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Costs Management Pilot

Final Report

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1 Introduction

The Costs Management Pilot Scheme (the "**Pilot**") was launched in all Technology and Construction Courts ("**TCC**") and Mercantile Courts on 1 October 2011. The Pilot applies to any case which has its first case management conference on or after 1 October 2011[1]. The Pilot was originally scheduled to run for 12 months, finishing on 30 September 2012, but was extended to run until 31 March 2013 in order to continue the costs management procedure without interruption until the new rules come into force on 1 April 2013. The Pilot continues for cases in the TCC or Mercantile Court issued before 1 April 2013.[2]

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 been the subject of heated debate amongst practitioners regarding its potential advantages and disadvantages. It has also provided the opportunity to ensure that any changes made to the Civil Procedure Rules on costs take into account the practical insights provided by the Pilot.

Sir Rupert Jackson's vision for the reform of litigation costs is to become a reality in April 2013. The Pilot has, as anticipated, brought to light practical problems and assisted in formulating the rules of the cost reforms which have now been passed by the Civil Procedure Rules Committee (the "**Rules Committee**") and will be fully implemented in April 2013,[3] subject to an amendment that introduces a (temporary) exemption from costs management in cases where the claim exceeds the value of £2 million ***"except where the court so orders"***.[4]

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 ("**Fenwick Elliott**"). In monitoring the effectiveness of the Pilot he is being assisted by Claire King, an Associate of Fenwick Elliott, and by Christina Lockwood, a lawyer and CEDR accredited mediator. Dr Benjamin Styles, a Chartered Statistician, has assisted in analysing the results of the Pilot.[5]

Before setting out the final results, we will first examine the courts' existing costs management powers, a solicitor's duty to inform their client about costs under the existing codes of conduct and Civil Procedure Rules, 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 "*Costs Management*". However, that is not to say that the CPR do not attempt to control costs. As Lord Justice Jackson acknowledges in his "*Review of Civil Litigation Costs: Preliminary Report*" (the "**Preliminary Report**"):

1. See Practice Direction 51G – Costs Management in Mercantile Courts and Technology and Construction Courts – Pilot Scheme, paragraph 1.1(3).
2. Paragraph 22(14) of SI 2013/262, Civil Procedure (Amendment) Rules 2013 reads: *"Any proceedings in the Mercantile Courts and the Construction Courts commenced before 1 April 2013 that are within the scope of the Costs Management in Mercantile Courts and Construction Courts Pilot Scheme provided for by Practice Direction 51G supporting Part 51 will proceed and be completed in accordance with that scheme."*
3. See also Ramsey, J (2012) *Costs Management Implementation Lecture,* 29 May, paragraph 5.
4. The amendment to CPR rule 3.12(1) was announced on 18 February 2013. It will be discussed in chapter 15 of this report and is attached as Appendix 6.
5. Thanks must also be given to King's College, London, TeCSA and DW Costs Limited for their sponsorship of this research; and to Tom Hutchison, an Associate of Freshfields Bruckhaus Deringer LLP, who explained the statistics for the Pilot's Interim Report. Chris Shilvock, a trainee at Fenwick Elliott, has also assisted in preparing this 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".*[6]

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 the 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;*
>
> *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."*[7]

6. Jackson LJ (2009) *Review of Civil Litigation Costs: Preliminary Report* (the "**Preliminary Report**"), 8 May, paragraph 2.1.

7. Jackson LJ (2009), the Preliminary Report, paragraph 2.1.

Costs estimates

In addition to the overriding objective, the Woolf reforms[8] introduced for the first time the idea of "*costs estimates,*"[9] 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 CPD which provides that costs estimates should be served by the parties at both the Allocation Questionnaire and Pre-Trial Check List (Listing Questionnaire) stage of proceedings[10], and that the court may at its discretion request further cost estimates at any stage of the proceedings.[11]

Prior to the Pilot, Section 6 of the CPD contained the relevant guidance on the format of costs estimates, stating 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 was 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.[12] Unfortunately 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*[13] 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 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,*[14] section 6 of the CPD was amended[15] to give the court additional power to seek explanations from parties where costs have increased by 20% or more from an earlier estimate[16], and as a result if the

8. The purpose of cost estimates is 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, Section 6.1).
9. CPD, Ch.7, paragraph 7.
10. CPD 6.4(1).
11. CPD 6.3.
12. CPD 6.6(1).
13. [2003] EWCA Civ 1766.
14. [2003] EWCA Civ 1766.
15. The 40th update to the CPR came into force on the 1 October 2005.
16. CPD 6.5A.

party cannot 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".*[17]

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 costs 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."*[18]

Costs 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."*[19]

Until 6 April 2009, the CPR made no reference to the court's power to impose a costs-capping order. Instead courts sought to rely on the wider powers conferred upon them by s.51 of the Senior Courts Act 1981[20] and the court's general case management powers in CPR 3.1(2)[21]. This approach was confirmed in the Court of Appeal case of *King –v- Telegraph Group Limited.*[22]

Following the decision in *King v Telegraph Group Limited,*[23] the courts were remarkably undecided as to the benefits of costs-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 costs-capping orders as successful ones.

In *Sheppard -v- Mid Essex Strategic Health Authority*[24] 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:

17. Morgan, J, QC (2010), *Cost Management – The Policy Background and the Law,* 23 November.
18. Jackson LJ (2009), the Preliminary Report, paragraph 2.16.
19. Cook, M (2009), Cook on Costs, Paragraph 10.9.
20. 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".*
21. 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".*
22. [2005] 1 WLR 2282.
23. [2005] 1 WLR 2282.
24. [2006] 1 Costs LR 8.

> *"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*[25] in which, whilst acknowledging the legality of costs capping (post *King v Telegraph Limited*[26]), 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*[27] not all judges shared the same enthusiasm for costs-capping; it was therefore wholly expected that the Court of Appeal in *Willis v Nicholson*[28] would provide some much needed guidance. However, somewhat surprisingly, the court declined jurisdiction on the matter; instead opting to invite the Rules Committee to consider the issue of costs 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 costs capping orders.[29] 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 on costs capping (which apply to all cases) essentially codify the test outlined in *Smart v Cheshire NHS Trust.*[30] 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*[31] 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.

25. [2003] EWHC 2806 (QB).
26. [2005] 1 WLR 2282.
27. [2005] 1 WLR 2282.
28. [2007] EWCA Civ 199.
29. 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 costs capping orders.
30. [2003] EWHC 2806 (QB).
31. [2009] EWHC 769.

The difficulty in obtaining a costs capping order was further demonstrated in the case of *Eweida v British Airways PLC,*[32] where the Court of Appeal set aside a costs cap on the basis that the exceptionality test could not be satisfied.

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."*[33]

Many litigators and commentators have questioned whether costs capping orders really help to 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."*[34]

These comments are particularly pertinent given the concerns raised in the legal press that costs management may in itself result in some form of costs 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 costs 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."*[35]

3 Review of solicitors' current duty to inform clients on costs

Solicitors are clearly required to keep their clients informed about the likely costs of litigation and provide cost estimates. The SRA Code of Conduct 2011 (the "**Code of Conduct**") emphasises that solicitors are under a continuous duty to give information on costs, which includes the duty to show clients the other party's proposed and approved costs budget.

The Code of Conduct repeatedly refers to the solicitor's duty to provide information on costs and states 'the outcomes' as mandatory provisions, starting with 'Client care' in its chapter 1:

32. [2009] EWCA Civ 1025.
33. Morgan, J, QC (2010), *Cost Management – The Policy Background and the Law,* 23 November, Page 6, Paragraph 3.
34. Ibid. Page 6, Paragraph 2.
35. Jackson LJ (2009), the Preliminary Report, Paragraph 5.1.

"Outcomes

*You must achieve these outcomes: [*O(1.1) – O(1.12)*]*

O(1.13) *clients receive the best possible information, both at the time of engagement and when appropriate as their matter progresses, about the likely overall cost of their matter."*[36]

Whereas the 'outcomes' describe what firms and individuals must achieve in order to comply with the relevant Principles as defined in the Code of Conduct, 'indicative behaviours' are non-mandatory provisions which supplement the outcomes and specify the kind of behaviour which may establish compliance with the Principles.

