Fenwick Elliott
The construction & energy law specialists

Costs Management Pilot

Interim Report 3 February 2012

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1 INTRODUCTION

On 1 October 2011 the Costs Management Pilot (the "**Pilot**") started in all Technology and Construction Courts ("**TCC**") and Mercantile Courts. The Pilot applies to any case which has its first case management conference on or after 1 October 2011[1] and is scheduled to run until 30 September 2012.

The purpose of the Pilot, as stated by Lord Justice Jackson in the introduction to the questionnaires being distributed by the courts to those participating in the Pilot, is to ascertain:

(a) the benefits and disadvantages of costs management; and

(b) how the process might be improved for the benefit of court users.

The Pilot has potentially wide implications for costs management in the TCC and Mercantile Courts and has already been the subject of heated debate amongst practitioners regarding its potential advantages and disadvantages.

At the invitation of Lord Justice Jackson, the Centre of Construction Law at King's College, London, was asked to monitor the Pilot. The monitoring team is headed by Nicholas Gould, who is a Visiting Senior Lecturer at King's College London and a partner in Fenwick Elliott LLP. In monitoring the effectiveness of the Pilot he is being assisted by Claire King, an Associate of Fenwick Elliott LLP, by Christina Lockwood, a lawyer and CEDR accredited mediator and by Tom Hutchison, an Associate of Freshfields Bruckhaus Deringer LLP. Dr Benjamin Styles of Imperial College, London a Chartered Statistician has assisted in analysing the results of the Pilot to date.[2]

This Interim Report sets out the results of this monitoring exercise for the first four months of the Pilot. Any conclusions are, by definition, interim only. The rate of completion for the questionnaires designed for the monitoring process, and distributed by the Courts, has been low to date and it is hoped that practitioners and judges alike will find more time to complete and return the questionnaires during the remainder of the Pilot.

Before setting out the interim results, we will first examine the Courts' existing costs management powers and the background to the Pilot.

2 REVIEW OF THE COURTS' CURRENT COSTS MANAGEMENT POWERS

Overview

The Civil Procedure Rules (the "**CPR**") make no reference to the term "*Cost Management*". However that is not to say that the CPR does not attempt to control them. As Lord Justice

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[1] See Practice Direction 51G – Costs Management in Mercantile Courts and Technology & Construction Courts – Pilot Scheme paragraph 1.1(3).

[2] Thanks must be given to King's College, London, TeCSA and DW Costs Limited for their sponsorship of this research. Chris Shilvock, a trainee at Fenwick Elliott LLP, has also assisted in preparing this Interim Report.

Jackson acknowledges in his "*Review of Civil Litigation Costs: Preliminary Report*" (the "**Preliminary Report**"):

> *"Within the CPR judges are given an armoury of powers which collectively enable cases to be managed not only by reference to the steps that may be taken in the given proceedings, but also by reference to the level of costs to be incurred".*[3]

In summary, the existing powers of the court that enable it, directly or indirectly, to manage costs are:

(a) Take the amount of an estimate into account when making case management orders (CPR 1.1);

(b) Require a party to file and serve an estimate of costs as per *Form H* (*section 6 PD 43-48* (the Costs Practice Direction (CPD) and CPR 3.1(3)(ll)*)*.;

(c) Require costs estimates (section 6.4(b), CPD);

(d) Retrospectively limiting a receiving party to the amount in an estimate of costs if costs ultimately exceed that estimate by 20 per cent or more and no satisfactory explanation is provided (section 6.5A and 6.6, CPD);

(e) Attach conditions (including as to costs) to case management decisions (CPR 3.1(2)(m) and CPR 3.1(3)(a)); and

(f) Limit the amount of recoverable costs for a given step in the proceedings (costs capping) (CPR 44.18).

Overriding Objective

The starting point, as with all matters of civil litigation is the overriding objective (CPR 1.1). This provides:

"1.1 The overriding objective

(1) These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly.

(2) Dealing with a case justly includes, so far as is practicable -

- *a. Ensuring that parties are on an equal footing;*
- ***b. Saving expense;***
- ***c. Dealing with the case in ways which are proportionate -***
  - *i. to the amount of money involved;*
  - *ii. to the importance of the case;*
  - *iii. to the complexity of the issues; and*
  - *iv. to the financial position of each party;*

[3] Paragraph 2.1 of the Preliminary Report.

d. Ensuring that it is dealt with expeditiously and fairly; and

e. Allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases."

In his Preliminary Report, Lord Justice Jackson contended that CPR 1.1(2) (b) and (c) essentially underpin the court's case management powers, and therefore *"it is axiomatic that the court has the jurisdiction to actively cost manage."*[4]

Costs estimates

In addition to the overriding objective, the Woolf reforms[5] introduced for the first time the idea of "*costs estimates,*"[6] with CPR 3.1(3)(ll) stating that the court may "*order any party to file and serve an estimate of costs*". This provision is supplemented by Section 6 of the Cost Practice Direction ("**CPD**") which provides costs estimates should be served by the parties at both the Allocation Questionnaire and Pre-Trial Check List (Listing Questionnaire) stage of proceedings[7], and that the courts may at its discretion request further cost estimates at any stage of the proceedings.[8]

Section 6 of the CPD currently contains the relevant guidance on the format of costs estimates, and provides that the form of estimate that should be used to prepare any cost estimates is Precedent H (annexed to the CPD). Nevertheless whilst it seems that the use of this form is optional given the use of the word "*should*", parties have been strongly advised to use this format.

The CPD sets out the intended purpose of cost estimates; namely to assist the court when assessing the reasonableness and proportionality of any costs claimed on assessment.[9] Unfortunately, however, it fails to give guidance on what is both reasonable and proportional, and as a result it was left to the Court of Appeal in *Leigh v Michelin Tyre Plc*[10] to consider the role that cost estimates have to play upon final assessment. The court gave the following guidance:

"a) Estimates of the overall costs of litigation should provide a useful yardstick by which the reasonableness of the costs finally claimed may be measured. If there is a substantial difference between the estimate and the final figure, then the difference calls for explanation. In the absence of a satisfactory explanation, the Court may conclude that the difference itself is evidence from which it can conclude unreasonableness.

b) The Court may take the estimate into account if the other party shows that it relied on the estimate in some way, giving the example of B being able to show he relied on A's estimate of costs in deciding not to settle a

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4 Paragraph 2.1 of the Preliminary Report.

5 The purpose of cost estimates are to keep the parties informed about their potential liability in respect of costs and assist the court to decide what, if any, order to make about costs and about case management (see CPD 6.1).

