churchill Gowns Limited and Student Gowns Limited

Claimants

25
26 v

27
28 Ede & Ravenscroft Limited and Others

Defendants

29
30
31
32 **A P P E A R A N C E S**

33
34 Derek Spitz (On behalf of Churchill Gowns)
35 Joshua Munro (On behalf of Ede & Ravenscroft)

36
37
38
39
40
41
42
43
44
45
46 Digital Transcription by Epiq Europe Ltd
47 Lower Ground 20 Furnival Street London EC4A 1JS
48 Tel No: 020 7404 1400 Fax No: 020 7404 1424
49 Email: ukclient@epiqglobal.co.uk
50
51

Friday, 22nd October 2021

(10.30 am)

MR JUSTICE ZACAROLI: Good morning, everyone. Just to remind you these proceedings are being live streamed and others are joining by Microsoft Teams platform. The customary warning, therefore. These are being heard remotely but as if they were physically in Salisbury Square. Everything else remains the same. There is an official recording being made and a transcript will be produced but it is strictly prohibited for anyone else to make any recording, whether audio or visual, of the proceedings.

Right. Mr Munro, I think is it?

MR MUNRO: Good morning, sir, yes.

MR JUSTICE ZACAROLI: Morning.

Application by MR MUNRO

MR MUNRO: It is my application to revise the Defendant's budget. You will have seen that I have to persuade you that there have been significant developments in the litigation since the CCMC on 12th January 2021 and that my application, which is dated 17th August 2021, was made promptly.

Sir, if I may, I will deal with those two questions in turn, sir. So significant developments. The Claimants submit that there are no significant developments but only, and I quote from the Claimant' skeleton arguments "ordinary twists and turns of litigation".

If I may, I will deal with that overriding submission of the Claimants' first. In my respectful submission this is a case in which it is obvious that there have been significant developments and not ordinary twists and turns of litigation. I say that because in particular there have been significant amendments to the

1 Claimants' pleadings. That generated an Amended Defence and Amended
2 Reply, an RFI, and there have also been your orders, of course, in respect of
3 expert evidence dated 20th July 2021 and your orders dated 8th
4 September 2021, in particular regarding disclosure and further information.

5 Given those facts, in my respectful submission it is obvious that there have been
6 significant developments warranting an upward revision of the costs budget.

7 **MR JUSTICE ZACAROLI:** In relation to the experts that's the case. It is accepted in
8 relation to the new expert, that it is a development that's not anticipated at the
9 time.

10 **MR MUNRO:** That's right. I was going to come on actually to the concession and
11 just explore a little bit how far that goes, but you are absolutely right. That is
12 conceded, but there is no concession, for example, in respect of disclosure,
13 despite your order in respect of disclosure dated 8th September 2021, sir, and
14 likewise in respect of further information, despite there being a hearing and
15 an order having been made.

16 So in my respectful submission that's a slightly unusual position for the Claimants to
17 take in that there has been a hearing and the court has made orders. Those
18 plainly were not anticipated at the time of the CCMC and yet it is said there
19 are no significant developments.

20 **MR JUSTICE ZACAROLI:** Yes, but on disclosure that may be a small part of it.
21 Much of your disclosure relates to other matters, doesn't it, for example, the
22 fact that you had many more documents than you thought you had, the fact
23 you were going to use an e-platform, which had not been anticipated. Those
24 are very major aspects of the disclosure uplift claimed, aren't they?

25 **MR MUNRO:** Well, it is not so much our disclosure actually. I did explore this in
26 conference with my instructing solicitors. The vast majority of the increased

1 costs in respect of the disclosure phase have been occasioned by
2 deficiencies in the Claimants' disclosure. It is right that some of them have
3 been occasioned by an increase in The Defendants' disclosure, but the vast
4 majority have been occasioned by flaws in the Claimants' disclosure. I will
5 expand on that in due course.

6 It is not right -- there was an answer given, as I understood it, by the Claimants in
7 respect of the disclosure phase to the effect that the Defendants have already
8 had their costs of the disclosure application which you ordered on the last
9 occasion and therefore shouldn't get any more, but that really is a superficial
10 analysis, in my respectful submission. The costs of the application don't, for
11 instance, include all the costs going forward of compliance with your order,
12 nor do they include all the antecedent costs, which are very significant costs
13 of all the work occasioned by the deficiencies in the claim, disclosure that led
14 to that application. So I hope that assists in respect of disclosure, but I will
15 come back to that.

16 **MR JUSTICE ZACAROLI:** As I say, I gathered from what I read before that a very
17 substantial amount of costs related to the two points I have mentioned. If
18 that's wrong, you need to try and explain to me why that's wrong on the basis
19 of the evidence. It is no good saying you discussed it with your solicitors and
20 it now appears that it is greater. There needs to be some care here between
21 the costs which have been incurred on disclosure that relate to things which --
22 well, the two things I have mentioned and maybe other aspects and what you
23 are now telling me about the extent to which it relates to work caused by
24 deficiencies in the Claimants' disclosure.

25 **MR MUNRO:** Yes. Certainly I will go through that in some detail when I come to the
26 particular phase, disclosure phase, if I may? If I may, I will just finish off on

1 the overriding --

2 **MR JUSTICE ZACAROLI:** Yes. I think it is accepted to some extent there have
3 been developments and to some extent there are developments that weren't
4 reasonably anticipated at the time of the original CCMC. So there's no issue
5 on the principle. What really matters is the detail in relation to the phrases,
6 isn't it?

7 **MR MUNRO:** Well, to a certain extent that's right, although it is at least on my
8 analysis apparent that the Claimants are in a slightly odd position, for
9 example, in respect of significant development 1, which goes to the pleadings,
10 and the recycled plastics issue .

11 **MR JUSTICE ZACAROLI:** Yes.

12 **MR MUNRO:** So, as I understand it, the Claimant's position is that that isn't
13 a significant development, and they are saying, for instance, that isn't
14 a significant development on the one hand, but on the other hand, they are
15 saying that there has been significant developments that warrant increases in
16 respect of the experts' trial preparation and trial phases particularly in relation
17 to the recycled plastics issue. I don't see how they square those two things,
18 for example, but perhaps that's something that can be dealt with by my
19 learned friend in due course.

20 **MR JUSTICE ZACAROLI:** Before you go on, the phrase "significant development"
21 is only part of the phrase, isn't it? Significant development that was not
22 reasonably anticipated at the time because that is built into that concept, isn't
23 it?

24 **MR MUNRO:** That's correct. Perhaps that's a useful juncture for us to look at the
25 guidance in the cases on what a significant development is for these purposes
26 if that would be convenient, sir?

1 **MR JUSTICE ZACAROLI:** Yes.

2 **MR MUNRO:** You should have an authorities bundle from me.

3 **MR JUSTICE ZACAROLI:** Yes.

4 **MR MUNRO:** Hopefully within that bundle at page 23 there's a case called

5 Thompson v NSL.

6 **MR JUSTICE ZACAROLI:** Yes.

7 **MR MUNRO:** Perhaps if I could invite you to go to paragraph 9 on page 24.

8 **MR JUSTICE ZACAROLI:** Yes.

9 **MR MUNRO:** Perhaps I could invite you to read that paragraph.

10 **MR JUSTICE ZACAROLI:** I have read that, yes.

11 **MR MUNRO:** I am grateful. Then paragraph 21 on page 28.

12 **MR JUSTICE ZACAROLI:** Yes.

13 **MR MUNRO:** And then paragraphs 33 to 35 on page 30.

14 **MR JUSTICE ZACAROLI:** Just let me read 21 first.

15 **MR MUNRO:** Oh, sorry. Yes, of course.

16 **MR JUSTICE ZACAROLI:** 30 what? Sorry.

17 **MR MUNRO:** And 33 to 35, please, sir, on page 30.

18 **MR JUSTICE ZACAROLI:** Yes. Thank you.

19 **MR MUNRO:** So I would respectfully endorse the guidance of the Master there,

20 whom you will have seen in turn is endorsing the guidance of her brother

21 master in the previous case, Master Davison.

22 **MR JUSTICE ZACAROLI:** Are you saying the principle to be derived from it then in

23 terms of what it means to say:

24 "A significant development is not reasonably anticipated".

25 **MR MUNRO:** Well, one must not set the bar too high, because otherwise one

26 encourages parties to expand the scope of anticipation, as it were, very

1 broadly, which will necessarily result in there being bloated budgets.

2 So with that in mind, sir, I should expand on some of the significant developments.

3 The recycled plastics issue is the first significant development, but it also has
4 caused costs at significant development 10 and 13. So those are the RFI
5 application and associated costs and costs associated with recycled plastics
6 expert, as well as number 1, which is recycled plastics issue and amendment
7 to the claim .

8 **MR JUSTICE ZACAROLI:** Uh-huh.

9 **MR MUNRO:** Now at the time of the CCMC you may remember that the Intertek
10 report had been recently served but there was no substance response as at
11 that time from the Claimants. So your position at the CCMC was that the
12 Intertek report might lead to changes and amendments to pleadings, but the
13 position was unclear and you decided sensibly not to put off budgeting for that
14 reason.

15 Now the amendment to the Claimant' case and the consequential effects thereof
16 were not reasonably foreseen. Indeed, it was reasonably anticipated that the
17 Claimants to a great extent might accept the Intertek report, and certainly the
18 amendments of pleadings, the RFI, the experts being reasonably required and
19 so on and so forth, were not reasonably anticipated as at that time.

20 Indeed, as I submitted before, this seems to be implicitly accepted by the Claimants,
21 because they accept there should be an increase to the experts' phase, the
22 trial preparation phase, the trial phase in respect of this very issue, the
23 recycled plastics issue. So it may be that my learned friend isn't troubling you
24 with significant developments 1, 10 and 1, but they certainly haven't been
25 expressly conceded.

26 If they aren't conceded in my respectful submission this is a classic example of

1 where a budget revision is appropriate. You have made an order in respect of
2 the experts. It is accepted that there will be knock-on effects to the trial
3 preparation and trial phase. You've made an order in respect of the RFI. The
4 RFI was consequential on this issue.

5 It's difficult in my respectful submission to see how this couldn't be classified as
6 a significant development as per the case law guidance. So those are my
7 submissions on those numbers 1, 10 and 13 on the list .

8 **MR JUSTICE ZACAROLI:** Can we deal -- I would like to deal with this
9 compendiously. There is an issue about promptness in relation to issue 1,
10 isn't there? At the very latest you were fully aware of the need to amend the
11 pleadings by the time I made an order to that effect. It must be actually quite
12 a long time before that. That was May. So it must be before that that you
13 were actually aware that there would be a need to amend pleadings.

14 **MR MUNRO:** If I may, I will come back to promptness because they are slightly
15 separate questions, significant developments and promptness, so if I may I
16 can come back to that, unless I can segue into it now, if you prefer but that's
17 the way I prepared my submissions, sir.

18 **MR JUSTICE ZACAROLI:** I will let you take your course at the moment. If it
19 becomes more difficult to follow, because I think we need to look at each one
20 separately, don't we? It is not a question of an increase to the budget
21 generally. One has to look at each phase separately.

22 **MR MUNRO:** I am not sure that's quite right. Perhaps if we can park that and come
23 back to that when it comes to promptness and I will certainly take you through
24 a timeline of developments when we come to promptness.

25 So that's all I have to say in respect of significant developments 1, 10 and 13, which
26 relate to the recycled plastics issue.