"Fee arrangements with your client" comprises several 'indicative behaviours' about keeping clients informed on costs. For example:

"IB(1.13) *discussing whether the potential outcomes of the client's matter are likely to justify the expense or risk involved, including any risk of having to pay someone else's legal fees;*

IB(1.14) *clearly explaining your fees and if and when they are likely to change;*

IB(1.15) *warning about any other payments for which the client may be responsible;*

IB(1.16) *discussing how the client will pay, including whether public funding may be available, whether the client has insurance that might cover the fees, and whether the fees may be paid by someone else such as a trade union."*

Mandatory provisions on fee sharing and referrals are stated in chapter 9 of the Code of Conduct. For example, one outcome that must be achieved is that:

"O(9.5) *clients are informed of any fee sharing arrangement that is relevant to their matter."*

Case law has made it clear that it is essential for solicitors to provide a good first estimate of costs, including a breakdown of solicitors' fees, disbursements and VAT for a specified period. Regular updates must also be provided going forwards. For example, in *Anstalt and others v Hayek and others*[37] Costs Judge Rogers held that not indicating to the client that hourly rates may increase will result in a solicitor being bound by his original charges; and that solicitors must ensure that a client is aware of rates applicable to additional fee earners as a matter progresses. Solicitors have the same duty with regard to providing the client with updated costs estimates at various stages of the proceedings.

The case *Reynolds v Stone Rowe Brewer (a firm)*[38] confirms the importance of complying with the Code of Conduct's provision O(1.13) that clients receive the best possible information, both at the time of engagement and when appropriate as their matter progresses, about the likely costs of their case. Getting the first budget right and being realistic about the likely costs to be incurred is very important.[39]

36. http://www.sra.org.uk/solicitors/handbook/code/part2/rule1/content.page Version 6 of the SRA Handbook was published on 1 January 2013. The Solicitors' Code of Conduct 2007 was replaced on 6 October 2011 by the SRA Code of Conduct 2011 as part of the introduction of outcome-focused regulation.
37. [2008] EWHC 90107 (Costs).
38. [2008] EWHC 497 (QB).
39. *See also Tribe v Southdown Gliding Club Limited and others [2007] EWHC 90080 (Costs); and Woolley v Haden Building Services Limited (No.2) [2008] EWHC 90111 (Costs).*

4 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 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 Proceedings Costs Management Scheme, 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."*[40]

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 to the parties or at least to the paying party.*"[41] 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.[42]

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

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 ("**PD 51G**").[43] 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 Management Information Sheet. Within the costs budget, reasonable allowances must be made for:

40. Jackson, LJ, *Final Report*, chapter 40, paragraph 8.1.
41. Jackson, LJ, *Final Report*, chapter 40, paragraph 7.4.
42. Jackson, LJ, *Final Report,* chapter 29, paragraph 5.
43. http://www.justice.gov.uk/courts/procedure-rules/civil/_old/pd_part51g

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."*[44] The court will have regard to any costs budget filed pursuant to PD 51G at any CMC or 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.[45] Paragraph 4.5 of PD 51G 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.[46]

Seven days after any hearing, each party's legal representative must notify its client in writing of any CMOs made at such hearing and also provide its client with copies of any new or revised budgets which the court has approved.[47]

When assessing costs on the 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.*"[48]

6 Defamation Proceedings Costs Management Scheme

Introduction

A compulsory Defamation Proceedings Costs Management Scheme has been operating in the Royal Courts of Justice and the District Registry at Manchester since 1 October 2011 and applied to defamation proceedings started on or after 1 October 2009 (the "**Defamation Pilot**"). The Defamation Pilot is governed by Practice Direction 51D ("**PD 51D**") and was, like the Pilot itself, extended to run until 31 March 2013.[49] The Defamation Pilot continues for any defamation proceedings commenced before 1 April 2013 within the scope of the scheme.[50]

Both pilot schemes - the Pilot and the Defamation Pilot - are broadly the same. The respective Practice Directions (PD 51G and PD 51D) include many identical provisions and have the same objective of managing litigation so that the costs of each party are reasonable and proportionate.

44. See paragraph 4.2 of PD 51G.
45. See paragraph 4 of PD 51G.
46. See paragraph 6 of PD 51G.
47. See paragraph 7 of PD 51G.
48. See paragraph 8 of PD 51G.
49. The Defamation Pilot is being monitored by others.
50. See paragraph 22(12) of SI 2013/262, Civil Procedure (Amendment) Rules 2013.

PD 51D requires each party to prepare a costs budget in the form of Precedent HA for consideration and approval by the court at the first CMC, and a revised cost budget at various stages of the proceedings thereafter. The court has a responsibility to manage the costs of the litigation as well as the case itself in a manner which is proportionate to the value of the claim and the reputational and public interest issues at stake.[51] Solicitors are expected to liaise monthly to check that their respective budgets are not being exceeded; if they are, either party may apply to the court for a costs management conference.[52]

The Defamation Pilot's purpose is set out in Paragraph 1.3 of PD 51D:

> *"The Defamation Proceedings Costs Management Scheme provides for costs management based on the submission of detailed estimates of future base costs. The objective is to manage the litigation so that the costs of each party are proportionate to the value of the claim and the reputational issues at stake and so that the parties are on an equal footing. Solicitors are already required by paragraph 2.03 of the Solicitors Code of Conduct 2007[53] to provide costs budgets to their clients. Accordingly, it should not be necessary for solicitors to incur substantial additional costs in providing costs budgets to the court."*

Both Pilots' Practice Directions contain mandatory terms, and have exactly the same clause with respect to the budget's effect on subsequent assessment of costs: Paragraph 5.6 of PD 51D, and paragraph 8 of PD 51G, respectively, read:

> "*When assessing costs on the standard basis, the court -*
>
> *(1) will have regard to the receiving party's last approved budget; and*
>
> *(2) will not depart from such approved budget unless satisfied that there is good reason to do so."*

Paragraph 5.6 of PD 51D lies at the heart of the appeal in the key case of *Henry v NGN*. In view of this, and the Pilots' similarities, *Henry v NGN* is relevant for both pilot schemes and details of the case are therefore set out below.

Henry v NGN

One of the first cases conducted under the Defamation Pilot was *Henry v NGN*.[54] The claimant (the receiving party) had exceeded her approved costs budget by almost £300,000.[55]

In a ruling on a preliminary issue for detailed assessment, Senior Costs Judge Hurst held that the claimant was not entitled to claim any more costs than in her court-approved budget, but gave permission to appeal before it had been sought.[56]

Costs Judge Hurst referred to the mandatory nature of PD 51D and decided that due to the claimant's failure to comply with the provisions of PD 51D and inform the defendant and the court of the extra costs, there was no good reason to depart from the approved budget.

The claimant contended that there were good reasons to allow costs greater than the approved budget because the defendant's tactics had given rise to extra work after the last approved budget.[57] The defendant maintained that the claimant had not advised the defendant or the court of the substantial increase in costs, and also failed to liaise with the defendant in respect of the budgets.

51. See PD 51 D, paragraphs 3.1 to 5.5. See also http://www.bailii.org/ew/cases/EWCA/Civ/2013/19.html
52. PD 51 D, paragraph 5.5.
53. Although PD 51D refers to the Solicitors Code of Conduct 2007, NB that it was replaced on 6 October 2011 by the SRA Code of Conduct 2011 as part of the introduction of outcome-focused regulation.
54. *Sylvia Henry v News Group Newspapers Ltd* [2012] EWHC 90218 (Costs) (16 May 2012) (www.practicallaw.com/1-519-5935). Ms Henry was a member of Haringey's social work team assigned to the tragic case of Baby P. Ms Henry brought a defamation claim against NGN due to a series of articles published by the Sun Newspaper. A settlement in favour of the claimant was reached shortly before trial.
55. Ms Henry claimed costs of £650,137, whereas her last approved costs budget was for a total sum of £381,305.
56. See also www.legalfutures.co.uk/features/actual-budget-catastrophe by Andy Ellis, the costs lawyer who acted for the defendant NGN.
57. Further reasons submitted by the claimant in this context: that the claimant's ATE insurance covered only a small proportion of the potential adverse costs; that the defendant did not state that it relied on the claimant's costs budget in settling the proceedings; and that the defendant had not complied with PD 51D either.