6 CPD. Ch.7 para 7.

7 CPD 6.4(1).

8 CPD 6.3.

9 CPD 6.6(1).

10 [2003] EWCA Civ 1766.

case but to carry on with it in the belief that he knew his potential liability for costs if unsuccessful.

c) *The Court may take the estimate into account if it would have made different case management decisions had it known the final costs would be much higher than the estimated ones, e.g. it would have reduced the number of experts for whom permission was given.*

d) *However, it would not be appropriate to use the estimate to reduce the costs payable simply because it was an inadequate estimate. If the other party did not rely on it, the Court would not have made different directions and the costs are otherwise reasonable and proportionate, it would be wrong to reduce the costs simply because they exceeded the estimate. To do so, would be tantamount to treating the estimate as a costs cap."*

Largely as a result of the decision in *Leigh v Michelin Tyre Plc,*[11] section 6 of the CPD was amended[12] to give the court additional power to seek explanations from parties, where costs have increased by 20% or more from an earlier estimate[13], and as a result if the party can not provide such explanation or the paying party can demonstrate reliance on the earlier estimate, the court can rely on the earlier estimate as evidence that the costs incurred are either unreasonable or disproportionate.

Whilst on the face of it Section 6 of the CPD provides the judiciary with an adequate mechanism for managing costs, cost estimates have on the whole been largely unsuccessful at managing costs; with Jeremy Morgan QC stating that in his experience:

> *"even the mandatory requirements have very often been ignored…Similarly the discretionary power to call for estimates at any stage has not been greatly used".*[14]

This sentiment is echoed by Lord Justice Jackson, who in his Preliminary Report acknowledges that *"scant attention is paid"* to the CPD during the course of case management hearings, and as a result there is an inherent need to strengthen the cost management powers, if the court is to take control of spiralling litigation costs.

Against this background, Lord Justice Jackson suggested:

> *"It may be that consideration should now be given to:*
>
> *i) strengthening the costs management powers within CPD Section 6,*
> *ii) elevating those provisions within the CPR; and*
> *iii) expressly using the term "costs management", which currently does not feature in the CPR or the CPD."*[15]

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11 [2003] EWCA Civ 1766.

12 The 40th update to the CPR came into force on the 1 October 2005.

13 CPD 6.5A.

14 "*Cost Management – The Policy Background and the Law*", Jeremy Morgan QC, 23 November 2010.

15 Paragraph 2.16 of the Preliminary Report.

Cost Capping

Costs capping is, and remains, controversial. In *Cook on Costs* it is stated:

> *"Cost Capping is an acknowledgement of the failure of the judiciary to restrict costs at the start of proceedings through case management and at the end of the proceedings by failing to award between the parties only those costs which are reasonable and proportionate."*[16]

Until 6 April 2009, the CPR made no reference to the court's power to impose a cost-capping order. Instead courts sought to rely on the wider powers conferred upon them by s.51 of the Senior Courts Act 1981[17] and the court's general case management powers in CPR 3.1(2)[18]. This approach was confirmed in the Court of Appeal case of *King -v- Telegraph Group Limited.*[19]

Following the decision in *King v Telegraph Group Limited,*[20] the courts were remarkably undecided as to the benefits of cost-capping, with some judges clearly in favour of increased judicial cost control, and others showing less enthusiasm for costs capping, and as a result there has been as many failed cost-capping orders as successful ones.

In *Sheppard -v- Mid Essex Strategic Health Authority*[21] the court held that it was far better for the court to attempt to control and budget for costs prospectively, rather than to allow costs to be incurred and then submitted to detailed assessment after the event. With Hallett J stating that:

> *"The courts are moving, at whatever pace, toward a system of pre-emptive strikes in order to avoid the costs of litigation spiralling out of control and becoming unreasonable or disproportionate."*

Contrast this with the decision in *Smart v Cheshire NHS Trust*[22] in which whilst acknowledging the legality of costs capping (post King) the judge suggested that:

> *"..the court should only consider making a costs cap order in such cases where the applicant shows by evidence that there is a real and substantial risk that without such an order costs will be disproportionately or unreasonably incurred.."*

It was clear that post *King v Telegraph Group Limited*[23] not all judges shared the same enthusiasm for cost-capping; it was therefore wholly expected that the Court of Appeal in

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16 Paragraph 10.9 of Cook on Costs 2009, by Michael J Cook.

17 See S.51 of the Senior Courts Act 1981 states: "The *court shall have full power to determine by whom and to what extent costs are to be paid*".

18 CPR 3.1(2) states: "take *any other step or make any other order for the purpose of managing the case and furthering the overriding objective*".

19 [2005] 1 WLR 2282.

20 [2005] 1 WLR 2282.

21 [2006] 1 Costs LR 8.

22 [2003] EWHC 2806 (QB).

23 [2005] 1 WLR 2282.

Willis v Nicholson[24] would provide some much need guidance. However, somewhat surprisingly, the court declined jurisdiction on the matter instead opting to invite the Civil Procedure Rules Committee to consider the issue of cost capping orders.

Following on from a period of consultation, the Rules Committee concluded that:

a) the court had jurisdiction to make costs capping orders;

b) the approach to costs capping should be conservative; and

c) costs capping orders should generally be made on application.

As a result of the above, both the CPR and the CPD were updated in an attempt to codify the position on cost capping orders.[25] However practitioners were quick to criticise the committee for not going far enough in its recommendations, having added very little to what had already been established by case law.

The new rules (which apply to all cases) essentially codify the test outlined in *Smart v Cheshire NHS Trust*.[26] Therefore, for a costs capping order to be made, the court must be satisfied that:

a) It is in the interests of justice to do so; and

b) There is a substantial risk that, without such an order, costs will be disproportionately incurred, and the court is not satisfied that the risk can be adequately controlled by case management and detailed assessment of costs (CPR 44.18(5)).

Additionally, Section 23A of the CPD further stipulates that costs capping orders should be made in "*exceptional cases*" only. Therefore, the criteria can be seen as extremely onerous on the party applying for costs capping, the result being that most applications will fail.

In the first reported case regarding the new rules *Matthew Peacock v MGN Limited*[27] the judge refused to order costs capping and held that the defendant's concerns could be adequately controlled by case management (as per the new rules). However the judge made it clear that, if it wasn't for the new rules, he would have been "*strongly inclined*" to order a costs cap.

The difficulty in obtaining a costs capping order was further demonstrated in the case of *Eweida v British Airways PLC,*[28] where the Court of Appeal set aside a costs cap on the basis that the exceptionality test could not be satisfied.

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24 [2007] EWCA Civ 199.

25 See CPR 44.18 (general principles), 44.19 (application for costs capping order), and 44.20 (application to vary a costs capping order, in addition CPD 23A provides detailed provisions for cost capping orders.

26 [2003] EWHC 2806 (QB).

27 [2009] EWHC 769.

28 [2009] EWCA Civ 1025.

The main barrier to costs capping is clearly the onerous rules which are imposed by the CPR. It is proving extremely difficult for a party to satisfy the courts that the risk of disproportionate costs cannot be adequately controlled by case management and subsequent detailed costs assessments, especially since *"the latter requirement can be interpreted as a criticism that costs judges will not do their job properly."*[29]

It has been questioned by many litigators and commentators whether costs capping orders really help keep costs under control. The time and expense of a costs capping application can be an added expense and a major distraction from the main litigation.

