



Welcome to the November edition of *Insight*, Fenwick Elliott's latest newsletter, which provides practical information on topical issues affecting the building, engineering and energy sectors.

**In this fifth issue of *Insight*, we examine and contrast the previous approach to litigation costs and the new costs management approach that will now be required in light of the extension of the Birmingham Pilot.**

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## New approach to litigation costs management

The voluntary costs management pilot that was running in the Birmingham Technology and Construction Court and the Mercantile Court ("the Birmingham Pilot") was extended to all Technology and Construction Courts and Mercantile Courts in England and Wales on a compulsory basis ("the Compulsory Pilot") on 1 October 2011.

### Former approach to costs

Prior to the extension of the Birmingham Pilot, the Technology & Construction Court ("TCC") had limited powers to control costs. Costs estimates had to be filed at the first Case Management Conference ("First CMC") and the Listing Questionnaire stage with details of costs incurred to date and the likely overall costs in the event that the matter proceeded to trial.

However, the estimates had no binding status and so were largely ignored in practice. The court would

often only consider the estimates at any later detailed assessment hearing if there was more than a 20% discrepancy between the original estimates and the costs claimed at detailed assessment. If such a discrepancy existed, in default of a reasonable explanation for the discrepancy, the additional costs claimed risked being regarded as being unreasonable in amount or disproportionate, particularly if the paying party relied on the original estimate in the conduct of its case.

There was also very limited scope to make a costs capping order. Such an order fixes a figure in excess of which costs would not be recoverable in the event that the matter proceeded to trial (save for a material change in circumstances or some other compelling reason). The cap was not a budget, nor was it subject to judicial scrutiny throughout the life of a case. Capping orders were only usually invoked in circumstances where the risk of costs becoming excessive could not be controlled by directions imposed by the court or by detailed assessment, and therefore tended to be the exception rather than the rule.

### The Birmingham Pilot

In late 2008, Jackson LJ (a former Judge in Charge of the TCC) reviewed the rules governing the costs of civil litigation and made recommendations on how to provide access to justice in a proportionate manner. Jackson LJ considered it best to adopt a project management approach by breaking down each step in the proceedings (for example, witness statements and disclosure) and allocating hours or a price to each step. This project management approach to costs was implemented by the voluntary Birmingham Pilot in mid-2009.

The participants were required to complete a much more detailed estimate of costs than had been the case previously and provide budgets for each stage of the case. The budgets were to be filed at court before each

Case Management Conference or Pre-Trial Review and the judge was furnished with the power to call for (telephone) hearings, if appropriate, to monitor expenditure. At each hearing, the parties' budgets would either be approved or disapproved and it was open to either party to apply to the court if one party was causing the other to incur fees unnecessarily.

The take-up of the Birmingham Pilot was very slow: only parties to eleven cases participated and the feedback was mixed. Solicitors generally found the budget preparation process to be a lengthy one but also expressed the positive view that budgeting focussed their minds on the issues and tactical considerations.

### The Compulsory Pilot

The Compulsory Pilot has now been commissioned, the effect of which is to extend the Birmingham Pilot to all TCC and Mercantile Courts in England and Wales until 30 September 2012.

The purpose of the Compulsory Pilot is to (i) obtain a greater understanding of the benefits and disadvantages of costs management and (ii) consider how costs management might be improved for the benefit of court users. The Compulsory Pilot applies to proceedings in which the First CMC is heard on or after 1 October 2011.

### New Practice Direction 51G ("PD51G")

The Compulsory Pilot has been implemented by and is governed by PD51G. The intended aim of PD51G is to manage and control the costs of litigation in accordance with the overriding objective, the primary purpose of which is to ensure that cases are dealt with justly which includes in proportion to the amount of money involved.