Costs Judge Hurst accepted that the defendant's tactics had inevitably increased the claimant's costs. However, it appears that he reached the conclusion that there was no good reason to depart from the approved budget because the claimant had largely ignored PD 51D:

> *"The provisions of the Practice Direction are in mandatory terms. Each party must prepare a costs budget or a revised costs budget (paragraph 3.1), each party must update its budget (paragraph 3.4), solicitors must liaise monthly to check that the budget is not being or is likely to be exceeded (paragraph 5.5). The object of the Direction is to manage the litigation so that the costs of each party are proportionate to the value of the claim and reputational issues at stake, and so that the parties are on an equal footing (paragraph 1.3). I am forced to the conclusion that if one party is unaware that the other party's budget has been significantly exceeded, they are no longer on an equal footing, and the purpose of the cost management scheme is lost.*
>
> *[…] the fact is the Claimant has largely ignored the provisions of the Practice Direction and I therefore reluctantly come to the conclusion that there is no good reason to depart from the budget."*[58]

The judgment in *Henry v NGN* was handed down on 16 May 2012 and was the first indication of the approach the courts might take with regard to approved costs budgets going forwards.[59] It suggested that failing to comply with costs management practice directions could have draconian consequences.

The judgment was appealed and the eagerly awaited Court of Appeal's decision on *Henry v NGN* was published on 28 January 2013 (the "**Court of Appeal Judgment**").[60]

The appeal was allowed – the Court of Appeal Judges[61] were satisfied that in this case there is good reason to depart from the appellant's budget. In their judgment:

> *"It will be for the costs judge to decide in what respects and to what extent the appellant should be allowed to recover costs in excess of those for which the budget allows."*[62]

The only question for determination by the Court of Appeal was therefore whether there was a good reason in this case to depart from the appellant's approved budget. Given the importance of the Court of Appeal Judgment, it is quoted in some detail below:

> *"20. In my view the judge misunderstood the reference in paragraph 1.3 to the parties' being on an equal footing and took too narrow a view of what may amount to good reason under paragraph 5.6(2)(b).[…] When paragraph 1.3 speaks of the parties' being on an equal footing it is concerned with the unfair exploitation of superior resources rather than with the provision of information about how expenditure is progressing. […], there was no inequality of arms."*[63]

> *"21. The appellant's solicitors […] failed to comply with the obligation to exchange information regularly and they also failed to serve a revised budget 7 days before the costs management hearing fixed for 8th June 2011. However, I am unable to accept that compliance with all the requirements of the practice direction is essential before a party can ask the court to depart from the approved budget. It is no more than one factor which the court may take into account in deciding whether there is in fact good*

58. *Sylvia Henry v News Group Newspapers Ltd* [2012] EWHC 90218 (Costs) (16 May 2012), paragraphs 68 and 69 of the Approved Judgment.
59. For further details of the case, see McDonald, G and Bacon, N QC (2012) Article on *Henry v News Group Newspapers Ltd*, 4 New Square, 31 May.
60. http://www.bailii.org/ew/cases/EWCA/Civ/2013/19.html
61. Lord Justice Moore-Bick, Lord Justice Aikens and Lady Justice Black.
62. Court of Appeal Judgment, paragraph 26.
63. Court of Appeal Judgment, paragraph 20.

reason to do so. In the present case the appellant was not the only one at fault. The practice direction makes it clear that the management of costs is the responsibility of all parties to the litigation and ultimately of the court itself. In this case all three were at fault to a greater or lesser degree.[…]"[64]

"24. *[…] Clearly the very fact that the court has responsibility for approving budgets as a means of managing costs is an indication that budgets are intended to provide some constraint. On the other hand, the budget is not intended to act as a cap, since the court may depart from it when there is good reason to do so. […]"*[65]

The Court of Appeal concluded that:

"25. *In the rather unusual circumstances of this case, […] the failure of the appellant's solicitors to observe the requirements of the practice direction did not put the respondent at a significant disadvantage in terms of its ability to defend the claim, nor does it seem likely that it led to the incurring of costs that were unreasonable or disproportionate in amount. In other words, the objects which the practice direction sought to achieve were not undermined. […]"*[66]

Court of Appeal's conclusion

In essence, the Court of Appeal found that:

a) both parties *and* the court failed to comply with PD 51D "*to a greater or lesser degree*";

b) there was no inequality of arms;

c) the objects of PD 51D were not undermined;

d) a budget is not a cap; and

e) the costs incurred by the appellant were reasonable and proportionate to what was at stake in the proceedings.

It is however important to note that the Court of Appeal Judgment concluded with a reference to both pilot schemes (the Pilot and the Defamation Pilot) and stated important differences between the final rules and the two pilot schemes. The new rules on costs management are part of the Civil Procedure (Amendment) Rules 2013 and will become effective from 1 April 2013 (the **"New Rules"**). The New Rules are supplemented by new and amended Practice Directions[67], including Practice Direction 3E ("**PD 3E**").[68]

The New Rules and PD 3E are annexed to this report as Appendices 3 and 4, respectively. The Court of Appeal noted that the New Rules impose greater responsibility on the court for the management of costs and greater responsibility on the parties for keeping budgets under review. The Court of Appeal also found that the New Rules:

"28. *[…] <u>Read as a whole they lay greater emphasis on the importance of the approved or agreed budget as providing a prima facie limit on the amount of recoverable costs</u>. In those circumstances, although the court will still have the power to depart from the approved or agreed budget if it is satisfied that there is good reason to do so, and may for that purpose*

64. Court of Appeal Judgment, paragraph 21.
65. Court of Appeal Judgment, paragraph 24.
66. Court of Appeal Judgment, paragraph 25.
67. http://www.justice.gov.uk/courts/procedure-rules/civil/pdf/update/cpr-60-update-pd-making-document.pdf
68. PD 3E – Costs Management - supplements Section II of CPR Part 3 and comes into force on 1 April 2013. It is annexed to this report as Appendix 4.

> *take into consideration all the circumstances of the case, I should expect it to place particular emphasis on the function of the budget as imposing a limit on recoverable costs.*[69] *The primary function of the budget is to ensure that the costs incurred are not only reasonable but proportionate to what is at stake in the proceedings. If, as is the intention of the rule, budgets are approved by the court and revised at regular intervals, the receiving party is unlikely to persuade the court that costs incurred in excess of the budget are reasonable and proportionate to what is at stake."*[70]

In other words, going forwards, a budget is much more likely to act as a limit on recoverable costs unless there is a very good reason for it not to do so. The need to get the budget right (and revising it regularly) will therefore be more important under the New Rules than under the two pilot schemes.

7 Press coverage to date

Whilst there have been many critical and cynical voices in the legal press, there have also been voices expressing their clear support for costs management. The section below aims to give an overview of those voices in order to give a picture of the context within which the Pilot took place and the New Rules were finalised.

During the early days of the Pilot in October 2011, litigators raised concerns that the Pilot would increase costs in direct contradiction to its intended purpose and 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."* It was said 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 a case"* and that *"they could find themselves exposed if they fail to employ specialists or skill up.*[71]

A concern expressed by the council of circuit judges was that *"judges did not have the business skills to manage costs like "litigation projects".*[72] In other words the courts themselves would act as a barrier to the effectiveness of the Pilot.

In a blog posted by PLC Construction at the very beginning of the Pilot several interesting questions were raised. For example, *"Even if the judge can assess a multi-million pound costs estimate, how long will he take to do so?"* The blog also provided some early advice to litigators:

> *"Ultimately, the accuracy of a costs estimate will depend on the level of understanding of the case: what is it really about? What are the issues between the parties that the court is being asked to resolve?"*[73]

Meanwhile, an article published by Hardwicke Chambers in November 2011 addressed whether the first CMC is too early to estimate costs, how much detail is required, and the Pilot's likely impact on the client-solicitor relationship. It concludes:

> *"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*

69. Underlining added.
70. Court of Appeal Judgment, paragraph 28
71. *"Costs management roll out will lead to cost increases"*, Solicitors Journal, 11 October 2011.
72. Ibid.
73. *"Should I be worried about the costs management pilot?"*, PLC Construction, 3 October 2011.

> *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."*[74]

These concerns were also raised during the Pilot in both interviews and in the questionnaires themselves and, to the extent they were, are examined further below.[75]

Further on into the Pilot, the Court of Appeal decision on *Henry v NGN* was immediately described as a landmark ruling that:

> *"gives litigants carte blanche to ignore the new costs rules."* [76]

Satellite litigation would be certain to follow and costs would accordingly be increased rather than controlled as Lord Justice Jackson hoped.