1 I will deal quickly mopping up minor points. Significant development 2, which relates
2 to the Claimants' application regarding disclosure, that was an application
3 made five days before the CCMC when the Precedent H was already
4 completed and couldn't be put into the budget for want of time.

5 Significant development 6, Statement of Truth. Issues raised by the Claimants were
6 raised in correspondence about five days before the CCMC. It wasn't
7 resolved until the correspondence ended on 25th February 2021 and
8 therefore wasn't in the budget. Significant development 5 only raised to £605
9 and I don't think it is proportionate for me to spend time on that, so I won't be
10 pursuing that.

11 **MR JUSTICE ZACAROLI:** You just dealt with 6 a moment ago, didn't you?

12 **MR MUNRO:** Again that's very minor.

13 **MR JUSTICE ZACAROLI:** It is not significant given the amount. Isn't that enough to
14 show it is not significant?

15 **MR MUNRO:** I will not be pressing you on that. It is not proportionate for me to
16 discuss that at any length.

17 Disclosure generally is important. This deals with significant developments 3, 4, 7, 8,
18 9, 11 and 12, which all overlap to significant extents, and therefore, if I may,
19 I will deal with those together.

20 I thought I had better update you at the outset with the position as at today and I can
21 do that most easily by reference to a letter bearing yesterday's date.

22 **MR SPITZ:** I am sorry to interrupt my learned friend. I am not sure that that is
23 appropriate, because we don't have any evidence about that. That's a letter,
24 sir, that we received late yesterday that deals with disclosure that we have not
25 had an opportunity to analyse or take instructions. If what my learned friend
26 proposes to do here is introduce that letter as a further reason for a variation

1 in the budget, then my short submission is this is not the appropriate occasion
2 to do that.

3 **MR JUSTICE ZACAROLI:** Is this the letter Alius Law 21st October:

4 "We write in reference to the scheduled documents provided by the Claimants on
5 17th September."

6 Is that the letter?

7 **MR MUNRO:** That's correct, sir, yes.

8 **MR JUSTICE ZACAROLI:** What do you say about that, Mr Munro?

9 **MR MUNRO:** The up-to-date position as per that letter is that the Claimant's
10 provided a schedule in purported compliance with paragraph 3 of your order
11 dated 8th September 2021. If it's convenient to remind ourselves of that
12 order, it appears at page 16 of the bundle, and paragraph 3 is at page 17.

13 **MR JUSTICE ZACAROLI:** This is all about the confidentiality point.

14 **MR MUNRO:** Yes.

15 **MR JUSTICE ZACAROLI:** Yes.

16 **MR MUNRO:** So the main points, and this may give you a flavour of costs going
17 forward, the main points apparent in that letter are that the Claimants haven't
18 completed the whole schedule. There are some attempts at matching
19 confidential to redacted documents which are incorrect. There are still
20 a number of confidential documents which are not identified. Confidential
21 versions appear not to be redacted for privilege and the Claimants purport to
22 delete duplicate documents which are not, in fact, duplicates and were
23 already disclosed.

24 So a lot of the ground in respect of disclosure was already, as I understand it,
25 traversed at that hearing on 8th September '21. So I won't do that again. As
26 I submitted before, it is not an answer to say that the fact that you made

1 a costs order means that there's no further costs. I won't go through in detail
2 all the details in the particulars of variation, but they are in the bundle and
3 I hope you have had an opportunity to look at them at pages 50 to 155. That
4 sounds more daunting than it is because of the boxing nature of that
5 document, but still it is nine pages of solid text if one extrapolates it and puts it
6 out of a boxy document with a great deal of detail of very significant amounts
7 of work done and costs incurred because of unexpected developments in the
8 disclosure.

9 Now I can hopefully make that slightly more digestible, if you like, by going through
10 a few headline points, but the detail is there. Would that be convenient?

11 **MR JUSTICE ZACAROLI:** I have skipped through it. It is very difficult to read
12 anyway in the column format, but I have skipped through it and I see there is
13 a very great amount of detail which in a sense cuts rather two ways, doesn't?
14 We are talking about a relatively high -- in fact, quite a high level exercise cost
15 budgeting. If we are getting into reviewing -- much of these costs have been
16 incurred.

17 **MR MUNRO:** Yes.

18 **MR JUSTICE ZACAROLI:** So we are getting into the stage where we are looking at
19 costs that have been incurred and I am having to take a view about not only
20 whether they are as a result of a development, whether it was significant,
21 whether it was reasonably anticipated, whether they are proportionate to
22 justify the increase in amount. One overarching question, just to draw back
23 a moment, is if one is looking at the position after the costs have been
24 incurred, what is it that you are actually -- what are you getting the court to do,
25 because I can't assess these costs? I don't have the information available to
26 do that. So I am only carrying out a very high level review, but since they

1 have been incurred, the purpose of costs budgeting is rather thwarted
2 because the purpose of cost budgeting is to be able to set what happens in
3 the future and to take case management decisions in light of what parties
4 have said they are going to spend on various things. All that is now water
5 under the bridge. We are really at the point of adjusting for the purposes of
6 assessment.

7 Now you can obviously argue before a costs judge if the budget isn't varied that
8 these have been developments, these significant developments are reasons
9 why the cost judge should depart from the budget when doing detailed
10 assessment.

11 **MR MUNRO:** Yes. I will very glad you asked that question, because I do have
12 a proposed way forward and certainly that was exercising my mind as well, sir

13 .
14 **MR JUSTICE ZACAROLI:** Yes.

15 **MR MUNRO:** The proposed way forward I would suggest is based really on matters
16 that now appear to be agreed between the parties. So perhaps if we could
17 have a diversion to look at this particular question at this point .

18 **MR JUSTICE ZACAROLI:** Yes.

19 **MR MUNRO:** Now the Claimants' response to the Defendants' application appears
20 at pages 22 to 31 of the bundle. It seems to me they were addressing the
21 same point that has occurred to you, sir. In paragraph 13 and
22 paragraphs 19(a) and (b), and those appear at pages 24 and 26.

23 **MR JUSTICE ZACAROLI:** Yes.

24 **MR MUNRO:** So perhaps if I can invite you read those paragraphs.

25 **MR JUSTICE ZACAROLI:** Is this replicated in their skeleton?

26 **MR MUNRO:** I think it is and perhaps my learned friend goes a little bit further as

1 well. I will go to his skeleton in a moment if I may?

2 **MR JUSTICE ZACAROLI:** Because I have read the skeletons. I have got the point.

3 **MR MUNRO:** It may be quite important to look at the precise terms of the Claimant'
4 proposal here, but I respectfully I think agree with it. We may be able to
5 narrow the scope of this hearing. It is necessary I think to look at the precise
6 terms of what the Claimants are proposing.

7 Paragraph 13 and paragraphs 19(a) and (b).

8 **MR JUSTICE ZACAROLI:** 19, yes.

9 **MR MUNRO:** That is on page 26 .

10 **MR JUSTICE ZACAROLI:** Yes.

11 **MR MUNRO:** And also paragraph 37 at page 41, sir.

12 **MR JUSTICE ZACAROLI:** Yes.

13 **MR MUNRO:** In the skeleton at page 4, paragraphs 19 and 20. That's my learned
14 friend's skeleton argument.

15 **MR JUSTICE ZACAROLI:** Paragraphs?

16 **MR MUNRO:** 19 and 20 .

17 **MR JUSTICE ZACAROLI:** Yes.

18 **MR MUNRO:** So it seems to me that the Claimants -- and I can quite see why --
19 want to see a detailed bill and a way to detailed assessment in respect of
20 incurred costs and, of course, there will be a lot more information in a detailed
21 bill than there will be in a Precedent T. I have to say I am rather happy with
22 that approach in respect of hitherto incurred costs .

23 **MR JUSTICE ZACAROLI:** Perhaps it is worth hearing from -- I don't want to waste
24 time on matters which don't matter and in any event have to be covered by
25 a costs judge at some stage. Let me see what Mr Spitz says about that
26 because he may say he wants me to make some rulings anyway. Mr Spitz,

1 what do you say about your proposal in paragraph 20?

2 **MR SPITZ:** Thank you very much, sir. My sense is it would be something of an arid
3 exercise to go through 13 alleged significant developments to reach
4 a conclusion where most of the costs have been incurred and then should go
5 off to detailed assessment. We are quite content where the costs have been
6 incurred, and this has always been our position, and I will show you that, sir,
7 in due course, but we are quite content for those to go off to detailed
8 assessment. Indeed your difficulty is how do you establish the required level
9 of confidence in the exercise that you are asked to carry out when you are not
10 told in the evidence what is an incurred cost and what is a future cost. You
11 are only told that in my learned friend's skeleton and it somewhat hangs in the
12 air.

13 So to be clear from our point of view and, sir, you are quite right. We accept that
14 there have been significant developments in relation to the additional expert
15 and we have made some proposals in relation to that, and that aspect of my
16 application in my submission you are in a position to deal with.

17 For the rest of it we just don't know what is an incurred cost and what is a future cost
18 and we are content for that to go off for detailed assessment.

19 We raised this and took this position as early as 11th August in response to the
20 application. So it is not something new. The applicant has come to court
21 seeking, as you will have seen, 700,000 odd in the first variation, 500,000 in
22 the second. It is now down to 165,000 odd, but this is the first time that the
23 Applicant has accepted that --

24 **MR JUSTICE ZACAROLI:** Let's move on to that later. I think the point is we are
25 both in agreement that actually this is best dealt with, the details of the costs
26 that have been incurred, by a costs judge after the event and there is little to

1 be gained by trawling through these to decide a number of issues, as I have
2 just outlined, in which case there does appear to be agreement.

3 **MR MUNRO:** I think so. That would restrict the scope of today's exercise to the
4 future costs that was identified in the spreadsheet that was attached to my
5 skeleton argument. Hopefully that will result in a considerable saving of your
6 time, sir.

7 **MR JUSTICE ZACAROLI:** Let me just get -- I printed your skeleton but not your
8 spreadsheet. Let me be sure I've got it. Yes.

9 **MR MUNRO:** Thank you. You will see that we are only exercised with some of the
10 significant developments. We are no longer exercised, I am happy to say,
11 with number 10, because that related to the RFI and those costs have now
12 indeed been incurred.

13 **MR JUSTICE ZACAROLI:** Yes.

14 **MR MUNRO:** So we are only exercised in respect of disputed significant
15 developments in respect of disclosure. So I think we do need to ask you to
16 make a determination as to whether there have been significant
17 developments in disclosure which warrant revision to the costs budget in
18 respect of future costs.

19 **MR JUSTICE ZACAROLI:** And it is only disclosure in certain aspects and the
20 amount varies significantly. I was just trying to match them to the issues.

21 **MR MUNRO:** Yes, 3 is confidentiality.

22 **MR JUSTICE ZACAROLI:** Right.

23 **MR MUNRO:** 4 is e-disclosure platform and 9 is deficiencies in Claimant's
24 disclosure.

25 **MR JUSTICE ZACAROLI:** Right. Then it's the experts' reports, trial preparation and
26 trial, because there is an issue over quantum for those.

1 **MR MUNRO:** That's purely quantum, as I understand.

2 **MR JUSTICE ZACAROLI:** So we are looking at those aspects of disclosure.

3 **MR MUNRO:** So again the point -- sorry to labour it -- that your costs order in
4 respect of the last occasion doesn't, of course, include all the costs going
5 forward of compliance with your order. It seems an obvious point, but one
6 that is contested by the Claimants, because they are saying there is no
7 significant development that warrants a revision upward in the budget. So it
8 seems difficult for them to make that submission, but I will leave that to my
9 learned friend.