Jeremy Morgan QC goes as far as saying that:

> *"All that a capping order results in is a figure which must not be exceeded if the case goes to trial. If the case settles, as most do, between cap and trial, then unless the cap has been exceeded before the trial begins, they serve no useful purpose whatever. A cap is not a budget."*[30]

These comments are particularly pertinent given the concerns raised in the legal press that the Pilot may in itself result in some form of cost cap being imposed on parties although it remains to be seen if this is how it will act.

In essence then, it appears that while the courts have potentially wide cost management powers, they are not used as effectively or actively as they could be.

In his Preliminary Report, Lord Justice Jackson concluded his analysis of the courts' costs management powers by proposing:

> *"The future. A more effective and direct application of costs management may possibly be viewed as desirable in order to achieve a better and more effective way of controlling costs. It has the advantage that it can be used without indemnity or affecting alternate methods of control through, for example, overall costs capping in those exceptional cases where that becomes necessary."*[31]

3 BACKGROUND TO THE PILOT

The Pilot arises out of Lord Justice Jackson's "*Review of Civil Litigation Costs: Final Report*" (the "**Final Report**") which built on his Preliminary Report as well as an earlier costs pilot which ran in the Birmingham TCC and Mercantile Court from 1 June 2009 until 31 May 2010 (the "**Birmingham Pilot**").

The Birmingham Pilot

In the Birmingham Pilot (which was voluntary and reported on in the Final Report), those who had agreed to take part had to complete an estimate of costs. Budget documents were to be lodged with the court before each case management conference ("**CMC**") or pre-trial review ("**PTR**") and the judge had the power to order regular hearings by telephone, if appropriate, to monitor expenditure. At each hearing, the judge would

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[29] Page 6, Paragraph 3, Cost Management – the policy background and the law, Jeremy Morgan QC, 23 November 2010.

[30] Ibid. Page 6, Paragraph 2.

[31] Paragraph 5.1 of the Preliminary Report.

record approval or disapproval for each step of the action, either by agreement between the parties or after argument. The judge would then give a direction for any party to apply to the court for assistance if it considered that another party was behaving oppressively in seeking to cause the party to spend more money unnecessarily.

As at 31 October 2009, the parties in eleven cases had voluntarily participated in the Birmingham Pilot. The results indicated that, done efficiently, the budget form took about two and a half hours for a solicitor to fill in. Solicitors commented that it was helpful in that it did force the solicitor in question to focus on the issues and what needs to be done to put up a good case. It was also reported that it was helpful to see what the other side's costs were likely to be.

Judges gave a mixed response. They generally found it to be an extremely useful aide to case management, but said that it resulted in the CMC taking longer with greater demands made upon the court. Judges reported that reading and considering the costs budget form took about 15 to 30 minutes.

The Final Report

In Chapter 40 of his Final Report Lord Justice Jackson analyses further what approach to costs management should be considered going forwards. In paragraph 1.4 he noted that the essential elements of costs management were as follows:

> *"i) The parties prepare and exchange litigation budgets or (as the case proceeds) amended budgets.*
> *ii) The court states the extent to which those budgets are approved.*
> *iii) So far as possible, the Court manages the case so that it proceeds within the approved budgets.*
> *iv) At the end of the litigation, the recoverable costs of the winning party are assessed in accordance with the approved budget."*

The issues considered in Chapter 40 were as follows:

> *"i) What form should the litigation budgets for exchange take?*
> *ii) What procedure should be adopted for securing Court approval of budgets or amended budgets?*
> *iii) To what extent should the last approved budget be binding, alternatively influential, upon the final assessment of costs?*
> *iv) Insofar as the last approved budget is binding, should it operate as an upper limit upon recoverable costs or should it operate as a form of assessment in advance?*
> *v) What form of training should lawyers and judges receive in order to perform the above tasks?*
> *vi) What steps should be taken to ensure that the process is cost effective, i.e. that the litigation costs saved exceed the costs of the process?"*

Lord Justice Jackson then proceeded to outline not just the results of the Birmingham Pilot (which are outlined above) but also recent developments in Australia, results of the Defamation Costs Management Pilot, the results of a number of meetings and seminars held

with practitioners, the Report of the Costs Management Working Group and a number of written submissions made during "*phase 2*". Readers are referred to Chapter 40 of the Final Report for further detail.

In light of his findings, Lord Justice Jackson made the following recommendations:

> *"i) The linked two disciplines of costs budgeting and costs management should be included in CPD training for those solicitors and barristers who undertake civil litigation.*
> *ii) Costs budgeting and costs management should be included in the training offered by the JSB to judges who sit in the civil courts.*
> *iii) Rules should set out the standard costs management procedure, which judges would have discretion to adopt if and when they see fit, either of their own motion or upon application by one of the parties.*
> *iv) Primary legislation should enable the rule committee to make rules for pre-issues costs management."*[32]

In his Final Report, Lord Justice Jackson concluded that while no case had yet been made for introducing costs management into the Commercial Court, a powerful case had been made for introducing costs management in "*those rather more modest multi-track cases, where the level of costs is a matter of concern for the parties, or at least to the paying party.*"[33] In relation to the TCC, Lord Justice Jackson did not recommend that costs management should be made compulsory but instead that a decision should be made by the judge in each case whether it would benefit the parties and the case.[34]

It is against this background that the Pilot was proposed and commenced.

4 DEFAMATION PROCEEDINGS COSTS MANAGEMENT SCHEME

A compulsory Defamation Costs Management Pilot has been running for all defamation cases in the High Court in London and in Manchester since 1 October 2009 (the **"Defamation Pilot"**). Initially, the Defamation Pilot was intended to run until 31 March 2011, but it was extended until 30 September 2012 to enable the researchers to gather more evidence.

The Defamation Pilot is being monitored by others.

5 THE COSTS MANAGEMENT PILOT

Having outlined the background to the Pilot we will now outline the provisions within the Pilot itself.

The Pilot is governed by Practice Direction 51G (**"PD51G"**). This provides that for those claims that fall within the Pilot, each party will have to file and exchange a costs budget in the form set out in Precedent HB (**"Form HB"**) at the same time as filing the Case

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[32] See paragraph 8.1, Chapter 40 of the Final Report.
[33] See paragraph 7.4, Chapter 40 of the Final Report.
[34] See paragraph 5, Chapter 29 of the Final Report.

Management Information Sheet. Within the costs budget, reasonable allowances must be made for:

a) Intended activities: e.g. disclosure (if appropriate, showing comparative electronic and paper methodology), preparation of witness statements, obtaining experts' reports, mediation or any other steps which are deemed appropriate to the particular case;

b) Identifiable contingencies: e.g. specific disclosure application or resisting applications made or threatened by an opponent; and

c) Disbursements: in particular court fees, counsel's fees, any mediator or expert fees.