In the New Law Journal ("NLJ") Iain Stark, chairman of the Association of Costs Lawyers, stated:

> *"Post April it looks like we will be waiting, as in the bad old days of the 'Costs War,' for cases to reach the Court of Appeal, thus paralysing the courts underneath and the everyday administration of justice. This will produce greater uncertainty, exactly what the Jackson reforms were supposed to stop."*[77]

Further:

> *"The sting is in the tail of the judgment, in which the court looks to the future in that the Court of Appeal said the new regime post 1 April will be applied more vigorously – live in fear!"*[78]

> *"Pushing the Jackson reforms through at break neck speed is in no-one's interest"*, said David Greene in the NLJ edition of 25 January 2013: *"After the long debate the profession has accepted that the Jackson and accompanying reforms are going to become law and now seeks to prepare for the radical changes to be introduced in April. […] The position is worsened by the prospect of resultant satellite litigation. There is too much time pressure on those at the Ministry of Justice to try and iron out all of the potential problems when it comes to the application of rules and the regulations."*[79]

> *"Why should you have to sue in the Commercial Court to avoid costs budgeting"*, asks Richard Langley on behalf of the London Solicitors Litigation Association (LSLA). He regards the new costs management rules as *"a really significant change that it will not be safe to ignore"*; and that in view of the consequences of failing to file a budget *"most parties will dutifully comply; and solicitors will labour over the completion of Precedent H"* – most of them manually because the costs budgeting software will not tailor with the variety of different time-recording systems that firms use; and that even if the right software was available, many firms would not be able to justify the investment.[80]

Richard Langley predicts in the NLJ of November 2012:

> *"that costs budgeting is going to lead, on average, to an increase in litigation costs, certainly when the additional costs generated by the budgeting process itself are*

74. Pliener, David of Hardwicke Chambers (2011) "*Costs Management Orders*", 25 November.
75. See chapters 12, 13 and 14 below.
76. *C of A "undermines" Jackson*, (2013) NLJ, 1 February, page 84, quoting Iain Stark, chairman of the Association of Costs Lawyers.
77. Ibid.
78. Ibid, quoting David Greene, partner at Edwin Coe solicitors and *NLJ* consultant editor.
79. Greene, D (2013) *Litigating in the dark. Pushing the Jackson reforms through at break neck speed is in no-one's interest*, NLJ, 25 January, page 56.
80. Langley, R (2012) *Costs calamity. Why should you have to sue in the Commercial Court to avoid costs budgeting,* asks Richard Langley, NLJ, 16 November, page 1424.

> *factored in."*[81] He asks: *"Why is the Commercial Court exempt from all this?"* and *"Why not give all litigants the chance to opt-in or out of different regimes of costs management and case management?"*[82]

In a two-page article on "Judicial costs control" in the NLJ of 19 October 2012, Charlie Clarke-Jervoise of Hogan Lovells finds that the "finalised regime" of costs management is more draconian than PD 51D, under which *Henry v NGN* was decided:

> *"The practice direction which will govern costs estimating from April next year contains some more onerous requirements than the ones currently regulating the pilots. Perhaps the most prescriptive change is that parties who fail to exchange and file budgets can generally only recover from the other side the court fees they have paid."*[83]

She concludes with the following criticism:

> *"One final but important point to note is that the new rules place no obligation on lawyers to show their clients the approved budgets. Obviously professional conduct rules require transparency of costs. However, given that one of the main reasons why Jackson LJ recommended costs budgeting is so that clients could be aware of their potential exposure to costs, this is a baffling omission."*[84]

This is an important concern raised and discussed during the Pilot, and it will be examined further below.[85]

Her Honour Frances Kirkham CBE expressed her concerns about the unacceptable cost of litigation, and

> *"that it is not only profoundly unjust but it is also unsafe for society that so few people or organisations can afford to bring their disputes to the court for resolution and that inequality of arms can lead to injustice."*[86]

However, she has reservations about judges' ability to deal with costs:

> *"In general, most judges have been out of practice for some years. Even now, most judges had previously been barristers. My own experience as a solicitor suggested that many barristers had little interest in costs and would happily leave such matters to solicitors. […] In practice it is difficult for a judge who is not a costs specialist to take a view on matters of detail, such as the length of time claimed to be necessary to deal with disclosure."*[87]

To summarise, recurrent themes raised by those critical of the Pilot and the New Rules are as follows:

a) The ability of the judiciary effectively to implement the Pilot and the New Rules, especially given their lack of experience regarding how costs are incurred in practice;

b) The risk that complying with the Pilot and the New Rules will increase costs;

c) The risk that satellite litigation and uncertainty as to the meaning of the Pilot and the New Rules will increase costs and produce delays as parties seek to challenge rulings as to costs;

81. Ibid.
82. Ibid.
83. Clarke-Jervoise, C (2012) "Judicial costs control", NLJ, 19 October, pages 1317 - 1318.
84. Ibid, page 1318, last paragraph.
85. See chapter 12 below, Clients' approval of the budget / Statements of truth.
86. Kirkham, HHJ (2012) Reflections on Life as a Judge of the Technology and Construction Court, SCL D134, April, page 6.
87. Kirkham, HHJ (2012) *Reflections on Life as a Judge of the Technology and Construction Court,* SCL D134, April, pages 6 and 7. Her Honour Frances Kirkham CBE suggests for judges to impose an appropriate overall costs cap at a very early stage and concludes: "It is unacceptable that it is generally not possible for a client to know the likely maximum liability it will have to the other side if it loses its case."

d) The fear of firms to be exposed if they fail to produce detailed and accurate budgets at the outset of a case;

e) Welcoming as a matter of principle that parties should know early on what their potential liability is likely to be;

f) The complaint that the available costs budgeting software does not tailor with law firm's time-recording systems and that therefore solicitors have to complete the budget form manually; and

g) A lack of understanding as to why the Commercial Court is exempt from costs management obligations.

More positive voices include His Honour Judge Simon Brown QC, a strong advocate of the New Rules. He had already asked in April 2012: *"Are you ready for the big bang next year?"* and warned:

> *"If civil litigation practitioners have not prepared themselves they will have a nasty (and expensive) shock in a year's time if they turn up for a routine case management conference (CMC) expecting the judge to rubber stamp their draft directions. They will, instead, find themselves in front of a docketed judge trained by the Judicial College in 'active' case management of his cases, demanding the parties to justify the 'proportionality' of their itemised and carefully calculated costs budgets in prescribed form, as approved by their respective clients.[…] If they have duly complied with the rules and directions, the parties will have to be prepared to justify their budgets and, if necessary, to argue about their opponent's as they would do on a summary (not detailed) assessment of costs."*[88]

Judge Simon Brown points out the benefits of costs management: If the budget of the receiving party is "approved", then its costs are likely to be paid in full without delay or further later assessment at the end of the case.[89] The feedback from the Pilot, in Judge Simon Brown's experience:

> *"was that the clients – the court's customers - positively appreciated this form of case management as it removed one of the great uncertainties in litigation at an early stage, i.e. how much was it likely to cost them to go on if they won or lost. I found that parties were more willing to co-operate with one another – and the court- in the process of litigation knowing that an unco-operative attitude produced a costly ping pong match by expensive lawyers working on hourly rates. Also there was a realistic narrowing of issues despite 'putting to proof' defences."*[90]

In the last article of his trilogy on costs management, Judge Simon Brown says that "*embracing technology*" is a must.[91] His view is that we must go digital and learn new technology skills to achieve "less lawyers' hours in 'processing information'" and use video conferencing facilities, Skype, DVDs and iPads instead of files "*printed out 6 times at vast expense*". He adds:

> *"The critical thing to recognise is that electronically stored information is universal and the evidential currency. […] People are notoriously slow, unreliable, stuck in time and place in courts and offices and are wasteful as well as expensive; while modern computers and standard software are cheap, easy to use, more efficient and quicker."*[92]

88. Brown, HHJ (2012) *Costs control. Costs management & docketed judges: are you ready for the big bang next year, asks HH Judge Simon Brown QC*, NLJ, 6 & 13 April, pages 498 – 499.
89. Ibid, page 498.
90. Ibid, page 498 and 499.
91. Brown, HHJ (2012) *Costs control (3) Embracing technology: are you ready for the big bang next year, asks HH Judge Simon Brown QC,* NLJ, 28 September, pages 1223 – 1225. He refers to the CPR, which state that you should further the overriding objective by *"actively"* case managing *"making use of technology"*. He also quotes Professor Richard Susskind who said that failure to do so will mean *"The End of Lawyers"*.
92. Ibid, page 1224.

