

**Guidelines for pilot from 01/06/2009 of “costs management” of cases in the
Birmingham TCC and Mercantile Court where parties voluntarily provide detailed
estimates of future costs** (bhamcostsmanag7)

1. The parties will submit detailed budgets of their “estimates of costs” as attachments to their Case Management Information Sheets and Pre-trial Check Lists (or at such other time as ordered by the court).
2. At the CMC and PTR, the judge will have before him/her these detailed budgets of both parties for the litigation. He/she will take into account the costs involved in each proposed procedural step when giving case management directions. The judge:
 - (i) Will, either by agreement between the parties or after hearing argument, record approval or disapproval of each side's budget for each step in the action.
 - (ii) May order attendance at regular hearings (by telephone if appropriate), the purpose of which is to monitor expenditure. Parties will be expected to provide to the judge any budget revisions in good time before such hearings to enable the judge to prepare for the hearing.
 - (iii) May include provision in the directions for any party to apply to the court for assistance if it considers that another party is behaving oppressively in seeking to cause that party to spend money unnecessarily.
3. The budgets will be in a standard Excel template form, as per the attached example. Each side will include separately in its budget:
 - (i) reasonable allowances for intended activities: e.g. disclosure (if appropriate, showing comparative electronic and paper methodology), preparation of witness statements, obtaining expert reports, mediation or any other steps which are deemed necessary for the particular case;
 - (ii) reasonable allowances for specified contingencies e.g. specific disclosure application (if an opponent fails to give proper disclosure); resisting applications (if made inappropriately by opponent).
4. The budget must include reasonable allowances for disbursements, in particular, court fees, counsel's fees and any mediator or expert fees.
5. It is intended that a party's budget will be no more detailed than that which the solicitor provides to his client for the purposes of paragraph 2.03 of the Solicitors Code of Conduct 2007. Accordingly, no costs should be involved on either side in the preparation of such estimate. A budget provided to the court will not (without consent) be released to any other party, until that party is ready to exchange but it is expected that the parties should discuss their budgets during the budget building process and before CMC, as they should do in the instance of electronic disclosure (CPR 31PD2A.2).
6. At each subsequent CMC, PTR and at trial the judge will receive updated figures, in order to ascertain what departures have occurred from each side's budget and why. A judge will, either by agreement between the parties or after hearing argument, approve or disapprove such departures from the previous budget as have occurred.
7. If any party exceeds the costs previously estimated for any activity, it shall notify all other parties and the court of the amount of the excess.

8. Directions orders produced at the end of CMCs will be given to the parties on each side by their respective lawyers, together with copies of the budgets which the court has approved or disapproved.
9. Bearing in mind that in the majority of TCC and Mercantile cases costs are the most important single issue, the judge will seek to manage the costs of the litigation as well as the case itself. When the court or a party relies upon one party's estimate of costs, the judge will record the fact of such reliance in the case management directions (for the purpose of any future argument concerning paragraph 6.5A of the Costs Practice Direction).
10. The objective of costs management is to control the litigation in such manner that the costs of each party are proportionate to the amount at stake and to ensure that the parties are on an equal footing.
11. At the end of the litigation the judge conducting a detailed or summary assessment will have regard to the budget estimates of the receiving party and will generally approve as reasonable and proportionate any costs claimed which fall within the previously approved total.
12. Where all parties to an action agree that costs management as described above should be undertaken by the court, the claimant's solicitor should notify the court manager of such agreement on behalf of all parties.

COMMENT

- a) Survey evidence suggests that SMEs crave certainty about the costs of litigation; and that fear of indeterminate costs liability in the event of defeat sometimes deters SMEs from pursuing valid claims or defences.
- b) The above guidelines were discussed at a well attended joint meeting of the TCC Users Committee and the Mercantile Court Users Committee in Birmingham on 26th May 2009. At the end of the meeting a substantial number of practitioners voted in favour of the above guidelines. No-one voted against. Some practitioners abstained, in order to consider the proposed guidelines further with their clients. I am grateful to the practitioners for attending that meeting and for the constructive discussions which took place.
- c) The Master of the Rolls (as Head of Civil Justice), Sir Anthony May (as President of the QBD) and Lord Justice Moore-Bick (as Deputy-Head of Civil Justice) have all indicated their approval to the proposed pilot exercise in Birmingham. This is a major court centre, which serves the business community of the West Midlands and beyond. The specialist courts have for many years occupied the same building and operated a shared list. In these circumstances, and given the coherence and expertise of the profession in Birmingham, this city is the ideal location for such a pilot exercise.

27th May 2009

Rupert Jackson