The stated objective of costs management is to *"control the costs of litigation in accordance with the overriding objective."*[35] The court will have regard to any costs budget filed pursuant to PD51G at any CMC or Pre-Trial Review ("**PTR**") and will decide whether or not it is appropriate to make a Costs Management Order ("**CMO**"). If the court decides to make a CMO, it will, after making any appropriate revisions, record its approval of a party's budget and may order attendance at a subsequent costs management hearing (by telephone, if appropriate) in order to monitor expenditure.[36] Paragraph 4.5 of the PD51G also provides that a party may apply to the court if that party considers another party is behaving oppressively in seeking to cause that party to spend money disproportionately on costs.

A party submitting its costs budget to the court is not required to disclose it to any other party save by way of exchange. However, the parties are required to discuss their costs budget during the costs budget building process and, before each CMC, costs management hearing, PTR or trial. In a case where a CMO has been made, at least seven days before any subsequent costs management hearing, case management hearing or PTR, and before trial, a budget revision must be filed, showing the reasons for any departures. The court may then approve or disapprove such departures from the previous budget.[37]

Seven days after any hearing, each party's legal representative must notify its client in writing of any costs management orders made at such hearing and also provide its client with copies of any new or revised budgets which the court has approved.[38]

When assessing costs on a standard basis, the court will have regard to the receiving party's last approved budget and will not depart from such approved budget "*unless satisfied that there is good reason to do so.*"[39]

6 PRESS COVERAGE TO DATE

Relatively little has been written in the legal press about the Pilot itself as opposed to the other issues raised by Lord Justice Jackson's Preliminary and Final Reports. What has been written raises the following concerns and comments:

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[35] See paragraph 4.2 of PD 51G.
[36] See paragraph 4 of PD 51G.
[37] See paragraph 6 of PD 51G.
[38] See paragraph 7 of PD 51G.
[39] See paragraph 8 of PD 51G.

- that costs would be likely to rise *"not so much from completing the new form HB as due to having to map out the case in so much detail at the outset;"*[40]

- that Judges do not have the business skills to manage costs like *"litigation projects;"*[41]

- that firms may be susceptible to huge losses if they get things wrong given that *"much greater emphasis and scrutiny will be placed on firms to produce detailed and accurate budgets at the outset of cases;"*[42]

- that law firms aren't necessarily equipped for this exercise, a consequence of which is that *"they could find themselves exposed if they fail to employ specialists or skill up;"*[43]

- concerns about the process, namely: completing Precedent HB; the circumstances when the court will make a CMO; and what happens when the costs estimate needs to change;[44]

- that the CMC process will take much longer – *"Even if the judge can assess a multi-million pound costs estimate, how long will he take to do so?;"*[45]

- that the old Precedent H was not fit for purpose specifically, that it was not user friendly and *"for a start is word based rather than in a workable excel format more suited to costs estimating;"*. However, Precedent HB is much better aligned to the stages of litigation.[46]

- *"In reality, this is a project whose impact will depend entirely upon the enthusiasm of the judiciary to embrace it. A pro-active approach would see Cost Management Orders dictating the eventual cost recovery in most cases (and much lengthier CMCs), whereas a more relaxed approach would see little change from the existing case management procedure….As a matter of principle, as long as it is applied with common sense and an open willingness to review as the case progresses, this new approach should be welcomed. Parties should know as soon as possible what their cost recovery is likely to be and it should facilitate settlements which are better informed and more realistic."*[47]

It should be emphasised that most of this coverage dates from before, or just after, the Pilot started. It may be that once practitioners are more used to the procedures governing the Pilot that these concerns lessen.

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40 "*Costs management roll out will lead to costs increases*", Solicitors Journal, 11 October 2011.

41 Ibid.

42 Ibid.

43 Ibid.

44 Ibid.

45 "*Should I be worried about the costs management pilot?*", PLC Construction, 3 October 2011.

46 "*Costs Management by the courts is here to stay*", by Clare McNamara of Berwin Leighton Paisner dated 8 June 2011 on PLC Construction.

47 "*Costs Management Orders*" by David Pliener of Hardwicke Chambers dated 25 November 2011.

7 MONITORING THE PILOT

Two questionnaires have been designed in order to monitor the Pilot: a questionnaire for judges and a questionnaire for solicitors. The courts are meant to provide solicitors with their questionnaire whenever the issue of costs budgets is considered by the court and also at the end of the case once the issue of who is to pay costs, and what amount, has been finally determined. They will be asked to fill in the questionnaire and then return it to the monitoring team. Judges likewise are asked to complete a questionnaire whenever a costs budget is considered by the court.

Copies of the Questionnaire for Solicitors and the Questionnaire for Judges are annexed at **Appendices 1** and **2** to this Interim Report.

The aim of the questionnaires is to provide objective data on the effectiveness of the Pilot. Given the heated debate already generated by the Pilot, it was hoped that the resulting data will prove extremely useful in determining whether or not to make costs management a permanent feature and, if so, in what form.

8 RESPONSES TO DATE

At the time of writing this report, the Pilot has been running for only four months. It will be running for a year, until 30 September 2012. A full assessment will not be possible until after the Pilot has concluded.

The rate of response to the questionnaires has, unfortunately, been slow. As at 30 January 2012, 11 questionnaires for solicitors and a total of 32 questionnaires for judges have been returned.

Out of 32 questionnaires for judges, 16 came from the Birmingham Mercantile Court and 6 questionnaires came from the Birmingham TCC.

The remaining 10 questionnaires for judges were returned by the following courts: the London TCC (one questionnaire only), Bristol TCC (four), Bristol Mercantile Court (two), Leeds District Registry (one), Newcastle Upon Tyne County Court (one), and one questionnaire without any information on the court or judge.

The Birmingham Mercantile Court and Birmingham TCC judges regularly return questionnaires, providing comprehensive and detailed information. However, other judges need to be contacted in order to see if the response rate can be improved.

As highlighted above, we are reliant on the courts to send out the solicitors' questionnaires whenever the issue of cost budgets is considered by the court and also at the end of the case. Only the courts have access to the solicitors' contact information. We are also reliant on the court staff to provide judges with a fresh copy of the questionnaire whenever cost budgets are considered.

9 RESULTS FROM THE SOLICITORS' QUESTIONNAIRE

Between 1 October 2011 and 20 January 2012, eleven completed solicitors' questionnaires were received and the responses were analysed.

However, at the time of this analysis, the Pilot has been running for only four months. A full assessment will not be possible until after the Pilot has concluded on 30 September 2012. At this stage it is too early to draw any firm conclusions.

The results of the data in respect of the relevant questions are set out below:

Q1: Court Name

The majority of the respondents' cases were in the Birmingham Mercantile Court (7/11).