According to Paul Sachs of Netmaster Solutions Ltd, a legal technology company, the requirement to manage costs must lead to changing the traditional methods of bundle preparation and distribution:

> *"The new breed of law firm is replacing paper bundles with online bundle technology and reaping benefits in costs management, time and quality."*[93]

In the context of 'embracing technology' and the question where the civil process is changing dramatically, Lord Justice Jackson in an interview with Professor Dominic Regan of City Law School, in March 2012 said:

> *"Like it or not but we must move to an electronic rather than a paper system. The commencement of proceedings, payment of fees, the exchange and filing of documents, court bundles – all these need to be done electronically. No one welcomes change or upheaval in their working practices, but civil litigation cannot go on forever with paper. I have not changed my opinion about the importance of electronic disclosure in appropriate case."*[94]

The Association of Costs Lawyers (ACL) Jackson working group in their first report, *Modernising bills of costs*, recommended that claims for costs should be presented by reference to "phases, tasks and activities", rather than in a largely chronological format, in order to increase transparency. The ACL working group also recommended developing a bill in electronic format that can be used throughout the whole costs process from the moment a solicitor is instructed.[95] Work on producing the new bill of costs by the working group is continuing with a new bill of costs expected within the next year.

In "Counting the pennies" Paul Wainwright and Dr Mark Friston provide a practical guide to costs budgeting and the question of whether to involve a costs draftsman, stating:

> *"While Precedent HB may be an easy form to complete, it does not follow that the budget itself will be easy to prepare accurately. In fact many budgets will be decidedly difficult to predict. […] The task of preparing a Bill of Costs is a simple matter of recording historical facts and this is a skill that nearly all costs draftsmen are already trained in. The task of preparing a budget however requires a higher level of skill, expertise and understanding of the case. Using that understanding, the costs draftsman will have to gauge both what is definitely likely to be required in the months to come and what might be required in terms of contingencies. This requires an entirely different set of skills."*[96]

They conclude that involving a costs draftsman in the budget preparation may be highly beneficial, provided that (1) the costs draftsman is sufficiently skilled in the art of budgeting, not just drafting, and (2) there is good teamwork and communication between the lawyer with conduct and the costs draftsman."[97]

With regard to the Court of Appeal Judgment in *Henry v NGN*[98], Professor Regan finds:

> *"A vital lesson for all, despite this decision, is the palpable need to monitor the budget, both overall and as to component parts of it. […] A firmer line on budgeting is bound to be applied. Of that there is no doubt."*[99]

As can be seen from the above, those advocating both the Pilot and the New Rules see them as a way to encourage not only the closer management and monitoring of costs but also, more specifically, the better use of technology to reduce costs wherever possible.

93. Sachs, P (2012) *Quality bundle or highly priced bungle?,* NLJ, 28 September, page 1220.
94. Regan, D (2012) *Jackson on Jackson,* NLJ, Vol. 162, Issue 7504, 9 March, page 339.
95. Burke, D (2012) *Brainstorming billing,* ilexjournal.com, January, page 37.
96. Wainwright, P & Friston Dr, M (2012) *Counting the pennies*, NLJ, 6 January, pages 26-27.
97. Ibid, page 27.
98. See chapter 6 above.
99. Regan, D (2013) *Not the end of the story?*, NLJ, 1 February, page 120.

Judges in particular emphasise that awareness of the New Rules amongst solicitors must be increased. Specialisation and using costs draftsmen, but in close communication with those running the case in question, is also seen as vital if the Pilot and the New Rules are to be implemented effectively.

The main advantages of costs management are seen to be:

a) Costs are likely to be paid to the receiving party without delay, in accordance with the agreed or approved budget;

b) Detailed assessments will only be necessary in exceptional cases;

c) Costs management removes one of the great uncertainties in litigation at an early stage: the parties know what their cost recovery is likely to be; and

d) A realistic narrowing of the issues as a result of the parties focusing on what is really at the heart of the dispute.

8 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 were meant to provide solicitors with their questionnaire whenever the issue of costs budgets was considered by the court and also at the end of the case once the issue of who is to pay costs, and what amount, had been finally determined. They were asked to fill in the questionnaire and then return it to the monitoring team. Judges likewise were asked to complete a questionnaire whenever a costs budget was considered by the court.

The questionnaire templates for judges and for solicitors are annexed at Appendices 1 and 2 to this report.

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

Following the publication of the Interim Report in February 2012[100], it was decided that costs management will become a permanent feature of the litigation landscape (subject to important exemptions). The rules, practice directions and guidance notes were re-written and comments as to how the costs management procedure could be improved were considered.[101] The New Rules will be implemented in April 2013.

9 Responses

At the time of writing this final report, the Pilot has been running for almost 18 months. The rate of response to the questionnaires has been relatively slow. As highlighted above, we were reliant on the courts to send out the solicitors' questionnaires whenever the issue of cost budgets was considered by the court and also at the end of the case. Only the courts have access to the solicitors' contact information. We were also reliant on the court staff to provide judges with a fresh copy of the questionnaire whenever cost budgets are considered.

100. Gould, N; King, C; Lockwood, C and Hutchison, T, *Costs Management Pilot Interim Report* (King's College London, 3rd February 2012). A full copy is available at http://www.judiciary.gov.uk/Resources/JCO/Documents/Reports/cost-management-pilot-int-report-feb2012.pdf

101. See chapter 15 and 16 below.

As at 15 March 2013, 39 questionnaires for solicitors had been returned and 144 questionnaires for judges had been returned.

Out of 144 questionnaires for judges, 47 came from the Birmingham Mercantile Court.

The remaining 97 questionnaires for judges were returned by the following courts:

1.	Bristol, Mercantile	27
2.	London, TCC	23
3.	Birmingham, TCC	15
4.	Manchester, Mercantile	11
5.	Bristol, TCC	10
6.	Manchester, TCC	7
7.	Leeds District Registry	1
8.	Newcastle upon Tyne, County Court	2
9.	Not specified	1

The Birmingham Mercantile Court and Birmingham TCC judges regularly returned questionnaires, providing comprehensive and detailed information. However, other judges often provided only basic information. This naturally impacts on the quality of the information provided by the questionnaires themselves, albeit this has been improved by the additional information that was forthcoming during the interviews and discussions held with judges under the Pilot, which is discussed later on in this report.

10 Results from the solicitors' questionnaires

Between 1 October 2011 and 15 March 2013, 39 completed solicitors' questionnaires were received and analysed.

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 from the Birmingham Mercantile Court and the London TCC (9/39, respectively).

Out of a total of 39 submissions, respondents' cases pertained to the following courts:

1.	Mercantile Court, Birmingham	9/39
2.	TCC London	9/39
3.	TCC Birmingham	4/39
4.	TCC Bristol	3/39
5.	Mercantile Court, Bristol	2/39

6.	High Court, Leeds Q.B. Division	2/39
7.	Not specified	2/39
8.	Mercantile Court, Leeds	1/39
9.	TCC, High Court, Birmingham	1/39
10.	Bristol, District Registry	1/39
11.	Exeter, County Court	1/39
12.	Mercantile Court, Manchester	1/39
13.	Newcastle upon Tyne, County Court	1/39

Q3: Type of hearing?

The majority of the respondents returned questionnaires relating to CMCs (32/39), 4 related to costs management hearings and only 1 related to an assessment of costs after settlement. 2 were unspecified.

Q4: Which party do you represent?

21 questionnaires were received from solicitors acting for the claimant and 17 from solicitors acting for the defendant. 1 was from "other" albeit this was not specified.

Q5: What was the case about?