10 It really overlaps with this, but you know the Defendants' position that the Claimant
11 have -- apologies for a crude summary in this way -- but made an awful hash
12 of their disclosure and their disclosure has been and continues to be, I am
13 sorry to say, in such a way that makes it very difficult for the Tribunal or the
14 Defendants to ascertain in particular which documents are true original
15 versions, which have been amended and how, what documents are attached
16 to e-mails, which documents were confidential, in which respects is privilege
17 asserted and so on and so forth, and these are all issues that led to the
18 application that was determined on the last occasion as well.

19 It is still very time-consuming trying to work out what the Claimants have done with
20 their disclosure, despite your order of 8th September being intended to
21 resolve this. So it requires manual review and side by side comparison of
22 hundreds of sometimes lengthy documents. It requires the involvement and
23 fees of e-disclosure platform -- an e-disclosure platform firm, and if it is not
24 satisfactorily resolved by the Claimants, which seems unlikely, given their
25 behaviour to date and the continuing behaviour adumbrated in that letter that
26 we looked at briefly, it is likely to involve much further correspondence and

1 also input from counsel.

2 That brings me on to the e-disclosure platform --

3 **MR JUSTICE ZACAROLI:** Before you move on to that, you are asking for future
4 costs of something 4.9 thousand in relation to an exercise where the total
5 amount of the increased costs by reason of this issue is just under -- about
6 65,000. Is that right? So 60,000 has been incurred.

7 **MR MUNRO:** That's correct.

8 **MR JUSTICE ZACAROLI:** One of the difficulties here then is where you have
9 a request to budget £5,000, putting it in round figures, in relation to a total
10 exercise which is costing 65,000, but we acknowledge that 60,000 has to go
11 to detailed assessment. How can I determine that that rump of 5,000 is
12 reasonable and appropriate? Doesn't it just get wrapped up with the detailed
13 assessment of the much larger figure?

14 **MR MUNRO:** Well, no, sir. I think we can deal with that particular question in
15 a relatively straightforward manner, because you've made your order. You've
16 seen that it is on confidentiality, as we saw before, paragraph 3. You have
17 seen a concrete example of there being further costs going forward.

18 The question for us is whether there's been a significant development which
19 warrants an upward revision. The answer to that is, in my respectful
20 submission, it must be yes because of the order. The order will require there
21 to be future costs, and then your concern really goes to quantum, but where
22 the Claimants have requested further details, this should go to a detailed
23 assessment. You are in a position to take a view as to what the future costs
24 will be. The future costs on this under £5,000 really are, I respectfully submit,
25 exceptionally modest.

26 I can give you detail as to the type of work that will be required based on what has

1 happened so far. On this particular question, sir, you required that schedule
2 to be provided pursuant to paragraph 3 of your order, and the fee earner
3 number 3, that's the junior associate, a gentleman called Lisle Chase, he has
4 to deal with this at £250 per hour. He has very considerable work to do solely
5 in relation to that schedule. So he has to conduct a review of the 514
6 line spreadsheet, a side by side comparison of 44 documents that the
7 Claimants have tried to delete as duplicates. He has had to do things like, or
8 will have to do things like manually searching through total documents for
9 documents that Claimants have failed to match. He has to have conference
10 calls with the e-disclosure platform provider and so on and so forth.

11 Hopefully the letter gives you a flavour as to this type of cost. So that really is
12 a modest cost I would respectfully submit going forward and something which
13 you are in a position to deal with today. It would be a gross injustice, in my
14 respectful submission, if my learned friend were to persuade you that
15 notwithstanding the fact that there has been a significant development in this
16 respect nothing should be allowed because his clients have said we want a
17 detailed assessment of the incurred aspect. I mean, that can't be right. Our
18 task must be to look at prospective costs and ascertain proportionate figures
19 in my respectful submission.

20 So unless I can assist you further, that's number 3, sir.

21 Number 4 is the e-disclosure platform. Now that is expensive, but it is needed due to
22 the unexpectedly high amounts of disclosure. I should say that both sides
23 didn't budget for an e-disclosure platform. Both have now used e-disclosure
24 platforms. So the Claimants are represented, as I understand it, by three
25 band A solicitors who all specialise in competition work and those solicitors
26 are led by a leading competition lawyer, Mr Tupper.

1 They didn't anticipate the need for any disclosure platform at the time of the budget
2 but their clients subsequently have incurred costs of an e-disclosure platform.
3 It is difficult therefore for the Claimants, in my respectful submission, to allege
4 that the Defendants ought to have anticipated the same need that the
5 Claimants' solicitors did not anticipate .

6 **MR JUSTICE ZACAROLI:** Is that right? I thought the Claimants' documentation
7 wasn't on an e-disclosure platform.

8 **MR MUNRO:** They have made the point in their response to the Defendants'
9 application that they are using an e-disclosure platform, but it is a cheap
10 version in summary, to put it crudely, and that the fees quoted to those
11 instructing me are significantly higher than the fees quoted to those retained
12 by the Claimant, and therefore on the issue of quantum they seek to cut us
13 down, but nevertheless despite that factual position, they have used
14 an e-disclosure platform, and they are instructing my learned friend to submit,
15 as I understand it, that there is no significant development in this regard,
16 which in my respectful submission can't be right, given that factual position, or
17 at least it would be very difficult for him to make out that it is right, given that
18 factual position.

19 **MR JUSTICE ZACAROLI:** Of course it could have been reasonably anticipated by
20 both sides, which may be why the Claimants (inaudible).

21 **MR MUNRO:** That, of course, is true, but given that the Claimants do have these
22 experienced competition lawyers, you may view it as a bit of a forensic point
23 more than anything else, but it does suggest it wasn't reasonably anticipated
24 and there has been unexpected developments that have caused that.

25 **MR JUSTICE ZACAROLI:** Just go back a step. You say I think the e-disclosure
26 platform was required because of the unexpectedly high volume of documents

1 that needed to be disclosed, but that's on your side, isn't it?

2 **MR MUNRO:** Well, both sides. That's one of the reasons. Another reason is the
3 problems with the confidentiality, because the e-disclosure platform, at least
4 a proper and decent platform, obviates a lot of the problems that the
5 Claimants have been causing when dealing with confidentiality, because
6 redactions can be dealt with via the platform rather than manually, which is
7 how -- the Claimants, despite having this cheap version of the platform, keep
8 on causing problems with confidentiality, as we have seen, as addressed in
9 the letter, because they don't have a platform that appears to be dealing with
10 this in a proper manner. So identification of file names, redaction of
11 documents and so on and so forth, that has all been much more expensive
12 due to these problems from the Claimant' side.

13 **MR JUSTICE ZACAROLI:** Yes. I am just looking at your skeleton. The first
14 statement at paragraph 14 is:

15 "In view of the unanticipated very large number of Defendants' documents, the
16 Defendants' could not proceed with the disclosure exercise without the use of
17 an e-disclosure platform."

18 So cause and effect. It rather looks like the e-disclosure platform became necessary
19 because of the Defendants' large number of documents.

20 **MR MUNRO:** I am sorry. That may be slightly misleading. The detail as to this is
21 within the particulars of variation. You will see that the position is far, far more
22 complicated and involved than that. I mean, I noted, for instance, on page 63
23 the following section:

24 "As the Claimants did not use an e-disclosure platform when disclosing their
25 documents, which would have stamped their documents with a unique
26 identifier, the only way the Defendants have of comparing the documents

1 within the confidential folder to what is already on their e-disclosure platform
2 to ring fence confidential documents and to the redacted folder to match up
3 confidential and non-confidential versions of documents is to compare their
4 file names or run searches for identical documents using what is known by the
5 e-disclosure providers as an MD5 hash tag value. However, the Claimants
6 have not used the same naming conventions for the file names in the
7 confidential and redacted folders, as they did in their general folder, which has
8 made doing this impossible and identifying them based on MD5 hash tag
9 values is not always possible as the documents and the confidential and
10 redacted folders have been highlighted or redacted such that they are no
11 longer identical to the versions in the general folder."

12 So this e-disclosure platform is essential. It has been essentially and importantly for
13 today's --

14 **MR JUSTICE ZACAROLI:** That's not quite what that says, is it? Obviously
15 a problem arose which we debated at length in September because the
16 Claimants did not retain the original file names or numbers. I forget which it
17 was, for the confidential document. That created a problem. What's being
18 described there is how that has been sought to be addressed using your
19 e-disclosure platform. It doesn't say you need the e-disclosure platform to do
20 it. Also it doesn't address the point that I made which is cause and effect, is
21 you decided to produce an e-disclosure platform long before this arose,
22 because of, as you say in your skeleton, the large number of Defendants'
23 documents you needed to disclose.

24 **MR MUNRO:** Well, yes. If I can deal with all of those, there was a review of the
25 Defendants' own documents which was expanded because there were two
26 tranches of disclosure as per the parties' agreement in April. The Defendants

1 instructed the platform for their own needs, but have incurred significant
2 additional costs on the platform in respect of the Claimant' documents and
3 problems, and most importantly for present purposes the platform going
4 forward will be essential, because there is continuing disclosure.

5 The e-disclosure platform will be necessary for trial preparation, including
6 preparation of trial bundles. If I am right as a matter of principle on this point,
7 the point goes to quantum rather than principle of whether there's a significant
8 development.

9 So those are my submissions on the e-disclosure platform, unless I can assist you
10 further, sir.

11 I think we really -- I mean, you are on top of the deficiencies with the Claimants'
12 disclosure. You have heard all about that on the last occasion. There's
13 comprehensive detail in the particulars of variation. There is probably little
14 I can add to that. I would respectfully submit there is an obvious significant
15 development in that.

16 **MR JUSTICE ZACAROLI:** This is now issue 9, right?

17 **MR MUNRO:** Correct. Sorry. I should have said .

18 **MR JUSTICE ZACAROLI:** What is the relationship between these allegations of
19 failings and disclosure and the confidentiality point we have just been
20 discussing.

21 **MR MUNRO:** They certainly overlap. They do overlap.

22 **MR JUSTICE ZACAROLI:** So what is separate in 9 that isn't part of the
23 confidentiality problem?

24 **MR MUNRO:** I mean, I cannot put a finger on exactly why they were separated out
25 into 3 and 9. I'm sorry. They certainly overlap. The work overlaps. I've given
26 you examples of that work.

1 **MR JUSTICE ZACAROLI:** The problem is there's a headline figure of 97,000
2 incurred, 37,900 still to be incurred. I don't have any feel -- with the
3 confidentiality point you made the point there is clearly work ongoing and
4 therefore the sum of 5,000 is a pretty small amount compared to what's
5 needed. What do you say about the 37,900 going forward? You don't have
6 any detail as to what that involves, do you?

7 **MR MUNRO:** No, I do have details as to that. That is 35 hours partner time,
8 21 hours senior associate time, 15 hours junior associate time.

9 **MR JUSTICE ZACAROLI:** Doing what, though? What precisely? It is not the
10 confidentiality point. That's separate.

11 **MR MUNRO:** The junior associate I went through the type of tasks that he will have
12 to do previously.

13 **MR JUSTICE ZACAROLI:** But on the confidentiality side.

14 **MR MUNRO:** Well, yes, but there is an overlap. 3 and 9 need to be taken together.
15 I am sorry, sir.

16 **MR JUSTICE ZACAROLI:** In which case one is looking at incurred costs of 160 and
17 future costs of just over 40.