The responses and frequency of responses are set out below:

1.	Mercantile Court, Birmingham	7/11
2.	High Court, Leeds Q.B. Division	2/11
3.	Mercantile Court, Leeds	1/11
4.	TCC, High Court, Birmingham	1/11

It is disappointing that no responses have been received from cases in the TCC in London as we would expect this court to deal with the most high value claims. It is hoped that a better response rate will be seen in the remainder of the Pilot.

Q3: Type of hearing?

The majority of the respondents returned questionnaires relating to case management conferences (7/11), three related to costs management hearings and only one related to an assessment of costs after settlement.

Q4: Which party do you represent?

Six questionnaires were received from solicitors acting for the claimant and 5 from solicitors acting for the defendant.

Q5: What was the case about?

The most common subject of the respondents' cases concerned professional negligence.

The responses and frequency of responses are set out below:

1.	Professional negligence	4/11
2.	Breach of franchise agreement	2/11
3.	Claim for specific performance	2/11
4.	Consumer Protection Act	1/11
5.	International carriage of goods	1/11
6.	Construction	1/11

Q6: What was the value of the claim including counterclaims?

Each respondent was asked about the value of their claim by indicating the relevant band from those set out below:

1.	Under £50,000	2/11
2.	£50,000-£99,999	1/11
3.	£100,000-£249,999	4/11
4.	£250,000- £499,999	3/11
5.	£500,000-£999,999	1/11
6.	£1m - £4,999,999	0/11
7.	£5m - £9,999,999	0/11
8.	£10m - £19,999,99	0/11
9.	£20m or above	0/11

Generally, the value of most claims was between £100,000 and £500,000, with no claims being over £1 million in value. This may reflect the fact that we received only one questionnaire from the London TCC to date, from a judge rather than a solicitor, where the higher value claims are likely to be heard. The low response rate perhaps also limits the conclusions that can be drawn at this stage as to the advantages and disadvantages of the Pilot in relation to high value claims.

Q7: How long did it take you to complete Form HB for the first Case Management Conference?

The majority of respondents took between two and four hours to complete Form HB. No respondent took less than an hour. This result is similar to the results of the Birmingham Pilot, which came to the conclusion that the exercise of completing the budget form, if done efficiently, takes about two and a half hours.[48]

The responses and frequency of responses are set out below:

1.	2-3 hours	5/11
2.	3-4 hours	3/11
3.	1-2 hours	2/11
4.	5 hours or over	1/11
5.	0-1 hours	0/11

Q8a: Did you revise Form HB for a subsequent hearing? Q8b: If so, how long did it take you to revise it?

Only one respondent had revised Form HB for a subsequent hearing and noted that it had taken between one and two hours to revise the form.

Q9: If you have ticked 5 hours or over in relation to either question 7 or 8b above, please explain why?

One respondent, who had indicated that they had taken over six hours to complete Form HB stated that very detailed breakdown was required. No other respondents commented in this section of the questionnaire.

[48] The feedback we have received from costs draftsmen in London is that the process can take considerably longer than this but this is not reflected in the results of the questionnaires completed to date.

Q10: What grade(s) of fee earner(s) were involved in completing Form HB (please tick all that apply):

Respondents were asked to indicate each grade of fee earner involved in completing Form HB. In some instances, more than one grade of fee earner was indicated on the questionnaire.

In 7/11 responses, a solicitor with over eight years experience was involved. In only two instances were solicitors with between four and eight years involved. Three respondents indicated that more junior solicitors or legal executives were involved and three respondents indicated that trainees or paralegals were involved.

Q11: What were the benefits of the Costs Management Procedure?

In general, the respondents considered that the costs management procedure assisted with early attention to future costs and helped clients to be better informed of overall costs. Some respondents, however, did not consider there to be any benefits.

The responses and frequency of responses are set out below:

1.	Early attention to future costs	3/11
2.	None	3/11
3.	Client better informed of overall costs	3/11
4.	Informed re options	1/11
5.	Easier to deal with costs after settlement	1/11
6.	Assists settlement	1/11
7.	Allows judges to challenge level of costs	1/11
8.	Allows early approval of costs budget	1/11

Q12: What were the disadvantages of the Costs Management Procedure?

In general, the respondents indicated that the main disadvantages were (i) that the costs management procedure increased costs, and (ii) that it was time consuming.

The responses and response frequency are set out below:

1.	Increases costs	6/11
2.	Time consuming	4/11
3.	Duplication can occur	2/11
4.	Budgets not approved	1/11
5.	None	1/11
6.	Unfamiliarity increases time spent	1/11
7.	Costs capping	1/11

Quite clearly, the cost of preparing the costs budget is a concern and completing Form HB would appear to be viewed as a time-consuming exercise, which therefore generates additional costs.

Q13: How do you think the Costs Management Procedure could be improved?

From the number of questionnaires received, there was no general consensus on any key improvements. The responses are set out below. Three respondents did not provide an answer.

The responses and response frequency are set out below:

1.	Abolish procedure	2/11
2.	No response	2 /11
3.	Exchange of costs estimates in advance	1/11
4.	Roll out to all suitable cases	1/11
5.	Link form to excel spreadsheet	1/11
6.	N/A	1/11
7.	Make it discretionary	1/11
8.	Option to do it by phone	1/11
9.	Start procedure at outset	1/11
10.	Sign off by client on form	1/11

Q14: Have you got any suggestions as to how Precedent HB could be improved?

The majority of respondents did not provide suggestions as to how Form HB could be improved, either by answering 'no' or not responding. Those that did respond suggested that:

(i) it could be shortened and made clearer;

(ii) that the categories could be more specific; and

(iii) that the amount or paperwork required could be reduced.

The responses and response frequency are set out below:

1.	No	6/11
2.	No response	2/11
3.	Reduce paperwork	1/11
4.	Categories too general	1/11
5.	Shorten and make clearer	1/11

In addition, we have received feedback from other miscellaneous sources on how the Form HB could be improved. Those included:

a) allowing room for more than one expert as it is rare in TCC litigation for a party to instruct just one;
b) allowing room for brief fees for Counsel as opposed to hourly rates;
c) conversely allowing hourly rates for experts rather than lump sums;
d) creating a category for strategy and general advice to the client;
e) making the costs budget time based rather than task based with time periods along the top of the spreadsheet and tasks down the left hand side.

Q15: Has the case concluded?

Of the eleven cases respondents referred to, only one case had concluded. The chances of a case concluding at this early stage of the Pilot, when only 4 months have passed, are limited.

1. Yes 1/11
2. No 10/11

Questions 16 to 22 relate to concluded cases only and thus were not answered by the respondents. Only one case had concluded at the time of completing the questionnaires.

10 RESULTS FROM THE JUDGES' QUESTIONNAIRE

Between 1 October 2011 and 20 January 2012, 31 completed Judges' questionnaires were received and the responses were analysed. The results of the data in respect of the relevant questions are set out below.