The most common type of dispute specified in the questionnaires was professional negligence (27.3%). The response rates are set out in percentages as some respondents specified more than one type of dispute:

1.	Professional negligence	27.3%
2.	Construction	15.9%
3.	Breach of contract	13.6%
4.	Insurance	6.8%
5.	Breach of franchise agreement	4.5%
6.	Claim for specific performance	4.5%
7.	Professional fees dispute	4.5%
8.	Debt recovery	4.5%
9.	Defective goods	4.5%
10.	Consumer Protection Act	2.3%
11.	International carriage of goods	2.3%
12.	Dilapidations	2.3%
13.	Subsidence claim	2.3%
14.	Claim for conversion	2.3%

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	2/39
2.	£50,000 - £99,999	9/39
3.	£100,000 - £249,999	13/39
4.	£250,000 - £499,999	5/39
5.	£500,000 - £999,999	7/39
6.	£1m - £4,999,999	1/39
7.	£5m - £9,999,999	1/39
8.	£10m - £19,999,999	1/39
9.	£20m or above	0/39
10.	No response	1/39

Generally, the value of most claims was between £50,000 and £1 million i.e. relatively low value claims. This is despite the fact that 9 responses were received from claims in the London TCC. Obviously this limits the conclusions that can be drawn from the questionnaires as to the advantages and disadvantages of the Pilot in relation to high value claims. This is disappointing given the recent decision to exempt cases from automatic costs management where the amount at stake exceeds £2 million (excluding interest and costs).[102]

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. 61.5% of respondents took under three hours to complete Form HB and 79.5% of respondents took under four hours.[103] This would suggest the costs in completing Form HB are not as significant as some have anticipated.[104]

The responses are set out below:

1.	Under 1 hour	4/39
2.	Over 1 to 2 hours	10/39
3.	Over 2 to 3 hours	10/39
4.	Over 3 to 4 hours	7/39
5.	Over 4 to 5 hours	1/39
6.	Over 5 hours	7/39

102. See chapter 15 below (The exemptions).
103. 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 from the questionnaires received.
104. See chapters 7 and 12 of this report.

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

Only five respondents had revised Form HB for a subsequent hearing. Of the three respondents who advised how long this revision had taken, one took under 1 hour to revise Form HB and two took between 1 and 2 hours.

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

Seven respondents indicated they had taken more than 5 hours to complete Form HB. The reasons given (and more than one reason was sometimes given) included that:

1.	Very detailed breakdown	28.6%
2.	High value claim	7.1%
3.	Complex litigation	28.6%
4.	Extensive calculations required	28.6%
5.	Difficulty in filling in form	7.1%

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 40.6% of cases a solicitor with over 8 years PQE including at least 8 years litigation experience was involved in completing Form HB. Costs draftsmen were only used in 7% of cases and trainee solicitors or paralegals in 17.2% of cases. Solicitors with four years PQE (including four years litigation experience) or legal executives were used in 12.5% of cases and other solicitors, legal executives or fee earners in 18.8% cases. This perhaps indicates that a relatively detailed knowledge of the claims in question is needed in order to complete Form HB (hence a higher grade of solicitor is required to complete the task) but this would obviously add to the costs 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 on future costs and helped clients to be better informed of the overall costs likely to be involved in the process. Some respondents noted more than one benefit. The responses and response frequency are set out below:

1.	Early attention to future costs	17/55
2.	Client better informed of overall costs	7/55
3.	Assists settlement	4/55
4.	Client better informed of costs of losing / other side's costs	4/55

5.	None	4/55
6.	Informed re: options re directions	3/55
7.	Allows early approval of costs budget	2/55
8.	Sets out costs clearly	2/55
9.	Emphasis on tactics	2/55
10.	Protection re costs	2/55
11.	Easier to deal with costs after settlement	1/55
12.	Allows judge to challenge level of costs	1/55
13.	Better informed of other party's planned procedural steps	1/55
14.	Focus on resolving as many issues as possible prior to trial	1/55
15.	Precedent HB a useful tool	1/55
16.	Very little	1/55
17.	Immediate assessment and award	1/55
18.	Question not answered	1/55

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. Once again, respondents sometimes indicated more than one disadvantage.

The responses are set out below:

1.	Increases costs	16/59
2.	Time consuming	14/59
3.	Difficult to predict how case will proceed	6/59
4.	Duplication can occur	4/59
5.	None	4/59
6.	Unfamiliarity increases time spent	2/59
7.	Costs capping	2/59
8.	Difficult to understand	2/59
9.	Too detailed for early stages	2/59
10.	Unable to input different hourly rates	1/59
11.	Difficult to predict which grade of fee earner will do task	1/59
12.	Not possible to recover costs from client	1/59
13.	Too much emphasis on costs at hearing	1/59
14.	Need to add contingencies	1/59
15.	Unclear what consequences of procedure are	1/59

16.	Budgets not approved	1/59

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.[105] 15 respondents did not provide an answer.

The responses and response frequency are set out below:

1.	More flexibility	5/42
2.	Link form to Excel spreadsheet	4/42
3.	Abolish procedure	3/42
4.	Less detail	3/42
5.	Greater clarity of consequences re adjustments to estimate	2/42
6.	None	2/42
7.	Exchange costs estimates in advance	1/42
8.	Roll out to all suitable cases	1/42
9.	Make it discretionary	1/42
10.	Option to do by phone	1/42
11.	Start procedure at outset	1/42
12.	Sign off by client on form	1/42
13.	Add inter-party correspondence category	1/42

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 although in some cases they had already provided feedback in answering how the procedure as a whole could be improved. Those that did respond suggested that:-

(i) it could be shortened and made clearer;

(ii) the categories could be more specific; and

(iii) the amount of paperwork required could be reduced.

The responses to the question as to if and how Precedent HB could be improved are set out below:

1.	No	16/41

105. It should be noted that some respondents provided more than one answer.

2.	No response	6/41
3.	Shorten and make clearer	3/41
4.	More flexibility	3/41
5.	Guidance notes	3/41
6.	Allow fixed fees for counsel	3/41
7.	Excel spreadsheet	3/41
8.	Reduce paperwork	1/41
9.	Categories too general	1/41
10.	More space to explain disbursements	1/41
11.	Less detail	1/41

Q15: Has the case concluded?

Only two cases had concluded out of the 39 questionnaires received. Out of these only one provided information as to how the amount awarded by the court compared to the budget of the winning party. In that one case the court awarded the amount the winning party had budgeted for.

11 Results from the judges' questionnaires

Between 1 October 2011 and 15 March 2013, 144 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 (132/144). 8 were costs management hearings, 2 were PTRs, and 2 were assessments of costs after a judgement or settlement. This suggests that relatively few costs management hearings were held during the Pilot.

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

The majority of judges did make a CMO at the relevant hearing (116/144).

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

The most common reason given by the respondents for making a CMO was 'to control costs'. The other most common reasons given were to control future cost increases (obviously very similar to controlling costs) and to aid costs management.[106]

The responses are set out below:

1.	Control costs	40/155
2.	Proportionality	26/155
3.	Control of future cost increases	25/155

106. In some cases more than one reason was given.14/155

4.	Suitable/typical case for a CMO	14/155
5.	Aid to case management	10/155
6.	Question not answered	9/155
7.	To record budget approval	7/155
8.	Equality of arms	6/155
9.	Costs estimates provided generally reasonable	4/155
10.	Unrealistic budgeting	3/155
11.	Estimates agreed	2/155
12.	Cost consequences of contingencies known in advance	1/155
13.	Unlikely to be any unforeseen contingencies	1/155
14.	Parties' encouraged judge to make order	1/155
15.	High value claim	1/155
16.	Three parties	1/155
17.	Significant variation in costs budget	1/155
18.	Budgets comprehensible	1/155
19.	Financial trouble of the party	1/155
20.	Complicated case	1/155

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

The respondents' hearings concerned a broad range of subject matters:

1.	Negligence	52/154
2.	Breach of contract	25/154
3.	Construction dispute	25/154
4.	Insurance	6/154
5.	Question not answered	6/154
6.	Fraudulent misrepresentation	5/154
7.	Dilapidations	4/154
8.	Employment dispute	4/154
9.	Debt repayment	4/154
10.	Sale of goods	4/154
11.	Restitution claim	3/154
12.	Conversion	3/154
13.	Claim on a guarantee	3/154
14.	Subsidence	2/154
15.	Cost of remedial works	2/154

16.	Carriage of goods	1/154
17.	Franchising	1/154
18.	Royalties	1/154
19.	Landlord and tenant	1/154
20.	Nuisance	1/154
21.	Adjudication enforcement	1/154

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 to £249,000" followed by "£50,000 to £99,999". However, some claims were for significantly more including one for over £10 million.