18 **MR MUNRO:** Yes. So the deficiencies in the Claimant' disclosure, which are
19 detailed at pages 135 to 154 of the bundle in the particulars of variation, are
20 expected, I would submit, reasonably to continue. It has taken a lot of time
21 working trying to make sense, for example, of that schedule that they provided
22 on 17th September. Hence the letter only going out yesterday, and trying to
23 carry out various searches to try to identify what the Claimants have
24 attempted to match up in respect of confidential versions of documents, native
25 versions of documents and what is correct and what is missing.

26 Once there is a response to that detailed letter the Claimants will have to carry out

1 another matching exercise and will have to disclose alternative confidential
2 versions which are marked up for privilege.

3 So in my respectful submission it is obvious there will be continuing substantial work
4 reviewing and analysing disclosure and, of course, disclosure isn't completed
5 in this case. There is continuing disclosure. So a sensible allowance in my
6 respectful submission should be made. These costs aren't particularly
7 alarming. So 35 hours partner time, 21 hours senior associate time, 15 hours
8 junior associate time and counsel's fees, £10,000 for considering and advising
9 regarding additional disclosure, including new documents that had been
10 served in the last couple of weeks by the Claimants. That's based on quotes
11 obtained from counsel's clerk. So I hope that assists in respect of the
12 particulars.

13 **MR JUSTICE ZACAROLI:** That last point, that's a different point, isn't it? There has
14 been some recent disclosure which will need to be reviewed. Is that based on
15 the confidentiality point or is that some --

16 **MR MUNRO:** They all overlap, sir. 3 and 9 overlap and 4 is more discrete, because
17 almost all of 4 is disbursements, that's the e-disclosure platform firm's fees,
18 but 3 and 9 overlap and should be dealt with -- I mean, normally in this kind of
19 hearing the court simply considers has there been a significant development
20 that affects the disclosure phase.

21 **MR JUSTICE ZACAROLI:** Yes, but the fact that some late documents have been
22 disclosed, is that significant? Doesn't that happen in every case? It is very
23 unusual that all disclosure arrives on Day 1.

24 **MR MUNRO:** It depends to what extent it is reasonably anticipated in the original
25 bundle and this wasn't.

26 **MR JUSTICE ZACAROLI:** The confidentiality point is different.

1 **MR MUNRO:** Yes.

2 **MR JUSTICE ZACAROLI:** That arose because of an issue in relation the
3 Claimants, the way the Claimants provide their disclosure, but if you are
4 talking about adding to these numbers, or these numbers are made up of not
5 just of that, but other things like some recent disclosure, how do I take a view
6 as to whether the fact there's been some more documents disclosed is itself
7 a significant development?

8 **MR MUNRO:** Well, I mean, that's -- I take your point on that, but there has been
9 a breach of your original disclosure order by the Claimants. I mean, parties
10 put their budgets in on the basis that it's assumed that disclosure will be
11 completed in accordance with the directions that are made at the CCMC. I
12 mean, that hasn't happened. If there is an increase, then that constitutes
13 a significant development in my submission, but it's certainly not my main
14 point. My main point goes to the particular and unusual developments in
15 disclosure in this case that have inter alia resulted in your last order.

16 **MR JUSTICE ZACAROLI:** Yes.

17 **MR MUNRO:** Forgive me if I may while I just go back to my notes on disclosure but
18 I suspect there is nothing more I can really add to the particulars of variation
19 which give a great amount of detail as to the type of work that's required and
20 the costs that are required. I think that's right.

21 So if I may deal with promptness then?

22 **MR JUSTICE ZACAROLI:** Yes.

23 **MR MUNRO:** Might I take you back to my authorities bundle, please, sir, at
24 page 22? This is a case digest in respect of a recent case, Omnia UK Limited
25 v Andrews Excavation Limited. The first page appears at 21 in the bundle.

26 **MR JUSTICE ZACAROLI:** Yes.

1 **MR MUNRO:** And you will see that the court considered the promptness
2 requirement here on page 22 in the holdings towards the bottom of the page,
3 heading "Promptness":

4 "Taking into account the piecemeal process of disclosure and the fact that the
5 Defendants had not indicated in March 2021 whether their cost budget would
6 need to be revised, and the fact that the Defendants had repeatedly
7 questioned whether they had received all the disclosure, they had not failed to
8 act with an appropriate degree of promptness in making their application.
9 They have been entitled to wait for confirmation that disclosure had been
10 concluded."

11 Then also in Thompson v NSL on page -- this is the case that we looked at before --
12 on page 39, paragraph 31.

13 **MR JUSTICE ZACAROLI:** Yes.

14 **MR MUNRO:** That page reference may be wrong, but I believe the
15 paragraph number is correct. Forgive me a moment, sir.

16 **MR JUSTICE ZACAROLI:** I have got 39.

17 **MR MUNRO:** I am very grateful. The page reference was right. That's right .

18 **MR JUSTICE ZACAROLI:** Yes.

19 **MR MUNRO:** So in respect of the flaws in the Claimant' disclosure there was
20 substantial correspondence in that throughout the summer which was never
21 fully resolved. Redacted documents were received on 25th June 2021. The
22 Defendants' application for orders relating to the Claimants' disclosure was
23 made on 19th July 2021 and then there was a hearing in that respect, as we
24 know, on 8th September '21.

25 **MR JUSTICE ZACAROLI:** This all relates to the confidentiality point, doesn't it?

26 **MR MUNRO:** It certainly does .

1 **MR JUSTICE ZACAROLI:** Yes.

2 **MR MUNRO:** So it is apparent from the timelines there that if the Defendants'
3 application were made earlier, it would have been a moving feast. It would
4 have required repeated amendments to keep up with the significant
5 developments in the litigation. So that is made out in respect of disclosure,
6 and by reference to that Omnia case, there the court ruled that the Applicant
7 had been entitled to wait for confirmation that disclosure had been concluded.

8 In our case, of course, it is still not concluded. You will see in the Thomson case
9 solicitors are not required to jump at the earliest opportunity and instead are
10 encouraged to take a more measured approach, as has occurred in this case.

11 Also on promptness it is appropriate to step back from this sensible and pragmatic
12 agreement that the parties have made in respect of incurred costs, which has
13 saved your time today, but look at the moving timeline in respect of other
14 aspects of the case. So, for instance, in respect of the RFI, so that generated
15 the last hearing in September 2021. The responses were provided on 15th
16 September 2021. That has been a moving target as well.

17 So it can't really be said that it would have been reasonable to make this application
18 earlier. It couldn't have been heard earlier than today, in my respectful
19 submission, in any event. If there was any possibility of that, then there would
20 have had to be a second application today due to the continuing significant
21 developments.

22 So I respectfully submit that it was sensible and reasonable to make the application
23 when it was made and to have this hearing now and to deal with this matter in
24 the sensible way that the parties have put forward, which seems to be
25 satisfactory to the Tribunal.

26 One asks whether a competent and proper Precedent T in terms of the Thompson

1 case could have been finalised substantially before it was, and in my
2 respectful submission it couldn't. This was fast moving. There were many
3 developments, as per the timeline set out in the particulars of variations. The
4 Precedent T was put to the Claimant on 5th August 2021. Their response
5 was on 11th August 2021. Their response was in essence "Well, we only
6 agree £15,000 increase in respect of experts". So nothing offered in respect
7 of disclosure and the recycled plastics issue.

8 The application was then made 17th August 2021. That was all shortly after the
9 correspondence regarding the flaws in the Claimant' disclosure over the
10 summer had resulted in no satisfactory resolution from the Claimants'. They
11 were not taking the Defendants' suggestions as to sensible ways forward in
12 respect of their disclosure. They were ignoring some of that correspondence,
13 and that meant that the problems in the disclosure necessarily continued.

14 **MR JUSTICE ZACAROLI:** Can I just go back to the promptness point?

15 **MR MUNROE:** Yes.

16 **MR JUSTICE ZACAROLI:** One has to deal with -- I think your submissions on that
17 have been primarily focused on the failings in disclosure relating to the
18 confidentiality and that point -- I take that point.

19 **MR MUNRO:** Yes.

20 **MR JUSTICE ZACAROLI:** But I think it is 123,000 or a bit more thousand pounds
21 worth of costs are said to be the result of a significant development, namely
22 the use of an e-disclosure platform. So you became aware that you would
23 need to use an e-disclosure platform at the latest it must have been April,
24 mustn't it, this year?

25 **MR MUNRO:** I can take instructions on that. I don't know the precise dates .

26 **MR JUSTICE ZACAROLI:** Well, it's a significant time before August when you first

1 mentioned -- when you first requested an increase in the budget. Is that
2 prompt?

3 **MR MUNRO:** Taken on its own it might not be considered to be prompt, but even on
4 that specific point, sir, it would have been premature to put in a Precedent T
5 as at April, assuming that April is the date, because the e-disclosure platform,
6 the necessity for that, it has turned out, isn't just due to, as we explored
7 before, increased amount of Defendants' disclosure. It is also necessary to
8 run the problems in respect of confidentiality in respect of the Claimant'
9 disclosure through the e-disclosure platform.

10 So the Precedent T wouldn't be -- would not have been able to be properly prepared
11 in that regard at that stage in an event. For example, that predates the new
12 disclosure of redacted documents. It pre-dated problems with confidentiality,
13 redactions, privilege and e-mail attachments, additional costs on the platform
14 regarding the Claimants' disclosure couldn't be anticipated until after that
15 correspondence in summer of this year, which were aimed at obviating those
16 problems, which the Claimant didn't satisfactorily respond to.

17 It also needs to be seen in the context of the application as a whole. It would be
18 unfair in my respectful submission to take out just one significant development
19 on the basis that an application should have been made in respect of one
20 significant development in isolation and rather than follow the court's guidance
21 in the cases we have seen which suggests that this should be carefully
22 prepared, the Precedent T, to take into account all of the proposed revisions
23 upwards.

24 Also just stepping back from this on the facts of this particular case I mean
25 realistically would you have wanted, sir, to have a hearing in respect of
26 a budget revision upwards in respect of disclosure before your order of

1 8th September?

2 **MR JUSTICE ZACAROLI:** Let's imagine you had identified the additional cost
3 resulting from an e-disclosure platform in April or whenever it was that you
4 needed to use the platform. You would have at that stage have written to the
5 Claimants saying "By the way, our budget was prepared on assumption A. It
6 now appears that it has got to be based on assumption B, the e-disclosure
7 platform. The resulting cost will be X".

8 Now you would have a much stronger ground if the delay after that was as a result of
9 the Claimants refusing to agree. Indeed, on that issue you probably wouldn't
10 need a hearing, it would be dealt with on the papers like these things often
11 are, but this was so complex by the time everything is thrown in that a hearing
12 was actually the sensible way to get through it.

13 **MR MUNRO:** Well, two points on that. The first is that's on the assumption that it
14 would have been reasonable to put in an application for a budget revision
15 solely in respect of e-disclosure platform rather than prepare a Precedent T
16 that compendiously goes through all the disclosure costs which, in my
17 respectful submission is much more sensible. It obviates the need for two
18 hearings, for example.

19 **MR JUSTICE ZACAROLI:** But you wouldn't have much of this -- much of the stuff in
20 this Precedent T wouldn't have been there, because it hadn't yet happened.
21 I acknowledge one of the problems with cost budgeting is the need for
22 constant revisions but we are stuck with it in this case. It was ordered. It has
23 happened, but if you are to make revisions, the rules do -- it is a threshold
24 condition, isn't it that the application is made promptly in relation to the
25 revisions, not just waiting to -- you can't I think say "We got so many revisions
26 over the course of a few months it turned out to be better to wait until the end

1 of those few months".