Q3: Type of hearing

The majority of respondents' hearings were CMCs (28/31). One was a Costs Management Hearing, one was a PTR and one was an assessment of costs after judgement or settlement.

Q4: Did you make a Costs Management Order for this claim?

The majority of respondents made a CMO at the relevant hearing (25/31).

Q5: If you answered "yes" to Q4 above, please explain why:

The most common reason given by the respondents for making a CMO was 'proportionality' by which was meant proportionality of the costs to the value of the claims in question. The other most common reasons given were as an aide to case management and to control future cost increases.

The responses and frequency of responses are set out below:

1.	Proportionality	12/31
2.	Aide to case management	6/31
3.	Control of future cost increases	6/31
4.	To record budget approval	5/31
5.	Question not answered	4/31
6.	Typical type of case	3/31
7.	Equality of arms	2/31
8.	Cost consequences of contingencies known in advance	1/31
9.	Unlikely to be any unforeseen contingencies	1/31

Q6: What was the case about? (e.g. professional negligence claim against an architect).

The most common response was 'negligence', followed by 'breach of contract' and 'construction dispute'. However, the respondent's hearings concerned a broad range of subject matters.

The responses and frequency of responses are set out below:

1.	Negligence	9/31
2.	Breach of contract	5/31
3.	Construction dispute	4/31
4.	Sale of goods	2/31
5.	Restitution claim	2/31
6.	Costs of remedial works	2/31
7.	Insurance	2/31
8.	Fraudulent misrepresentation	2/31
9.	Conversion	1/32
10.	Dilapidations (L&T)	1/31
11.	Carriage of goods	1/31
12.	Franchising	1/31
13.	Employment dispute	1/31

Q7: What was the value of the claim?

Each respondent was asked about the value of the claim by indicating the relevant band from those set out below. The most common responses were "*£100,000-£249,000*" then "*under £50,000.*" No respondents had a claim worth more than £5 million. There was generally a broad range of claim values.

The responses and frequency of responses are set out below:

1.	Under £50,000	8/31
2.	£50,000-£99,999	2/31
3.	£100,000-£249,000	9/31
4.	£250,000-£499,999	6/31
5.	£500,000-£999,999	2/31
6.	£1m- £4,999,999	4/31
7.	£5m - £9,999,999	0/31
8.	£10m - £19,999,99	0/31
9.	£20m or above	0/31

Q8: How long did you spend preparing for this hearing?

The average time spent was approximately 65 minutes.

Q9: How much time was spent studying the budgets?

The average time spent was approximately 20 minutes with the lowest time being fifteen minutes and the highest being thirty minutes.

Q10: How long did the hearing last?

On average, hearings lasted approximately 47 minutes.

Q11: How much time was spent dealing with the approval/ amendment of the budgets?

The average time spent was approximately 13 minutes. The maximum time spent was twenty minutes and the minimum five minutes.

Q12: From your perspective what are the benefits of the Costs Management Procedure?

In general, the respondents considered that the greatest benefit of the costs management procedure was encouraging proportionality (14/31) i.e. that costs were proportional to the value of the claims in question. Eight did not provide an answer.

The responses and frequency of responses are set out below:

1.	Proportionality	14/31
2.	Not answered	8/31
3.	Improved case management	7/31
4.	Educating parties about their potential costs	6/31
5.	Readiness for mediation	5/31
6.	Allows scrutiny by Court	5/31
7.	Certainty of costs from outset	4/31
8.	Equality of arms	4/31
9.	Identifies possible cost savings	1/31
10.	Too early to say	1/31

Q13: From your perspective what are the disadvantages of the Costs Management Procedure?

The majority of respondents either answered 'none' or did not answer (16/31 and 11/31 respectively).

Two respondents considered that more judicial time was spent on case management, one commented that it was too early to say and one considered that the cost of preparing Precedent HB was a disadvantage.

Q14: Could the procedure be improved?

The majority of respondents either answered 'no' (13/31) or did not respond (15/31). 3 answered 'yes'.

Q15: If your answer to Q14 above was "yes", how could the procedure be improved?

Two respondents considered that parties should be required to approve their budgets and one considered that the precedent should be filed in electronic format as well as in hard copy.

11 FEEDBACK FROM THE SOLICITORS' QUESTIONNAIRES AND INTERVIEWS

As mentioned above, a total of eleven questionnaires were returned by solicitors.

Nine out of eleven solicitors agreed to amplify their answers by telephone. Feedback gathered from these questionnaires and telephone interviews indicated that the following issues should be addressed.

Form HB

The answers provided suggest that many solicitors find completing the budget in accordance with Form HB difficult and time-consuming, but expect that this exercise will get easier with practice.

Three solicitors stated that the link to Form HB should also lead to a version in Excel. Some respondents reported that they had to calculate figures manually, or otherwise type the whole form into an Excel document, which one solicitor found "*immensely irritating*".

Form HB does not appear to be an automated spreadsheet. If one downloads the form from http://hmctsformfinder.justice.gov.uk/courtfinder/forms/hb-eng.pdf it is possible for instance to fill in the "*Assumptions [to be completed as appropriate*]" on page 1, but the columns next to such assumptions (Disbursements, Profit Costs, Total) do not allow any entry to be made.

Feedback from miscellaneous sources has also indicated that there was frustration that firms had to prepare their own excel spreadsheets in order to allow more flexibility and make the necessary calculations easier.

It seems that setting up Form HB in such manner that it always downloads as a useable spreadsheet would be a substantial improvement.

Two solicitors recommended shortening Form HB and making it less detailed. They found that the required apportionments of costs, also the apportionments between fee earners, are too detailed.

One respondent stated that a "*range of figures*" in respect of the categories of work would make lawyers feel less worried about their predictions when setting out the costs estimate.

Who should complete Form HB?

Often the task of preparing the costs budget is passed to junior lawyers or trainees, rather than being done by the most senior person. However, no one questioned the importance of getting the costs budget right. It is often mentioned how difficult it is to complete the costs budget, particularly in complex cases, and that it takes time, skill and litigation experience.

This might suggest that the person best placed to carry out the estimate would be an experienced litigator, rather than a junior lawyer or trainee.

One solicitor (with over eight years' PQE and litigation experience) in fact pointed out that a senior solicitor ought to prepare the costs budget; and that particularly e-disclosure is often under-appreciated by less experienced litigators.

Question 10 in the Solicitors' questionnaire asks what grades of fee earners were involved in completing Form HB. In seven out of eleven responses a solicitor with over eight years experience was involved. The frequent involvement of senior solicitors in this exercise also explains why the costs of preparing the budget may be high. Feedback from costs draftsmen in London suggests that they are frequently being used in addition to fee earners to produce the Costs Budget.

Risk of under-estimating costs

One lawyer, who referred to his litigation career of over three decades, strongly disapproved of Form HB and the additional costs it incurs for the client. At the same time he appreciated how important it is that clients know the potential liability they must face. However, this solicitor said that in his litigation career he has never *over*-estimated costs, whereas *under*-estimating costs can happen very easily. If costs are underestimated, this has to be explained to the client; and an application to the court to approve the increased costs in itself incurs further costs.