The responses are set out below:

1.	Under £50,000	19/144
2.	£50,000 - £99,999	27/144
3.	£100,000 - £249,999	42/144
4.	£250,000 - £499,999	19/144
5.	£500,000 - £999,999	15/144
6.	£1m - £4,999,999	17/144
7.	£5m - £9,999,999	3/144
8.	£10m - £19,999,999	1/144
9.	£20m or above	0/144

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

The average time spent was approximately 58 minutes.

Q9: How much time was spent studying the budgets?

The average time spent was approximately 16 minutes with the lowest time being 0 minutes and the highest being 60 minutes.

Q10: How long did the hearing last?

On average, hearings lasted approximately 45 minutes.

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

The average time spent was approximately 14 minutes. The maximum time spent was 75 minutes and the minimum 0 minutes.

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

107. More than one benefit was listed in many cases.

Where answers were provided, the respondents considered that the greatest benefit of the costs management procedure was encouraging proportionality (35/197)[107] In 61 cases no answer was provided.

The responses are set out below:

1.	Question not answered	61/197
2.	Proportionality	35/197
3.	Certainty of costs from outset	18/197
4.	Allows scrutiny by the court	15/197
5.	Educating parties about their potential costs	12/197
6.	Improved case management	11/197
7.	Focuses discussion on underlying issues	10/197
8.	Parties can make a specific challenge on the other side's costs	7/197
9.	Readiness for mediation	7/197
10.	Control of costs	6/197
11.	Equality of arms	5/197
12.	Identifies/encourages possible costs savings	5/197
13.	Encourages settlement	2/197
14.	Too early to say	1/197
15.	None if parties do not provide estimates	1/197
16.	Encourages to agree on costs issues	1/197

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

The majority of respondents either answered 'none' or did not answer (46/170 and 66/170 respectively).[108]

The responses are set out below:

1.	Question not answered	66/170
2.	None	46/170
3.	More judicial time spent on case management	13/170
4.	Cost of preparing Precedent HB	8/170
5.	Additional court resources (aside from judges)	7/170
6.	Respect parties' positions if happy with opponents' costs positions (large cases)	7/170
7.	Lack of judicial experience	5/170
8.	Lack of flexibility	5/170

108. Respondents often listed more than one disadvantage.

9.	Parties' uncertainty as to approach	3/170
10.	Uncertainty as to what directions will be approved	3/170
11.	Too early to say	2/170
12.	Difficult to form view on reasonableness in large cases	2/170
13.	Superficial	2/170
14.	Parties did not provide estimates	1/170

Q14: Could the procedure be improved?

The majority of respondents either answered 'no' (45/144) or did not respond (76/144). 21 answered 'yes'.

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

The responses with respect to the "yes" answers are set out below:

1.	Question not answered	9/26
2.	Require parties to approve their budgets	3/26
3.	Guidance notes for judges and solicitors	3/26
4.	Provision for parties to explain cost consequences of directions sought on Form HB	3/26
5.	Mechanism for parties to consider each other's budgets and inform court if agreed and if no other reason for CMC	2/26
6.	Avoiding too much detail	2/26
7.	Budgets submitted on allocation of track	1/26
8.	Solicitors need training	1/26
9.	Protocol re: non-compliance	1/26

12 Feedback from solicitors' questionnaires and interviews

As mentioned above, a total of 39 questionnaires were returned by solicitors.

35 out of 39 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.

Law firms reported their frustration about having to prepare their own Excel spreadsheets, and that it would be a substantial improvement if Form HB were set up in such a manner that it always downloads as a usable spreadsheet. Some respondents complained that they had to calculate figures manually, or otherwise type the whole form into an Excel document, which one solicitor found "*immensely irritating*", because Form HB was Word-based rather than in a workable Excel format.

The following criticisms of Form HB were made:

1) Form HB should be a fully functioning Excel form that automatically makes all the calculations.

2) Several requests were made to improve the mechanical side of Form HB because it was not possible to insert figures in all the cells. Columns and spaces in the budget form should expand as required.

3) Form HB should allow room for more than one expert as it is rare in TCC litigation for a party to instruct just one.

4) Form HB should ask for brief fees for counsel as opposed to hourly rates.

5) Conversely allowing hourly rates for experts rather than lump sums.

6) From the court's point of view, it may be too much information. Form HB ought to be shorter and more general.

7) Predicting costs accurately at the early stages of litigation is very difficult, particularly if the trial date is many months away. The work required to bring a case to trial can change as the case progresses.

8) Costs largely depend on how difficult the other side is and thus completing Form HB involves a lot of guesswork.

9) Later adjustments to costs estimates incur further costs.

10) Form HB is not compatible with law firms' time-recording systems.

11) There should be guidance notes on how to complete Form HB.

12) Costs estimates should be based on a 'range of figures' in respect of the categories of work, rather than a specific figure. This would make lawyers feel less worried about their predictions when setting out the costs estimate.

13) The required level of detail and accuracy is too high, also due to the required 'stage-by-stage' estimates. This increases costs to the client. Solicitors found that the required apportionments of costs, and the apportionments between fee earners, are too detailed.

14) To factor in contingencies in the estimate is difficult. A better explanation of the contingencies in Form HB would help. For example, the form does not contain an extra day of trial as one of the possible contingencies.

15) A breakdown of experts' fees might be helpful in cases where multiple experts are involved.

16) Form HB should include a category for strategy and general advice to the client.

17) The costs budget should be time-based rather than task-based, with time periods along the top of the spreadsheet and tasks down the left-hand side.

It should be noted that the new Precedent H is now available in an Excel version.

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. Costs judges confirmed this view and said that the budget should be done by the most senior person on a case.[109]

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

The risk of under-estimating costs has been mentioned in the legal press and in feedback gathered under the Pilot. 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.

An advocate in one of the UK's largest law firms (who also sits as Deputy High Court Judge and Recorder (Civil)) believes that costs management will work to limit costs, but at the same time will push the smaller cases to the smaller firms. Large firms will not run the risk of taking on a case where the chances of making a loss are too big, and where it depends on judicial discretion whether you make a profit or loss: "If you are working on a 10 – 15% margin at best, then it happens quite quickly that the case becomes a loss-maker." This lawyer believes that there should be very clear criteria for the judges' decisions on costs, budgets, budget increases, when they are allowed etc.

109. Feedback was provided on a confidential basis during a meeting with three judges in Leeds.

Consequences of later adjustments to costs estimates

Several solicitors raised the issue of possible consequences of later adjustments to Form HB and demanded greater clarity. Litigators asked: "How will a court treat the case of having to change costs later?"

In a telephone interview, one solicitor referred to a case in the London TCC involving a claim about flooding, which took place before the Pilot. Huge questions about causation arose, which nobody could foresee at the outset. The trial was adjourned twice. This considerably increased costs. The solicitor pointed out that if costs budgets had been produced, everyone would have been way out of their estimates, by about £50,000 to £100,000 for each side.

Respondents to the questionnaires required further clarification as to what the courts might see as reasons to approve or disapprove departures from the previous budget; and how the principle that it 'will not depart from the approved budget unless there is good reason to do so' operates. They asked: "Does this mean approval with a caveat?" and "To what extent should the last approved budget be binding on the final assessment of costs?"

In the New Rules, CPR 3.18 is a slightly amended version of PD 51G, paragraph 8 and reads:

> "Assessing costs on the standard basis where a costs management order has been made
>
> *3.18.* *In any case where a costs management order has been made, when assessing costs on the standard basis, the court will—*
>
> *(a)* *have regard to the receiving party's last approved or agreed budget for each phase of the proceedings; and*
>
> *(b)* *not depart from such approved or agreed budget unless satisfied that there is good reason to do so.*
>
> *(Attention is drawn to rule 44.3(2)(a) and rule 44.3(5), which concern proportionality of costs.)"*

The substantive amendment is the reference to regard being had to the budget "for each phase of the proceedings", emphasising the need to consider each phase separately.

CPR 3.18 does not provide guidance as to what constitutes ***a good reason*** to depart from the budget. This question lay at the heart of the appeal in the case of *Henry v NGN*. The Court of Appeal Judgment gives indications as to when the court might depart from the approved or agreed budget.[110]

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.