2 **MR MUNRO:** No, one cannot go that far but one does have to apply the guidance in
3 the Thompson case. The solicitors shouldn't be jumping as soon as there's
4 a significant development, but rather should be dealing with this in
5 accordance with the overriding objective and making the Tribunal's life easier.
6 So it really would be -- it's a counsel of perfection. That's the wrong phrase
7 actually. It is not realistic in my respectful submission to expect the
8 Defendants in this case to effectively have two bites at the budget revision
9 application, because on that analysis they would have to make one
10 application in respect to part of the disclosure phase and then another
11 application in respect of other parts of the disclosure phase. That really
12 wouldn't be proportionate or a good use of the Tribunal's time, or parties'
13 costs, in my respectful submission. That is the answer to the first point.

14 The second point is you asked hypothetically "Could this be dealt with by
15 agreement?" I think realistically we know the answer to that, because we see
16 the Claimants' stance in respect of disclosure. Despite the fact that an order
17 has been made, despite the fact that in my submission it's obvious
18 respectfully that costs over and above the budget will be incurred, they still
19 say nothing should be allowed for disclosure. So it's unlikely that agreement
20 would have been forthcoming. That's despite, as I say, they were using their
21 own e-disclosure platform .

22 **MR JUSTICE ZACAROLI:** Yes.

23 **MR MUNRO:** So in summary it would have required multiple Precedent Ts if each
24 significant development required the solicitors to jump, to use the phrase of
25 Master McLeod in the Thompson case, and make the application as soon as
26 each significant development occurred.

1 I think we have identified that perhaps the most concerning point so far as the court
2 is concerned as to disclosure is the confidentiality -- are the confidentiality
3 issues. As I say, the correspondence on that occurred during the summer
4 and there is no doubt that the application was prompt in that regard.

5 We have dealt with quantum to a certain extent, so it is probably easier for me to
6 finish my submissions by addressing you briefly on quantum, if I may.

7 **MR JUSTICE ZACAROLI:** Yes.

8 **MR MUNRO:** I would respectfully invite you to bear in mind the factors in CPR rule
9 44.35 as to proportionality. So that provides that:

10 "Costs incurred are proportionate as they bear a reasonable relationship to (a) the
11 sums at issue in the proceedings" -- here this is a £3.9 million claim -- "(b) the
12 value of any non-monetary relief in issue in the proceedings (c), the
13 complexity of the litigation, (d), any additional work generated by the conduct
14 of the paying party, (e), any wider factors involved in the proceedings such as
15 reputation or public importance."

16 Now just pausing there, this is an extremely important case for the Defendants when
17 it comes to their reputation and indeed their commercial position, I respectfully
18 submit for obvious reasons, sir.

19 **MR JUSTICE ZACAROLI:** Yes.

20 **MR MUNRO:** (f) doesn't apply. That's about the vulnerability of parties and
21 witnesses. So this is a case of the utmost importance to the Defendants and
22 the market generally.

23 As to the particular detail in respect of the future costs, we have discussed
24 disclosure. So if I may, I will discuss with you experts, trial prep and trial
25 phases.

26 As to experts, the Claimants don't accept the Intertek report's conclusions. There

1 appears to be -- well, there is a situation involving expert evidence which may
2 well prove expensive. The Defendants' proposed revision is £16,500. That is
3 for expert fees including the report, communications with the experts, P35s.
4 On top of that there is £1,500 experts' fees for a proposed conference and
5 £5,500 counsel's fees for proposed conference.

6 I would respectfully suggest --

7 **MR JUSTICE ZACAROLI:** Sorry. Go back again. Where do I find these figures
8 broken down? I did see it before. Where is it?

9 **MR MUNRO:** I broke them down in my skeleton argument .

10 **MR JUSTICE ZACAROLI:** Yes.

11 **MR MUNRO:** I can dig out the paragraph .

12 **MR JUSTICE ZACAROLI:** I have got it here. It is not separated out in your
13 skeleton.

14 **MR MUNROE:** Oh, is it not? I am so sorry.

15 **MR JUSTICE ZACAROLI:** Not paragraph 23.

16 **MR MUNRO:** The Precedent T itself will contain the experts' fees .

17 **MR JUSTICE ZACAROLI:** That's where I saw it.

18 **MR MUNRO:** I think that's round about page 31.

19 **MR JUSTICE ZACAROLI:** It is £18,000 for the expert fees including a conference.

20 **MR MUNRO:** Yes. So 16,500 for report, communications, P35s, 1,500 for the
21 conference. Counsel 5,500 for the conference. I would respectfully submit
22 that there could be a modest reduction to the time costs here, sir. So on
23 a rough and ready basis £27,000, that's a reduction down from the figure
24 proposed of £28,405. That would be for future time costs and equates
25 roughly to 45 hours partner time.

26 **MR JUSTICE ZACAROLI:** Wait a minute. Time costs I have got here at £39,000,

1 haven't I?

2 **MR MUNRO:** No. I am addressing you on the basis of the spreadsheet now. So
3 some of those have been incurred prior to the Precedent T.

4 **MR JUSTICE ZACAROLI:** Right.

5 **MR MUNRO:** A modest amount was incurred, about 11,000 I think .

6 **MR JUSTICE ZACAROLI:** It was £39,000 overall.

7 **MR MUNRO:** Yes, that's correct. So for future costs I would suggest £27,000. That
8 would equate to 45 hours' partner time, sir .

9 **MR JUSTICE ZACAROLI:** It's a thousand reduction.

10 **MR MUNRO:** Well, nearly 1,500.

11 **MR JUSTICE ZACAROLI:** Yes.

12 **MR MUNRO:** So 45 hours' partner time. I respectfully submit that that's reasonable.

13 Trial preparation --

14 **MR JUSTICE ZACAROLI:** Just to break that down.

15 **MR MUNRO:** Yes, of course.

16 **MR JUSTICE ZACAROLI:** Going forward, so there hasn't been a conference of the
17 expert yet I take it because it is future cost costs.

18 **MR MUNRO:** I will just check my instructions for that, sir.

19 **MR JUSTICE ZACAROLI:** No, I think it is -- no, it is not clear.

20 **MR MUNRO:** Can I come back to that? I am not sure what our position is there.

21 If I may, I will move on to trial preparation. Additional time is now anticipated to deal
22 with the disclosure and recycled plastics issues. That will impact upon
23 preparation for trial. So, for example, in respect of the trial bundle and
24 skeleton arguments. Additional time is also anticipated to instruct the
25 recycled plastics experts to attend the pre-trial conference and trial, including
26 preparation of a further witness summons in respect of the experts' trial

1 attendance. The future costs as per the spreadsheet are just under £18,000,
2 £17,866. The offer from the Claimants is £8,550. The Defendants would, to
3 save time, accept a reduction to £15,000. I would respectfully submit that that
4 equates to a modest and reasonable increase that is proportionate in respect
5 of time costs, counsel's fees and expert fees, including a pre-trial conference.

6 So unless I can assist you further, that's the trial prep phase, sir.

7 Trial phase. Additional fees now anticipated in respect of the recycled plastics
8 expert attending trial, and it is assumed that they will be required to attend the
9 trial for two days. The proposed revision is £5,500. That is the quote after
10 negotiation with the experts. I don't understand why the Claimants are
11 offering nil for this. I would respectfully submit that's a reasonable figure and
12 I invite you to allow it.

13 **MR JUSTICE ZACAROLI:** That's just the cost of the expert attending trial.

14 **MR MUNRO:** Yes. I think that's everything on budgeting. I will also invite you once
15 we have dealt with the budgets, if I may, to set down directions in respect of
16 the Defendants' application to clarify the position in respect of unpleaded new
17 allegations in the Claimants' witness statements.

18 **MR JUSTICE ZACAROLI:** We will come on to that at the end.

19 **MR MUNRO:** The parties may have some agreement as to that.

20 **MR JUSTICE ZACAROLI:** We will come on to that at the end.

21 **MR MUNRO:** Thank you.

22 **MR JUSTICE ZACAROLI:** I notice the time. We will take a break for the
23 transcribers. I propose not turning off the audio or video, for eight minutes.
24 We will resume at 11.55.

25 **MR SPITZ:** Thank you very much.

26 **(Short break)**

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

Reply by MR SPITZ

MR JUSTICE ZACAROLI: Yes, Mr Spitz.

MR SPITZ: Yes. Thank you very much, sir. I believe I can be relatively brief and initially just highlight the relevant framework, because it applies across the three issues we've been dealing with. I can do that, sir, by pointing you to some paragraphs in the skeleton argument, because they conveniently set out the authorities that I rely on.

The first is at paragraph 24 of my skeleton, which deals with significant development and it is the statement from the court in the Chalfont St Peters Parish case. You will see the quote from page 6 of our skeleton. I will not read it out but that's the court describing significant development.

Then at paragraph 25 of the skeleton the fairly obvious point that if the mistake rests on the applying party, that's not a good enough reason to constitute a significant development and that's the authority from *Wares v Simpkins* (?).

Then the other authority that I refer you to, sir, is the *Persimmon Homes* case which I have attached with my skeleton argument. So that's not in a supplementary bundle but those are paragraphs 117 and 118. I don't know whether you have the decision conveniently to hand. If not, it is probably quickest and most efficient if I read those paragraphs.

MR JUSTICE ZACAROLI: Yes, I have those paragraphs.

MR SPITZ: Thank you, sir. If you would then have a look at 117 and 118 briefly.

MR JUSTICE ZACAROLI: Yes.

MR SPITZ: All right. Emphasising the need for the court to be confident in what is provided and what is before it from the Applicants' side.

If I can then turn quickly to the three areas that we were debating in relation to

1 significant development and promptness. The confidentiality and redaction
2 issue, the use of an e-disclosure platform and the purported deficiencies in
3 relation to the Claimants' approach to disclosure.

4 As far as the confidentiality ring and redaction issues are concerned, that was the
5 future cost of £4,940. The short point there is it's difficult to see on what basis
6 the Tribunal can have confidence that it is dealing with future costs only,
7 because there's no distinction in the particulars of variation between the
8 incurred costs and the future costs. That exercise would have been helpful,
9 but that exercise hasn't been done.

10 **MR JUSTICE ZACAROLI:** It has been done in the spreadsheet that Mr Munroe
11 referred to.

12 **MR SPITZ:** The number is there but one does not know where that really comes
13 from. One can't source that to the particulars of variation .

14 **MR JUSTICE ZACAROLI:** We know that there is ongoing work on this issue, don't
15 we? That's a given. Therefore there's bound to be some costs incurred in
16 relation to it. Mr Munro's point is well, it's £5,000, just under that is
17 a conservative figure on any view.

18 **MR SPITZ:** Yes. As far as whether it amounts to a significant development or not,
19 my submission is simply this, that the need for a confidentiality ring and
20 redactions to preserve confidentiality are common elements of competition
21 litigation. In fact, confidentiality ring is almost the rule rather than the
22 exception nowadays. The need for it was reasonably foreseen and certainly
23 should have been foreseen.

24 It was discussed at the CCMC in January 2021 and what appears to have happened
25 is that the Defendant underestimated the extent of confidential documents
26 that they had or misunderstood what confidentiality rings would entail, but this

1 doesn't make it the confidentiality ring or issues in relation to redactions into
2 a significant development. It is not something that comes by a side swipe. It
3 is something that could not have been foreseen .