As was the case for the Birmingham Pilot, the parties are required to file and exchange costs budgets (in the form of



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Precedent HB) at the same time as filing the Case Management Information Sheet in preparation for the First CMC. The budget should include the following:

- Intended activities: e.g. disclosure (whether electronic or paper); preparation of witness statements;
- obtaining experts' reports; mediation or any other steps which are deemed appropriate to a particular case;
- Identifiable contingencies: e.g. application for specific disclosure; resisting applications threatened or made by other party;
- Disbursements including court fees, counsel's fees and any mediator or experts' fees.

PD51G permits the court to make a Costs Management Order ("CMO") through which the court will record its approval or disapproval of a party's budget for future costs and also comment on costs that have already been incurred. The court may also require attendance at a Costs Management Hearing ("CMH") to monitor expenditure. If a party is considered to be behaving oppressively in seeking to cause another party to spend money disproportionately, then an application can be made by the aggrieved party.

If any court approved budget later becomes inaccurate, a revised budget must be prepared with reasons for any increase which will then be subject to judicial scrutiny. When costs are assessed at any later detailed assessment hearing, the court will have regard to the last approved budget which should not be departed from without good reason.

### How the Compulsory Pilot will work in practice

It is very difficult to predict how the Compulsory Pilot will work in practice mainly because no formal guidance has yet been issued by the TCC. The only observation that can be made at this stage is that a CMO may well be similar to, or the same as, costs capping orders which have thus far been used very sparingly in practice.

What is certain is that there are bound to be teething problems. Judges and barristers alike generally have little or no experience of costs or how they should be controlled purely because this is a function that has historically always been carried out by specialist costs judges and costs draftsmen following conclusion of the case. Even for experienced practitioners, costs can be very difficult to forecast with accuracy, particularly where disclosure is concerned. Accurate assessment of the volume of your own client's document can be an inexact science, let alone that of the other party. Costs Management training has been offered by the Judicial Studies Board to all civil judges but training is not compulsory. The judicial approach to costs management may therefore not be uniform until such time as the TCC issues guidance.

Whilst the new system is bedding in, parties may be inclined to over-egg their estimates to avoid the risk of a lower costs recovery in the event that their estimate comes in light. Costs budgets might theoretically be tactically inflated to place commercial pressure on a weaker party but the threat of (or making of, if necessary) an application in the event of oppressive or unreasonable behaviour by another party might make such tactics difficult to realise in practice.

Careful costs management by lawyers will be key to achieving a successful outcome. In the event that a costs estimate is exceeded, a party with a relatively strong case might be forced

to settle earlier than would otherwise have been the case. This is because a higher proportion of irrecoverable costs than previously may need to be factored in as part of the economics of the case.

It may well be more difficult for parties to hide any possible trump cards which might be able to be used to their advantage (assuming any later expert and other supporting evidence is favourable). One way to circumvent this might be to identify the trump card as a separate head of claim and list it as a contingency. This would have the effect of delaying disclosure of expenditure (and therefore the importance placed on the trump card) to some point in the future at such time as the trump card might be relied upon.

### Conclusion

The Compulsory Pilot will be closely monitored by Nicholas Gould (a partner at Fenwick Elliott, in his capacity as Senior Visiting Lecturer at King's College, London) and Claire King (a Fenwick Elliott Associate) who, along with the rest of the monitoring team, will in due course consider responses to questionnaires that will be completed by all solicitors and judges involved in the Compulsory Pilot.

The monitoring will no doubt be instructive and may result in change, but it remains to be seen whether the Compulsory Pilot will become a permanent feature of litigation in courts in England and Wales.

Should you wish to receive further information in relation to this briefing note or the source material referred to, then please contact Lisa Kingston. [lkingston@fenwickelliott.com](mailto:lkingston@fenwickelliott.com). Tel +44 (0) 207 421 1986

Fenwick Elliott LLP  
Aldwych House  
71-91 Aldwych  
London WC2B 4HN  
[www.fenwickelliott.com](http://www.fenwickelliott.com)