Two-pronged process of costs and issues

One solicitor referred to a judge trying to restrict the budget by treating the case in question as a straightforward case, which according to the claimant's solicitor it was not. The claimant was a mortgage lender in a professional negligence case against a law firm. The defendant raised many issues in a "*scatter gun*" approach and was not willing adequately to address and narrow the issues in dispute – and thus forced the claimant to address *all* the issues so that in trial such issues would not be regarded as accepted. Therefore just addressing the costs was not enough – dealing with the issues was just as important.

Could there be a risk of reducing a costs budget simply by reference to the amount in dispute, and so proportionality, rather than by reference to the issues and the work in fact required? The solicitor in the above-mentioned case seemed to note a tendency to simplify a case in order to reduce the level of costs, without considering the complexity of the issues.

Form HB does not provide for the issues of the case to be set out in the costs budget. It was suggested that including the issues of the case in Form HB could be a way of reminding anyone looking at the costs budget of the complexity of the case.

Clients' approval of the budget

One solicitor recommended the introduction of a formal requirement for clients to approve the budget. This solicitor referred to law firms who do not necessarily obtain the client's consent to the budget, although of course it is the client who funds the litigation!

In this context the issue of client's attendance in court was raised: there would be no need for clients to attend the CMC, but it would be beneficial if clients were to attend the PTR. At the PTR the judge could then directly speak to the parties about the risks of proceeding to trial and also address the issues with the parties, which might allow them to come closer to a settlement.

New skills and training

Expressly and implicitly the issue of training was raised several times. What form of training lawyers and judges should receive in order to perform the tasks of costs management remains to be discussed.

Implications for mediation

The case described by one solicitor was settled by mediation soon after completing Form HB. The solicitor explained that at the time of the mediation the parties had a much better understanding of the likely costs involved in litigation, which was due to the Pilot and completing Form HB. A clear understanding of the potential costs of litigation at the time of mediation seems to have contributed to the success of the mediation.

Hearings by telephone

A case was reported where both parties were fully prepared for trial and all the costs had already been incurred when a costs management hearing at Leeds Mercantile Court was ordered. Both parties had to travel a substantial distance for the hearing, which served no purpose at this late stage in the process, but added "*several thousand pounds*" to the defendant's costs and £1,000 to the claimant's costs.

The conclusion in this particular case was that a hearing by telephone would have saved thousands of pounds.

Case transfer

Duplication of work as a result of transferring a case from one court to another court was also raised. One solicitor who approved of the Pilot reported one reservation. She acted for the claimant in a professional negligence case against a solicitor. The matter was transferred to the Birmingham Mercantile Court after allocation to a different court. Cost estimates had been submitted to the first court and had to be produced again for the Birmingham Mercantile Court. This felt like a duplication of work and costs.

The question arises how such duplication of the process could be avoided; and if a review of an existing order on transfer to the new court might be part of a solution.

Further feedback received suggests that the costs management procedure is most beneficial if done early in the process.

Transparency about costs

More certainty as to the other side's costs and as to the likely overall costs seems to be regarded as a substantial benefit. Ten out of eleven solicitors accept that the Pilot focuses parties' and solicitors' minds on the issues and on the costs of the future conduct of the case. Ten out of eleven solicitors appreciate how important it is that clients know the potential liability they must face.

Several solicitors commented that completing Form HB is a useful exercise because it makes everyone realise what needs to be done to build the case, and what the costs of this process are likely to be. In this context it was also pointed out that this educates the parties about the costs of not settling at an early stage, which might assist settlement.

Two solicitors expressed the view that the costs management procedure will make things easier if the issue of costs arises after settlement.

What does the client want?

Two solicitors explained that their firms specialise in providing legal services to the insurance and reinsurance markets; and that they mostly act for the defendant. They further explained that insurance clients are usually happy to receive a total figure of the estimated costs and are not interested in much detail. Therefore completing the budget form constitutes extra work that otherwise would not have to be done. It adds to the costs of litigation.

One of the solicitors specialised in insurance said that in 99 per cent of the cases the other party (i.e. the claimant) is willing to disclose their incurred and estimated future costs when asked. This will of course not be done in the detail of Form HB, but given as a total figure. However, this can be obtained in a five-minute telephone call or in writing, whereas completing Form HB took her more than 5 hours every time, which was very difficult to explain to the respective clients.

How cost-effective is costs management?

In the Final Report Lord Justice Jackson lists the issues for consideration if costs management becomes a feature of civil litigation in the future. In paragraph 1.5 (vi), Chapter 40 he asks a central question:

> *"What steps should be taken to ensure that the process is cost-effective, i.e. that the litigation costs saved exceed the costs of the process?"*

Cost transparency and more certainty were the frequently stated merits of the Pilot. "*Time-consuming and costly*" were the most frequently stated disadvantages. It is probably too early for a final conclusion on the question whether the advantages of completing Form HB outweigh the disadvantages. A clearer picture should have emerged by the end of the Pilot.

12 FEEDBACK FROM JUDGES' QUESTIONNAIRES AND INTERVIEWS

As at 30 January 2012, a total of 32 questionnaires for judges have been returned.

Out of 32 questionnaires for judges, 16 came from the Birmingham Mercantile Court and 6 questionnaires came from the Birmingham TCC. Out of the remaining 10 judges' questionnaires, one was returned by the London TCC and one by the Bristol TCC. None of the other 8 questionnaires gives the name of the judge who completed the questionnaire.

Therefore to date telephone interviews could only be conducted with a Birmingham Mercantile Court judge and a Birmingham TCC judge, respectively.

Feedback gathered from the judges' questionnaires and telephone interviews indicated that the following issues should be addressed.

Cost management or cost capping?

A judge at the Birmingham Mercantile Court who is fully supportive of the Pilot and regards it as viable, pointed out that the challenge during the Birmingham Pilot was, and continues

to be during this Pilot, that parties and their lawyers understand that the costs management procedure is about costs *management*, and not costs *capping*.

During the Birmingham Pilot, this Birmingham Mercantile Court judge had 20 per cent fewer cases compared to his usual caseload because many parties (or rather their respective solicitors) chose to file their claim elsewhere in order to avoid their costs budgets being "*capped*". This judge was happy to report that now his numbers are up to what they were before the cost management pilots; and in his opinion a very important and positive message follows from this: that solicitors have become to appreciate the system and now clearly see the advantages of having their clients' budget approved at an early stage and of knowing the overall risk involved in going to trial.

This particular judge emphasised that he does not want to cut costs per se; although costs should ideally be proportionate to the claim. He is fully aware that in some cases parties feel obliged to instruct senior counsel even if this doubles the legal fees, for example when the party is being accused of fraud. Equal footing then also comes into the equation and he might approve two budgets, which can seem disproportionally high for the respective claim.