4 **MR JUSTICE ZACAROLI:** I think the thrust of the point made here by the
5 Defendants is that this relates to the Claimants' failure to provide -- to retain
6 the original names and numbers of files where they were claiming
7 confidentiality. That was what gave rise to the dispute in the summer and that
8 is what has given rise to the increase in costs. Now that couldn't have been
9 anticipated. It couldn't have been anticipated that the Claimant would get it
10 wrong when they came to give disclosure.

11 **MR SPITZ:** It may be that precisely the vagaries of how things would unfold couldn't
12 have been anticipated, but it is always the case, I would submit, that the
13 process has various, as I framed it in the skeleton, twists and turns along the
14 way. The fact that those twists and turns will take place, without knowing
15 what the particular content of those will be, is something one does factor in
16 when one puts forward the budget.

17 As far as the e-disclosure platform is concerned, there paragraph 14 of my learned
18 friend's skeleton does indeed make the point that the Defendant discovered
19 that it had far more documents than it expected to have, and that's
20 an example where this isn't a significant development. It's not something that
21 couldn't have been foreseen. It rests squarely with the Defendants. So the
22 e-disclosure platform is not something one can treat as a significant
23 development justifying an upward variation.

24 The point was made by my learned friend, "Well, the Claimant didn't have
25 an e-disclosure platform". Well, in fact, as it was put, it obtained a cheap one
26 but in any event the Claimant didn't seek a variation upwards of its budget in

1 relation to the e-disclosure platform, so that doesn't advance matters
2 particularly.

3 The real question is it is clear no provision was made for an e-disclosure provider in
4 the original budget. The real issue is should it have been? Given that it
5 seems clear that the Defendant underestimated the extent of their disclosure,
6 or alternatively did not know what was entailed in making the disclosure in
7 a competition case of any substance, these errors and oversights are not
8 a good ground for attempting to amend the budget.

9 The need for e-disclosure platforms in litigation of any significance is also
10 well-established and common in litigation of any substance. So it was
11 foreseeable. It should have been foreseen.

12 As to promptness I am not going to repeat the points that have been raised and
13 canvassed and you will have seen my skeleton, but this ought to have been
14 done more promptly than it was.

15 As far as the third area is concerned, the deficiencies in relation to the Claimants'
16 approach to disclosure, there it's a case where in our submission the
17 observations of Master Kaye in Persimmon Homes really bites, that the
18 Tribunal needs to be confident that the proposed variation relates only to the
19 additional impact of what is contended to be a significant development rather
20 than an effort to do a root and branch revision of phases of the last approved
21 cost budget.

22 Ede & Ravenscroft say some of the difficulties with the redactions of confidential
23 documents had been resolved when particulars of variation were prepared in
24 August and then revised in September.

25 The Claimants' objection to the quantum that's claimed remains that the proposed
26 variation -- it's simply impossible to know what are the already incurred

1 expenses and what is the future cost, because one cannot source what's in
2 the document to anything in the particulars of variation.

3 So we have provided some estimates in the alternative, if the Tribunal is confident
4 that the proposed variation relates only to additional impact of future costs
5 and we've offered 25 hours of partners time, which we have calculated to be
6 15,125 and 24 hours of a junior associate's time at 6,250 for a total of 26,375.

7 **MR JUSTICE ZACAROLI:** This is the issue 9.

8 **MR SPITZ:** This is inadequacies with the disclosure, deficiencies in the Claimants'
9 approach to disclosure.

10 So if all the threshold requirements are met, and we say they are not met, we have
11 offered 26,375 and, as I understand it, what is claimed is £37,900.

12 I think I can also deal pretty swiftly with the justified variations to the budget. This is
13 the quantification exercise. So it's the expert reports. Now, sir, you are
14 probably aware that in August the variation sought was 158 -- approximately
15 158,000 for the expert reports. That came down in September where the
16 variation sought was 65,000 and, as I understand it now in the skeleton, the
17 variation is for a future cost of 51,900.

18 We haven't been told what the explanation is for the various changes from the
19 September particulars of variation of 65,000 to what is being sought now.
20 While we accept that a variation is justified, the amounts on the table, we
21 submit, are not reasonable and proportionate. Again we understand that it's
22 something of a rough and ready exercise, but it's worth pointing out that
23 Churchill are not engaging a second expert. The expert's report is unlikely,
24 we submit, to go beyond dealing with the Intertek tests that have already been
25 done, and cross-examination of the expert is likely to be pretty focused and
26 swift. I know that my learned friend suggests the expert will be required for

1 two days. I think that that is highly unlikely. I think that the cross-examination
2 will be, as I say, focused and swift and I think a maximum of a day for the
3 expert.

4 So Churchill have offered 9,075 for 15 hours of partners time and 15,000 for
5 disbursements and the total that Churchill offers for the expert has then come
6 to 24,075. We submit that that is reasonable and proportionate.

7 We have also made a proposal on trial preparations. I am turning to the trial
8 preparation aspect of it now, where what has been originally asked for, 17,866
9 by Ede & Ravenscroft, would equate roughly to just less than 30 hours of
10 partners' time, which we suggest is excessive. It's not at all clear what the
11 amount of additional work involved would be, and we have suggested that
12 10 hours of partners' time, so £6,050 with disbursements or counsel fees of
13 2,500 ought to be reasonable and proportionate. So the total there on our
14 proposal is 8,550 in relation to trial preparation.

15 Finally, when it comes to the trial itself Ede & Ravenscroft have acknowledged that
16 the attendance of the second expert is not going to increase the length of the
17 trial. They seek a variation of 5,500. As it was put, they anticipate that the
18 expert will be required for two days. As I understood it, that amount relates
19 solely to the attendance fees of the expert. If that's correct and it is solely for
20 the attendance of the expert, we submit that the disbursements for the second
21 expert ought to be sufficient to cover that and that's the £15,000 that we
22 offered for disbursements, but if it's not, certainly we can't see any basis for
23 fees of two days' attendance where it's highly likely that cross-examination is
24 going to take a part of a day and certainly the expert wouldn't be required for
25 more than a day.

26 So those are our figures and our proposal for the quantification section of the

1 application. Unless I can be of further assistance .

2 **MR JUSTICE ZACAROLI:** Thank you, Mr Spitz.

3
4 **Reply by MR MUNRO**

5 **MR MUNRO:** Sir, just very briefly I have an answer to your question about whether
6 there has been a conference with the expert so far. The answer is no. In
7 respect of promptness I would respectfully refer you back to paragraph 19 of
8 my skeleton. That gives the dates in respect of correspondence in respect of
9 disclosure and also the date of the disclosure application. So correspondence
10 was on 3/10/21 -- 22nd June, 1st July, 2021. Disclosure application 19th
11 July 2021 and the Precedent T was sent, having been carefully prepared, in
12 accordance with the principles that we saw in Master McLeod's case on
13 5th August. So in my respectful submission that's reasonably prompt.

14 **MR JUSTICE ZACAROLI:** What's in that correspondence? That's correspondence
15 that's complaining about the disclosure I think.

16 **MR MUNRO:** Yes.

17 **MR JUSTICE ZACAROLI:** That's not suggesting a variation to the budget. That's
18 about disclosure problems.

19 **MR MUNRO:** That is correct. Seeking to have sensible ways forward in respect of
20 disclosure problems, amongst other things .

21 **MR JUSTICE ZACAROLI:** Yes.

22 **MR MUNRO:** Unless I can assist you further, those are my submissions.

23 **MR JUSTICE ZACAROLI:** Thank you. I am going to take a few minutes just to
24 think about this. There is a few moving parts. It's now nearly 12.15. I am
25 going to suggest that I come back with a ruling on this at 12.30. Again I don't
26 propose to leave formally. I am just going to close my video and microphone

1 down and we will resume at 12.30.

2 **MR MUNRO:** Certainly.

3 **MR SPITZ:** Thank you so much.

4 **(Short break)**

5 **RULING**

6 **MR JUSTICE ZACAROLI:** Following the parties' agreement today that incurred
7 costs will be left to detailed assessment, all that I need deal with is the
8 variation to the costs budget in respect of the relatively small amounts that
9 remain anticipated costs under a few headings.

10 Before I deal with the detail, I few points of general remarks. The purpose of cost
11 budgeting is of course to enable the court to manage costs in the context of
12 proposed future procedural steps. It is predominantly a forward looking
13 exercise. Rule 15A6 of the CPR undoubtedly permits the court to vary a
14 budget for costs related to that variation which have already been incurred,
15 but it need not do so.

16 Whether it is appropriate to do so will depend on a number of factors, including the
17 overriding fact that the exercise is always intended to be directed at future
18 costs. It also must be seen in the context of the obligation to seek a variation
19 promptly. A failure to do so, for example, by only seeking a variation or
20 applying to the court after the costs have already been incurred would be
21 a powerful reason to decline to order a variation.

22 It must also be seen in the context that a variation to the budget is not the only
23 remedy a party has, as the parties sensibly recognised today. There is
24 always the ability to ask the costs judge to depart from the budget on
25 a detailed assessment on the basis that unanticipated developments are
26 themselves a good reason to depart from the budget.

1 That is particularly true in relation to already assessed costs and, as I say, the
2 parties are sensibly agreed that is the right approach here.

3 As to the question of what is reasonably anticipated or what amounts to a significant
4 development, I take the point that Mr Munroe urges that one ought not to set
5 the bar too high, otherwise that would encourage parties to be over-eager in
6 their original budget. On the other hand, it also needs to be balanced against
7 numerous comments in a number of cases as to the approach to be taken.
8 I take as one example Chalfont Saint Peter Parish Church v Holy Cross
9 Sisters Trustees Inc. [2019] EWHC 735 at page 30.

10 Of course, as litigation progresses there are changes of emphasis. New particulars
11 are served, witness statements are exchanged and issues picked up that
12 have to be dealt with and a cost budget should not need changing unless
13 there is something of substantial additional significance that could not be
14 foreseen.

15 With those overarching remarks, I will turn to the remaining points in dispute.

16 The first is what has been called significant development 3 and this is issues arising
17 because of problems with the confidentiality ring and redaction issues. I need
18 not rehearse the background. In short, the Claimants had failed to retain the
19 numbers and names of documents which they had redacted on the grounds of
20 confidentiality, which made matching them to the documents that remained
21 very difficult.

22 On this aspect a total of £65,000-odd has been claimed, but it is accepted that just
23 over £60,000 has already been incurred, so all that is in issue is a sum of
24 £4,940 which is still to be incurred.

25 I raised with Mr Munro the difficulty in taking an overview as to reasonableness of
26 this small proportion of costs still to be incurred when the bulk of the costs

1 have been incurred. His answer was that it is clear there are bound to be
2 future costs involved and £5,000-odd is pretty modest in the circumstances.

3 Mr Spitz for the Claimants contends this is not a significant development. The need
4 for a confidentiality ring was known about at the outset.

5 It seems to me, however, that this does not arise from the mere fact of the
6 confidentiality ring but arises directly from the way in which the Claimants
7 dealt with the redactions at the outset and it is that unexpected, unanticipated
8 behaviour which has led to these increased costs. I therefore do think this
9 passes the threshold condition.

10 So far as timing is concerned and promptness, this matter occurred relatively late in
11 the day and I do not think the delay between that and the application for
12 a variation in early August is significant. I am satisfied that the further figure
13 of £4,940 is a figure that is a reasonable estimate of the costs to be incurred
14 in relation to the confidentiality issue hereafter. So I will allow an increase in
15 the budget to that extent.

