

The Bucket List: Costs Budgeting

1. The Theory

- 1.1 On 1 October 2011 the TCC introduced the costs management pilot scheme, with the aim of managing the cost of litigation. The scheme is now due to be rolled out across the Courts as part of the costs reforms that come into effect on 1 April.
- 1.2 The scheme requires parties to file and exchange costs budgets (“CBs”), detailing both incurred and estimated costs for each stage in the proceedings, at various stages in the proceedings.
- 1.3 The first budget must be exchanged prior to the 1st CMC, at which the Court may (and presumably in practice will) issue an order approving a party’s costs, subject to any revisions. Before any subsequent procedural hearings, a party whose CB is no longer accurate must file and serve a revised budget showing what departures have occurred from the last approved budget and why. This will be subject to scrutiny by the Court, who may approve or disapprove of it.
- 1.4 When assessing costs, the Court will have regard to that party's last approved budget and will not depart from it unless satisfied that there is a good reason to do so.

2. The Practice

- 2.1 Most litigation practices have been providing clients with costs estimates and budgets for many years. However, under the new system firms will be required to provide very detailed estimates, broken down for each stage in the proceedings. This and the potentially serious consequences of exceeding those estimates constitute a radical change in litigation budgeting. All litigators will be expected to be litigation project managers who are subject to strict duties.
- 2.2 CPR PD 51G states that parties should submit their CBs using Precedent HB, which is appended to the Practice Direction. This has, however, been superseded by Precedent H published by the Law Society (although this is not yet stated in the PD).
- 2.3 The precedent requires estimates for various standard steps in proceedings (disclosure, witness statements, expert reports etc), but parties are free to add their own contingencies. Care should be taken to ensure that any possible contingencies are included given the strict approach Courts may take to budgets (although query whether some leeway will be given initially or whether zero tolerance will be shown; *pour encourager les autres*). Furthermore, the form allows parties to specify the assumptions on which their budget is based (for example, 10 factual witnesses). These should be detailed - if a party’s budget requires amendment, particularly if due to actions of the other side, a party may want to rely on them to support a request for approval of a revised budget.
- 2.4 Incurred time must be separated out according to the number of hours spent by each fee earner. For new cases, this may be a straightforward exercise – costs incurred will be relatively low and all time pre-dating the claim form can be put into the “Pre-action Costs” bucket. However, if the claim has been live for a long time before the 1st CMC takes place, this can be significant. Furthermore, if substantial work has been done on, say, expert reports or pursuing settlement (another bucket), this time will have to be separated out. How easy this is may depend on how good your time recording system is (and was - when the time was recorded, prior to the CB being contemplated).
- 2.5 This difficulty may, however, be tempered by the fact that the PD states that Courts cannot approve costs incurred before the date of the first costs management order, although they may

make comments on those costs and take them into account when considering the reasonableness and proportionality of all subsequent costs. While this is somewhat cryptic, the practical application seems to be that the Courts have limited ability to scrutinise costs incurred up to the 1st CMC. That said, one practitioner has reported a judge setting a budget at the 1st CMC which capped recoverable pre-action costs at a threshold lower than the sum already incurred. In that case, the judge did, however, grant the affected party permission to show why its pre-action costs were reasonable.¹

3. Some early concerns

- 3.1 Whilst allocating time for incurred time may be tricky, even with assumptions, providing estimates for certain stages in the proceedings, particularly reviewing documents disclosed by the other side, places some weight on the digit that is thrust in the air. One can foresee solicitors being generous with their estimate for the “Issues / Pleadings” bucket to provide a degree of buffer, especially as the issues are not set out in the CB (raising a prospect of satellite disputes about which issues were live when a given CB was produced and which extra issues should have been anticipated).
- 3.2 Another concern is that a financially stronger party may submit a high costs estimates in order to pressure the other into a settlement. Furthermore, it remains to be seen how the Court will address the situation where one party’s costs are pushed up by the actions of the other (for instance by submitting voluminous witness statements or expert reports). Although the PD provides that a party may apply to the Court if it considers that the other is behaving oppressively by trying to force it to incur costs, it’s unclear what this will extend to.
- 3.3 Other tactics may also come into play. For instance a party might give a low estimate for disclosure to maximise the chances of the Court ordering the fullest possible disclosure, weighing up the benefit of greater disclosure against the cost consequences of exceeding the CB. This, of course, would have a knock on effect on the other side’s CB too.
- 3.4 While parties are required to provide figures for each bucket, parties may also try to allocate time across the various buckets to balance out their estimates. For instance, time relating to interactions with experts might, quite justifiably, be said to sit in both the “Issues / Pleadings” and “Expert Reports” buckets. Thus as one bucket fills up the other might be called upon.
- 3.5 It is likely that clients will seek to hold solicitors accountable for CBs that prove too low so that some costs are not recovered. This may entail claims against solicitors for estimates provided by third parties, like counsel and experts, where their estimates prove too low. Solicitors may want to exclude liability in their retainer letters for estimates provided by third parties, although clients may want to hold solicitors accountable for their oversight of third parties' estimates.
- 3.6 As to how strict an approach is likely to be taken to enforcement, while the Master of the Rolls has encouraged Judges to apply costs sanctions rigorously, the Court of Appeal took a much more lenient approach in the recent case of *Sylvia Henry v News Group Newspapers Ltd*. At first instance, the Court had limited the claimant's recovery to its initial CB, despite the fact that the cost overrun was largely due to the defendant’s conduct. However, on appeal the Court of Appeal adopted a more permissive approach, finding that where there were “good reasons” for the CB being exceeded, the party should be able to recover those costs. As the Court of Appeal noted, the case can be distinguished on the basis that it concerned the Defamation Proceedings Costs Management Scheme. However, the judgment may still prove persuasive for the other CB regimes.

¹ <http://www.no5.com/news-publications/publications/costs-management-in-mercantile-and-tcc-cases>

4. Recent Events

- 4.1 In a surprising turn of events, on 18 February the President of the QBD and the Chancellor of the High Court published an amendment to the CPR that will exempt cases worth more than £2 million from the automatic application of the new costs rules (although a judge can still impose them as part of his directions). This will bring the TCC into line with the Commercial Court, with the aim of avoiding a party commencing in the Commercial Court to avoid the new costs rules.
- 4.2 The writer of this blog, however, finds himself in the peculiar position of having a case worth over £25 million listed for a March CMC. The Presiding Judge of the TCC has directed that as the costs pilot will continue to run until 1 April, we are required to produce a CB for the CMC. Curiously, if the CMC was a month later there would be no CB.
- 4.3 TeCSA has arranged a conference for 20 March to provide guidance on costs budgeting. Watch this space for further developments as the pilot ends and the new regime evolves.