Revised budgets

One Birmingham Mercantile Court judge described a case where he left the budget issue open until the end of trial. The case was about professional negligence; solicitor's mortgage fraud was being alleged. Prior to the PTR, the parties filed revised budgets to account for sums incurred but not budgeted for due either to oversight or reacting to conduct of litigation by the other side. At the PTR, the judge allowed the defendant's revised budget. With regard to the claimant's revised budget, he only allowed part of the increase to accommodate fees for a more senior counsel to face a QC instructed by the defendant. He explained this with equality of arms and also the fact that fraud was being alleged.

Thus in this case the judge neither disapproved nor approved the claimant's revised budget, but gave permission for either party to seek approval or disapproval of budgets at the end of trial when the matter could be reviewed in the light of known conduct of the litigation.

The judge explained that the advantage of leaving the budget issue open as described above is that justification of exceeding the budget could then be looked at by the case managing and trial judge (i.e. himself) before the matter might have to go for detailed assessment in front of a costs judge not privy to the case management and trial. He gave permission to raise the issue of costs again at the end of the trial. The claimant hereby was given the opportunity to seek approval retrospectively. And the trial judge was able to give a steer to the costs judge.

This judge suggested that perhaps this should be put in PD51G: allowing for an informed decision to be made at the end of trial, rather than leaving it to the costs judge to make a decision "*in a vacuum*".

Could the cost management procedure be improved?

The judges who returned questionnaires from the Birmingham Mercantile Court, the Birmingham TCC and the London TCC all agreed that the costs management procedure works well and is a perfectly serviceable scheme, which does not call for improvements.

In this context, a judge at the Birmingham TCC pointed out that there are two elements to the costs management procedure: (1) Form HB; and (2) PD51G. This judge said that he received virtually no negative feedback from parties suggesting that Form HB needs revising in any way, nor did he receive any negative feedback from court users regarding PD51G.

One of the judges expressed the opinion that the costs estimate is the "*finance director's question*" and that it would be total madness not to prepare a costs budget in bigger cases. It is therefore crucial to educate parties and their solicitors to expect that they must file cost estimates in accordance with Form HB straight away.

The parties' approval of the budget

A Birmingham Mercantile Court judge reported what he learnt at a judicial training event in September 2011. One of the topics discussed was whether the budget had been approved by the parties, since it is the parties (or at least one of them) and not the solicitors who have to pay for it all.

The general view at the judicial training, which was also attended by several barristers, was that Form HB should provide for a formal requirement of the parties' verification of the budget. Parties should formally approve their respective costs budgets before exchange or filing with the court. It was suggested to include a statement such as "*My costs budget has been explained to me and I understand that I will be liable to pay £.X. I accept that this is a reasonable budget*."

New skills and training

The same judge at the Birmingham Mercantile Court reported that he is frequently asked to speak about the subject of costs management. This is partially because there is great interest in the subject by the profession, but also due to the fact that many lawyers have great difficulties preparing the budget and completing Form HB. Some solicitors have asked this judge for advice on how to do their budgets.

He believes that a judge should not have to lecture in his spare time and therefore would very much welcome if the topic of training could be raised with Lord Justice Jackson. Some guidance should be given to lawyers on how to prepare their budgets.

Case transfer

One judge at the Birmingham TCC referred to the fact that he does both High Court and County Court work and explained a problem that arises in practice: It happens fairly often that a case is filed in a different court, wonders around for a couple of years, wasting time and incurring costs, until someone finally suggests transferring the case to the TCC.

The question then arises whether in a case like this, a costs management order still ought to be made. This judge pointed out that in any event, the earlier on in a case that a costs management order can be made, the better.

How cost-effective is costs management?

A central question is whether the cost of preparing the cost estimate is in itself proportionate to the exercise.

In the context of this question, a judge at the Birmingham TCC referred to a Court Users Meeting, which was particularly well attended by solicitors and barristers. He explained that he holds these meetings every 6 months, in November and in May.

The common ground among the attendees of the last Court Users Meeting at the Birmingham TCC in November 2011 was that it takes 2-3 hours to prepare the costs budget in accordance with Form HB, virtually never exceeding 4 hours. The overwhelming majority confirmed this. The majority of the attendees also believed that familiarity with the process will improve this further.

In answer to the question whether the generated additional costs are proportionate to the costs saved by the costs management exercise, the Birmingham TCC judge said that at the Court Users Meeting in November 2011, in all cases but one, everyone said "Yes".

Contingencies

Two judges pointed out how important it is to flag up the contingencies in Form HB. In terms of costs it makes a substantial difference whether you have a one-week trial or a two-week trial. Flagging up contingencies also shows flexibility.

Litigant in person

It was observed that the costs management procedure is not appropriate for litigants in person and we unaware of any case in which a litigant in person has been asked to complete Form HB. It would be sensible for the rules expressly to exempt litigants in person, as they do in defamation costs management: see paragraph 3.2 of Practice Direction 51D.

Judicial continuity

A Birmingham TCC judge believes that the key to the Pilot being so successful is judicial continuity. He stated that the costs management procedure works so well in the TCC and Mercantile Courts because the same judge deals with a case from start to finish. This is not given in other courts. This judge has severe doubts whether the scheme would work without judicial continuity and sees many problems arising if the costs management procedure were to be extended to other courts.

13 SUMMARY OF INTERIM RESULTS

As highlighted above, due to the relatively limited responses to the questionnaires issued to date, any findings highlighted in this report are by necessity interim only. It is hoped that both solicitors and judges, but particularly solicitors, will complete more of the questionnaires during the remainder of the Pilot.

With these caveats in mind, it seems that solicitors in general have a mixed opinion of the Pilot. Significant concerns are expressed that the Pilot increases costs due to the time taken to comply with it. This is despite the fact that for most respondents, filling out of Form HB only took between two and three hours with only one solicitor taking over five hours. However, feedback from costs draftsmen and other sources has indicated that, in London at least, the process can take considerably longer, although this is not borne out by the questionnaires received to date.

Having said this, solicitors interviewed seem to acknowledge that the Form HB would become easier to deal with once familiarity with it increased and if the feedback as to how the Form HB is taken on board, this may also assist the process. Solicitors also highlighted that the Pilot did assist with early attention to costs, that this allowed their clients to better understand their potential liabilities (including their potential liability to the other party if they did not win) and could also assist with settlement. It will be interesting to see the views of solicitors representing parties in higher value cases, particularly in the London TCC, as the responses to date represent relatively low value claims, with only one claim being worth over £500,000.

In relation to the judges' views, they generally seem to believe that the Pilot encouraged proportionality of costs to the value of the claim, that the current scheme worked well and did not require improvements. Other advantages included that it aided case management as well as controlling future costs. However, we would note that the majority of responses from judges came from a very limited number of individuals and courts and accordingly any findings should be treated with caution at this stage.