16 The next issue is what is called significant development 4, the use of an e-disclosure
17 platform. A principal problem here is the reason why an e-disclosure platform
18 became necessary. The Defendants say that both sides, in fact, are now
19 using a platform, and it cannot be right that this was something which should
20 have been reasonably anticipated at the time of the original costs budget.
21 I do not accept that is a necessary conclusion.

22 As it happens, the Claimants have found a much cheaper platform provider and have
23 not sought any increase in their own budget on this basis. In any event, one,
24 if not the principal reason put forward by the Defendants for opting for
25 an e-disclosure platform in the first place was the very large number of their
26 documents that they discovered they needed to provide.

1 I do not accept that this was a significant development that could not have been
2 reasonably identified at the outset. Whereas another side's greater than
3 anticipated disclosure might well be such a reason it is difficult to say that a
4 party's own voluminous disclosure is something that they ought not
5 reasonably to have identified at an earlier stage and before the original cost
6 budget.

7 Mr Munro refers to passages in the Precedent T, referring to using e-disclosure
8 platform in trying to address the confidentiality issue and seeks to justify the
9 choice of an e-disclosure platform on that basis, but I do not read that
10 passage in the Precedent T as explaining the need for such a platform, rather
11 explaining how it was, in fact, used when the confidentiality issue arose.

12 Indeed, the solution to the confidentiality problem when it came before the Tribunal
13 for a decision was one which placed the onus of sorting the matter out
14 substantially, if not almost completely, on the Claimants.

15 Moreover, it seems to me that the application for variation was not in this respect
16 made promptly. There was a delay of at least some months. Mr Munro says
17 that the Defendants were not obliged to request an increase or apply for
18 an increase at the stage when they realised an e-disclosure platform was
19 needed; and it was sensible to wait until a composite application could be
20 made with a properly fleshed out Precedent T raising all of the issues that we
21 now see.

22 I do not accept this. On the Defendants' case, the need for an e-disclosure platform
23 would have led to an increase in budget of over £123,000. That was
24 something which should have been identified at that stage and should have
25 been the subject of a standalone request or application. There was
26 accordingly a lack of promptness in making the application.

1 Accordingly, my conclusion is that this is not a significant development that could not
2 have been reasonably anticipated and the application was not made promptly.

3 I therefore decline to vary the budget in this respect.

4 The third area is significant development 9, deficiencies in and with the Claimants'
5 approach to disclosure. In explaining this category Mr Munro took up
6 a significant part of his submissions in describing the problems in relation to
7 the confidentiality redactions I have already referred to. He accepted that
8 there is, in fact, a significant overlap between this category and the
9 confidentiality issue separately identified as significant development 3. Taking
10 them together, the total costs incurred are approximately £160,000 and the
11 future costs are roughly £40,000.

12 The problem with this heading is the lack of identification of any particular reason
13 other than the confidentiality point, which I have already addressed, for why
14 this is a significant development. It is essential to explain why particular
15 issues on disclosure which give rise to more work are significant
16 developments that could not have been reasonably anticipated. It is not
17 enough to say, for example, that further work is now required because of
18 some late documents being disclosed.

19 In this context it is worth reiterating what Master Kaye said in the case of *Persimmon*
20 *Homes v Osborne Clarke LLP*, [2021] EWHC 831 Ch, at paragraphs 117 and
21 118. I won't read those out now in the interests of time, but those are read
22 into the transcript.

23 It is particularly apposite here when it was acknowledged during the hearing that
24 there is substantial overlap with the confidentiality issue and where the
25 different amount for that element which has been ordered has been justified
26 on the basis, as I have just discussed, that it is a figure which we can be

1 reasonably confident will be spent on what must be left in relation to that
2 issue. It rather cuts across that reasoning to ask for an unidentified portion of
3 a much greater sum under issue 9 on the same basis.

4 For these reasons I cannot be satisfied that a threshold condition of this broad
5 category, that is to say I cannot be satisfied that all of it, and if not all, which
6 part of it, can be justified on the basis that it is the result of a significant
7 development that could not have been identified before budgeting. That is not
8 to say that on detailed assessment the Defendants might not be able to
9 persuade the costs judge that the nature of the issues that have arisen on
10 disclosure from June onwards in particular might justify a departure from the
11 budget.

12 There are then some disputes remaining about quantum only. The first is in relation
13 to the report of the remaining expert. On the issue upon which new expert
14 evidence has been allowed it turns out that the Defendants will be providing
15 the only expert report.

16 Given that there is now only one expert, it does seem to me that the amount of work
17 in terms of partner time, counsel time in conference and indeed the number of
18 days the expert will be needed to attend trial does require some further
19 reduction. Rather than delving into the particular hours of partner time that
20 are appropriate or the particular fee the expert might charge, which I think is
21 a fixed amount anyway, or the amount of time counsel might be engaged, the
22 appropriate course here is to identify an overall figure which can be justified
23 as being proportionate and reasonable for the further work.

24 Overall, an appropriate figure is £50,000, including the work that has been done.

25 That would reduce the future figure to -- and I am afraid I have not done the
26 maths, but if one took as the grand total £50,000 and took off the so far

1 incurred of £12,397, the remaining figure is what I propose to allow for the
2 future expert's work.

3 So far as trial preparation is concerned, I accept that the recycled plastics issue will
4 require more work in terms of trial preparation for both solicitors and counsel,
5 and it seems to me that the figure of £15,000 which the Defendants are now
6 prepared to accept, is a reasonable figure in the circumstances.

7 So far as the trial itself is concerned, the only issue is whether the expert can
8 reasonably be required to attend trial for one day or two. The Claimants, who
9 will have the job of cross-examining him, say he will not be needed for more
10 than one day. On that basis the figure for that should be cut down to £2,750.

11 **MR MUNRO:** Thank you very much.

12 **MR SPITZ:** Thank you very much.

13 **MR JUSTICE ZACAROLI:** Right. Shall we deal with the -- I suppose there's costs
14 of today to deal with and then there is the other application that's in the
15 background. Perhaps costs of today first.

16
17 **Application by MR MUNRO re costs of today**

18 **MR MUNRO:** I would respectfully submit that costs in the case would be the
19 appropriate order. It was inevitable -- sorry. My voice is echoing at my end.

20 **MR JUSTICE ZACAROLI:** It is not here.

21 **MR MUNRO:** I will press on.

22 **MR JUSTICE ZACAROLI:** Can you hear him well enough?

23 **MR SPITZ:** I can hear my learned friend, but I am hearing it with an echo. I think
24 the main point is if it is clear for you, sir, let's persist.

25 **MR JUSTICE ZACAROLI:** I will turn my microphone off at the moment while he is
26 speaking. That might help.

1 **MR MUNRO:** Thank you very much, sir. It was inevitable in my submission that
2 there would be a budget revision as a result of the Claimant's conduct, and by
3 that I mean in particular amending their case, the recycled plastics issue and
4 their conduct in respect of disclosure. So it was regrettable that they didn't
5 choose to engage properly, in my submission, with the budgeting process
6 and, of course, my clients have done very considerably better than the
7 Claimants' offers, which were unhelpful.

8 Their response to the proposed application in their letter at pages 166 and 167 was
9 to cover just £15,000 in respect of the expert and nothing more. In fact, just
10 on the expert we have more than doubled that, the figure being over £37,000
11 that has been allowed.

12 Now the fact that we have agreed with the Claimants a sensible way forward
13 shouldn't in any way result in any penalty to either party, in my respectful
14 submission, and bearing in mind all those circumstances, although I could
15 submit that costs should follow the event, because we have done better than
16 the Claimants' offers, I don't and I would respectfully submit that costs in the
17 case is the appropriate and fair order.

18 Unless I can assist you further, those are my submissions.

19 **MR SPITZ:** Sir, thank you.

20 **MR JUSTICE ZACAROLI:** I am just unmuting myself. Thank you, Mr Munro. Yes,
21 Mr Spitz. Sorry.

22
23 **Reply by MR SPITZ**

24 **MR SPITZ:** We would seek our costs of and occasioned by the application, sir, for
25 three main reasons. The first one addresses the point about costs in the
26 case. Some sets of proceedings do indeed proceed on the basis that

1 generally awards of costs in the case are granted as the rule rather than the
2 exception. This is not one of them.

3 This is a case where on several occasions applications have been made and costs
4 orders have been made in response on the basis of the outcome of those
5 applications, and the same should follow here unless there is a particularly
6 good reason not to make a costs order in favour of a successful party, that
7 order should be made, and the Claimant is the successful party here.

8 There are two points to make about that. The first is the shorter point in relation to
9 what has been decided. Of the three issues that were live insofar as they
10 went to the threshold questions, the Claimant succeeded on two out of those
11 three and they were the two substantial issues. The issue that the Claimant
12 did not succeed on was the relatively small amount of £4,900, but the
13 Claimant had success on the other two. So for that reason the Claimant is
14 overall the successful party.

15 The deeper reason for costs in favour of the Claimant is perhaps the way that this
16 application has unfolded. My submission to you, sir, is in significant ways the
17 application was misconceived. As early as 11th August in response to the
18 first particulars of variation the approach that the Claimants took was to say in
19 effect, "Why don't we send all of the incurred costs off to assessment in front
20 of the costs judge?" That's at page 167 of the bundle. I just read it. It is not
21 necessary to turn it up.

22 **MR JUSTICE ZACAROLI:** I have got it anyway.

23 **MR SPITZ:** You have read it?

24 **MR JUSTICE ZACAROLI:** I have got it. Take me to the passage you want me to
25 read.

26 **MR SPITZ:** It is page 167. It is the first full paragraph. It starts:

1 "Should your clients prevail at trial, our clients should have the opportunity to
2 challenge incurred increased costs on a detailed assessment."

3 And then the corollary is:

4 "Your clients will have the opportunity then to justify those increases."

5 As my learned friend fairly concedes in his skeleton argument, this was the approach
6 that the Claimants were taking, which was to say incurred costs -- the vast
7 majority of incurred costs, deal with it before a costs judge.

8 So that is not the way in which this application then unfolded. Instead, it unfolded
9 with a request seeking a variation upward of some £700,000 or more. That
10 was varied downwards in September where it was still the very significant
11 amount of £500,000 that was being sought. No effort to distinguish between
12 costs incurred and future costs, none whatsoever. It was only in my learned
13 friend's skeleton where the possibility of dealing with it in the way that the
14 Claimants had always suggested that it be dealt with was put forward.

15 That on its own is a significant reason why the costs in relation to this application
16 should be payable by the Defendants. So those are the three submissions.

17 The pattern of this litigation has involved making costs orders depending on the
18 outcome. Claimants were the successful party in two significant respects.
19 The first is two out of three of the live issues were determined in the
20 Claimant's favour. The second main issue is when it comes to the way the
21 application unfolded, it should not have unfolded in the way that it did. We
22 would not have needed to be here for a hearing -- a remote hearing. It could
23 have been dealt with on paper if we were dealing with three purported
24 significant developments and then some budgeting in relation to future costs
25 of an expert and trial preparation. We would not have been here if the
26 approach adopted by the Defendants had been to recognise that cost

1 budgeting is primarily a prospective rather than a retrospective exercise.
2 They didn't realise that. They didn't take it on board. It was pointed out to
3 them and that's what led to the need for the hearing.

4 So those are the submissions in relation to costs and the request, sir, is for costs of
5 and occasioned by the application .

6 **MR JUSTICE ZACAROLI:** Thank you. Mr Munro.

7
8 **Reply by MR MUNRO**

9 **MR MUNRO:** Yes. Briefly, sir, first, the application wasn't misconceived. It
10 succeeded and the budget has been varied. I will come back to that as to the
11 rules as well in a moment.

12 Second, the Defendant has succeeded in that it has beaten the Claimants' offer.

13 **MR JUSTICE ZACAROLI:** In some minor respects but what was left was pretty
14 minor, wasn't it, in terms of the overall requests?

15 **MR MUNRO:** Well, I am not sure that's right in terms of pounds and pence. The
16 Claimants say we would never have needed a hearing but it was up to them
17 to make sensible offers. They offered £15,000 in respect of the experts. We
18 more than doubled that. We have made a reasonable concession in respect
19 of the trial preparation which the court has accepted. It is very substantially
20 higher than the Claimant's offer and they offered nil in respect of trial and
21 costs have been allowed.

22 Also in respect of disclosure costs have been allowed and altogether these are
23 significant sums. The Claimants didn't protect themselves by making an offer.
24 So for them to say they have been successful and no hearing was required, in
25 my respectful submission is factually unsustainable.

26 The third point is that parties where they exceed their budgets are under

1 an obligation under the rules to put in a Precedent T, and indeed the other
2 side to the budget revision application is under an obligation to fill in other side
3 of the Precedent T, something that didn't happen in this case. So there's
4 nothing in the submission that the application is misconceived and indeed I go
5 further.

6 The detailed assessment, which may reveal who is of the overall winner in these
7 respects, a detailed assessment will be conducted strictly in the light of and
8 subject to what the parties have said and with the Tribunal has said in this
9 hearing.

10 So the parties have fashioned a sensible way forward which goes further actually,
11 much further, than what was said in that letter, because it includes, for
12 instance, what was said in paragraph 26(b) of the Claimant's response to the
13 Defendants' application. That provided:

14 "As to the issue of the use of recycled plastics and amended pleadings, since the
15 award of all these costs has been determined, the matters should fall outside
16 the budgeting process for both parties."

17 So on a detailed assessment because of that concession it will not be necessary for
18 my clients, should they prevail, to convince the costs judge that there is
19 a good reason. So that was flushed out only in response to the application.

20 Then in my learned friend's skeleton argument he put forward the proposed way
21 forward in respect of detailed assessment, which was that in effect parties
22 would keep their powder dry in respect of most of the significant
23 developments, put the Precedent T before the costs judge with the benefit of
24 a broken down bill giving the detail, and in the light of what has happened at
25 this hearing the costs judge will determine whether there's a good reason.

26 So for all of those reasons it would be unfair and wrong in my submission to award

1 the Respondent its costs and the appropriate order is costs in the case.

2 **MR JUSTICE ZACAROLI:** Just on that -- leaving aside the epithet that the
3 application was misconceived, what about the August 11th letter, which put to
4 your clients that essentially the proposition that insofar as costs are incurred,
5 they ought to be left to detailed assessment after the event, which is in fact
6 what has happened today. You've agreed to that today. Now had that been
7 agreed at the outset, we would have had a much, much reduced scope of
8 hearing, wouldn't we? We have had a reduced scope as it happens, but not
9 in the way the parties set up and argued for it before the hearing started
10 today.

11 **MR MUNRO:** One needs to unpick that a little bit. First, was it reasonable to
12 prepare the Precedent T and make the proposed application at that stage?
13 So was it reasonable to incur those costs? I think the answer to that has to be
14 yes. The rules obliged the party to incur the costs. Those costs are
15 substantial. Precedent T is a complicated exercise. Those costs should be
16 costs in the case. There is no question that my client should be deprived of
17 them in my respectful submission.

18 Then the costs after that, well, as matters have developed, it is more complicated
19 than what was said in that letter, because what was said in that letter could be
20 construed and was construed in the following way, that they were saying,
21 "Well, abandon your application to exceed the budget and be consigned to
22 a detailed assessment in which you will have to submit that there was good
23 reason to go beyond the budget, but you haven't made a proper application
24 for revising your budget upwards".

25 That's slightly different. That simple position is different from the concession that
26 was obtained in paragraph 26(b) of the Claimants' response to the

1 Defendants' application as to the issue of the use of recycled plastics in
2 amended pleadings, which in terms was "Since the award of all these costs
3 has been determined, the matter should fall outside the budgeting process for
4 both parties."

5 That wasn't in the letter, but that is accepted and is a result of considerable value to
6 my clients, because it means they won't have to show good reason, and then
7 as per my learned friend's skeleton arguments, that the right of both parties to
8 make detailed submissions regarding incurred costs shall be reserved to be
9 heard at a detailed assessment hearing.

10 So the matter has to be considered in the light of all of that and, in my respectful
11 submission, costs in the case is fair and appropriate.

12 **MR JUSTICE ZACAROLI:** Just looking at that letter in a little more detail. This is
13 a question I think for Mr Spitz actually. The letter doesn't say "We will deal
14 separately with any future costs". The letter was actually seeking to reject the
15 entire application on the basis that it should be dropped, including (inaudible).

16 **MR MUNRO:** Save for £15,000, sir, yes.

17 **MR SPITZ:** Well, what it refers to in terms is the ability to challenge incurred
18 increased costs on a detailed assessment.

19 **MR JUSTICE ZACAROLI:** Yes, that point is made undoubtedly but it also goes on
20 to say:

21 "Given the position, we wouldn't expect the variation request to be pursued at all".

22 **MR SPITZ:** Yes, that's correct. It does go on to say that. The main point about all
23 of this is that one ought not to be able to come to court on the basis of
24 a variation budget that makes it impossible to determine what is incurred and
25 what is future costs and then to expect the Tribunal to have confidence in the
26 future costs aspect.

1 It also deprives the Claimant of the opportunity to respond on the future costs until
2 the hearing. There could have been no response to the particulars of
3 variation where the Claimant might have been able to say "Well, we accept
4 that X is a future cost and you have said that Y is incurred". That's the reason
5 I used the phrase that the application was misconceived.

7 **Ruling on costs of today**

8 **MR JUSTICE ZACAROLI:** As to costs, an important factor in this case is that on
9 11th August at a very early stage the Claimants did recommend the approach
10 in relation to incurred costs which has been adopted by the Defendants today,
11 and is anyway one I would have strongly been minded to adopt, which is to
12 leave all incurred cost to detailed assessment. That has cut down the scope
13 of what had to be argued today considerably, but the parties were put and
14 Claimants were put to the cost and expense of dealing with the application so
15 far as it relates to incurred costs, notwithstanding the climb-down today.

16 It is fair to point out, as Mr Munro does, that that letter did not then go on to offer to
17 deal with the variations for future costs. It was an attempt to persuade the
18 Defendants to drop the application altogether. Nevertheless, I think it is
19 a significant factor that that offer was made and it is essentially the position
20 that was reached today.

21 So far as the winners or losers of what ended up being argued today: the
22 Defendants lost two major points of principle; they won on one which was part
23 of the disclosure points, a relatively small amount; and on the quantum issues
24 they are on balance the successful party.

25 I think in order to reflect those factors the appropriate costs order is to give the
26 Claimants 30% of their costs of the application incurred since 11th August.

1 Otherwise, the costs will be in the case.

2 **MR SPITZ:** I am grateful.

3 **MR MUNRO:** Thank you, sir.

4 **MR JUSTICE ZACAROLI:** Right. Do we turn to the other application?

5
6 **Discussion re directions**

7 **MR MUNRO:** Yes. That's merely in respect of directions. This is Defendants'
8 application to clarify position regarding unpleaded new allegations in
9 Claimants' witness statements. I would respectfully suggest that the
10 Defendant put in submissions in writing by 29th October and the Claimants
11 put in submissions in writing by 5th November and the Defendants put in any
12 reply in writing by 12th November.

13 **MR JUSTICE ZACAROLI:** Yes. I had a quick look at it. It is three of the original
14 five points are now in issue, aren't they?

15 **MR SPITZ:** Three of the original six I believe.

16 **MR JUSTICE ZACAROLI:** Six. Yes. (f) wasn't there, yes. The point is -- well, is
17 the point whether the Claimants is going to amend its case to mirror or to
18 reflect what is said in those paragraphs of the witness statement? I mean, is
19 that an issue which can be answered immediately? Is it the Claimants'
20 intention to amend its case in light of what's said in the witness statements?

21 **MR SPITZ:** The Claimants' position is it is unlikely to be in a position to amend
22 because of costs considerations and also because the Claimant doesn't want
23 to risk an extension -- risk any adjournment on the trial date. So the Claimant
24 will put up its stall on whether these are sufficiently foreshadowed in the
25 pleadings and whether they are matters of evidence rather than matters that
26 go to the essence of the cause of action.

1 **MR JUSTICE ZACAROLI:** I see. So they are either already in there or they are not.

2 **MR SPITZ:** Or they are not .

3 **MR JUSTICE ZACAROLI:** And if they turn out not to be, you are not going to be
4 pushing for these issues to be resolved in addition to anything that's already
5 there?

6 **MR SPITZ:** That is correct, sir.

7 **MR JUSTICE ZACAROLI:** Right. I am just thinking in terms of when this needs to
8 be resolved then. So the latest of these written submissions will be 19th?

9 **MR MUNRO:** 12th November.

10 **MR JUSTICE ZACAROLI:** As things stand I shall be embroiled in a large trial at that
11 point. So it is unlikely I will get to look at this until December when we have
12 a PTR. It may be that I will leave this to resolve at the PTR, but I'll see if it can
13 be resolved in advance of that. There may just not be time, as it turns out, but
14 we will see. I don't think it matters that much, does it? Well, tell me. Does it?

15 **MR SPITZ:** From the Claimants' point of view no, it's not one of the most burning
16 issues in the litigation, that sort of timetable, and particularly when one factors
17 in the fact that amended particulars are not going to take place.

18 **MR JUSTICE ZACAROLI:** Mr Munro, with that clarification I think it is not -- it
19 wouldn't be a huge problem for you if this wasn't resolved until the PTR. Is
20 that fair?

21 **MR MUNRO:** May I just check?

22 **MR JUSTICE ZACAROLI:** Yes.

23 **MR MUNRO:** Thank you. Yes. That's fine. Thank you, sir.

24 **MR JUSTICE ZACAROLI:** If it is simple and I can do it in the papers before, I will,
25 otherwise it will wait until the PTR.

26 **MR MUNRO:** Very good, sir.

1 **MR SPITZ:** Sir, will we stick with the timetable that my learned friend has proposed
2 and see where that goes or is there something different that has been
3 mooted?

4 **MR JUSTICE ZACAROLI:** I think it is seven days, seven days, seven days.

5 **MR SPITZ:** That's fine.

6 **MR JUSTICE ZACAROLI:** Yes. I have no objection with that. That can be ordered.

7 **MR MUNRO:** Thank you, sir.

8 **MR SPITZ:** Thank you.

9 **MR JUSTICE ZACAROLI:** Anything else for this morning -- this afternoon?

10 **MR MUNRO:** No. Thank you, sir.

11 **MR SPITZ:** No. Thanks.

12 **MR JUSTICE ZACAROLI:** Thank you both very much. Good afternoon.

13 **MR MUNRO:** Thank you very much.

14 **(1.05 pm)**

15 **(Hearing concluded)**

16

17

18

19

20

21

22

23

24

25