110. See chapter 6 above.

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

Several solicitors (and a few judges) recommended the introduction of a formal requirement for clients to approve the budget. Solicitors 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!

A lawyer who sat in on 20 costs budgeting hearings in defamation cases came to the conclusion that it *must* be stressed in the CPR rules or PD 3E that lawyers must show both sides' budgets to their clients. In her experience clients virtually never attended the court hearings and despite the solicitors' professional conduct rules many do not show the budget to their client. Therefore another way must be established to ensure that the paying customers see both sides' original and approved budgets, and accordingly know how much their liability might be if they are unsuccessful. Otherwise one of the main purposes of the Jackson costs budgeting reforms would be thwarted.

Paragraph 5.4 of PD 51D (governing the Defamation Pilot) reads:

> *"Directions orders produced at the end of case management conferences and/or costs management conferences must 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."*

Paragraph 7 of PD 51G (governing the Pilot) reads:

> *"No later than seven days after the conclusion of any hearing, each party's legal representative must --*
>
> *(1) notify its client in writing of any costs management orders made at such hearing; and*
>
> *(2) provide its client with copies of any new or revised budgets which the court has approved."*

Whereas others pointed out solicitors are already obliged to keep their client fully informed and in effect show their client everything. If a firm ignores its key obligations to its client, then it is hard to see why they would pay any more attention to the CPR stating that solicitors must show the budget to the client. It would just be a repeat in the CPR of a duty that already exists under current law.[111] Another argument made against the introduction of a formal requirement for clients to approve the budget is of a practical nature: How can

111. See chapter 3 above.

a judge make sure that a solicitor does in fact show his client the budget? It becomes one more issue for the judge to try to manage.

In this context the issue of the client's attendance in court was raised. One solicitor expressed the view that 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. Whereas interviews with judges suggest that judges find it very beneficial when the parties themselves attend the first CMC. Judges would strongly welcome it if more parties attended CMCs. One judge commented: "You can tell them things lawyers won't tell them. Some parties know how to manage their lawyers, but lots of people do not."[112]

Statements of truth

Those advocating the introduction of a formal requirement for clients to approve the budget also support the introduction of a formal requirement for clients to sign the statement of truth because the client is the court's customer (not their lawyer) and it is the client who funds the litigation.

It was argued that lawyers have a vested interest in high costs (equalling high fees and a high income) and thus it should be the client who formally approves the budget, particularly if such budget may be seen as disproportionate at first sight, but nevertheless be approved or agreed because of the importance of what is at stake, for example the client's business reputation.

Solicitors also recommended having the actual wording of the statement of truth on Precedent H.

The New Rules and supplementing Practice Directions do not require the client to sign the statement of truth. Paragraph 1 of PD 3E states:

> *"A budget must be dated and verified by a statement of truth signed by a senior legal representative of the party."*[113]

Paragraph 2.2A of Practice Direction 22 specifies the wording for a statement of truth verifying a costs budget:

> *"The costs stated to have been incurred do not exceed the costs which my client is liable to pay in respect of such work. The future costs stated in this budget are a proper estimate of the reasonable and proportionate costs which my client will incur in this litigation."*

New skills and training

Expressly and implicitly the issue of training was raised several times.

Solicitors expressed their belief that barristers and judges do not understand how solicitors work and that many would be quite surprised about the amount of work involved in preparing a case for trial – which explains the high costs of litigation.

Several solicitors criticised that the judges' approach under the Pilot was patchy and inconsistent. Training of the judiciary would be essential for a successful implementation

112. Several judges (Mercantile, District and Costs Judges) expressed this view in interviews conducted under the Pilot.
113. A complete version of PD 3E, plus Subsection 3 on Costs Budgets, is attached to this report as Appendix 4.

of the New Rules.

Following a "last call for comments on costs management and the pilot scheme under PD 51G" issued by Practical Law Company (PLC) on 7 March 2013, a costs lawyer sent the following comment to the Pilot's monitoring team:

> *"I have been a costs draftsman/ lawyer for over 40 years. Apart from a general concern at the speed that these profound reforms are being introduced, my major concern relates to what I perceive to be a woeful lack of training for the Judges who will be at the heart of the costs budgeting scheme. I am led to understand that 1 day of training will be given! It takes at least 3 years to qualify as a costs lawyer. I find it extraordinary that Judges will be making vitally important decisions on costs issues without a full knowledge of costs law, which is considerable!"*

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.

In interviews, six other solicitors also mentioned the benefits of having a detailed budget at the time of a mediation. One solicitor reported on two cases in the London TCC involving costs budgets under the Pilot and said that both cases settled at mediation. The fact that she and her costs draftsman had submitted to the court a very detailed and realistic costs budget (which had taken them both about 7 hours to complete) represented a *"fantastic bargaining chip"* at the mediation. At the mediation it was very easy to persuade the defendant that they (the claimant) were very confident to get 100% of their costs back if the case went to trial. The budget had been fully approved by the judge at the CMC and the claimant had stayed within the budget.

In her second case that settled at mediation, she submitted a budget of £175,000 on the assumption of a 3-day trial. She had prepared it with the assistance of a costs draftsman, involving about 6 hours of work for both of them. The other side had submitted a very unrealistic budget of £37,000 for a 2-day trial. The judge was not impressed and said that it would be a 4-day trial and that £37,000 would not be sufficient to prepare properly. Again, this all helped to settle the case at the mediation.

One solicitor (who conducts "fixed price per stage litigation" as his marketing tool) said that more active costs management is required, not less, and that *"litigation is simply a means to an end: to resolving disputes. Litigation is unattractive because of costs and uncertainty"*. The effect of the costs management procedure should be settling cases earlier. He said that he has not done a trial in 10 years and that mediation is fantastic. When he represents a party at mediation, he also offers this service on a fixed-price basis ("fixed-price mediations"). This solicitor (who is not a mediator) said that the settlement rate of mediations is higher than 90%. Out of 20 mediations he attended, only one failed to settle.

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.

The rules would have allowed this. PD 51G, paragraph 4.4 says that a 'costs management hearing' may be done by telephone if appropriate. The New Rules encourage to conduct 'costs management conferences' by telephone:

> *"3.16. (1)* *Any hearing which is convened solely for the purpose of costs management (for example, to approve a revised budget) is referred to as a "costs management conference".*
>
> *(2)* *Where practicable, costs management conferences should be conducted by telephone or in writing."*[114]

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 widely to be regarded as a substantial benefit, particularly if this is achieved early in the process. Remarkably, even lawyers who disapprove of the Pilot and particularly of Form HB, 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.

A solicitor who is a regular user of the Birmingham Mercantile Court and an expert in e-disclosure said in a telephone interview that his firm aims to do costs management anyway. The only difference introduced by the Pilot is a different format. This solicitor said that *"you must discuss the budget with the client in any event"* and that he regards the costs management procedure as an *"entirely sensible and appropriate thing to do"*.

34 out of 39 solicitors accepted that the Pilot focuses parties' and solicitors' minds on the issues and on the costs of the future conduct of the case. Most solicitors also appreciate

114. CPR rule 3.16 (1) and (2).

how important it is that clients know the potential liability they must face. 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?

Under the present regime, neither party has any effective control over the costs that the other side is running up in the course of the litigation. Feedback from solicitors confirms that many of their clients welcome the new transparency about costs and regard being able to limit the other side to a certain costs budget as a substantial benefit of the Pilot. Feedback from judges suggests that in the past parties often did not realise what their potential liability might be until the end of the process.[115]

However, solicitors also said that ultimately it is a commercial market and if clients are prepared to pay a certain sum or (for example) wish to be represented by two senior partners and one junior partner, it is their choice. The costs management procedure is another layer of administration and work that costs the client money. One solicitor specialised in commercial property dispute resolution, who was clearly not a fan of the Pilot, said that *"there is always a trade-off between costs and quality"* and that *"costs management does not give you certainty on your own costs. It only limits exposure to costs on the other side"*. This solicitor concluded: *"The courts have spent many hours trying to save costs. Whereas law firms spend LOTS of time and money calling the courts, trying to get hold of the right person, which is not at all easy"*.

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, which 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 [116] and 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?"*[117]

Significant concerns were expressed by solicitors that the Pilot increases costs due to the time taken to comply with it. This is despite the fact that for most respondents completing Form HB only took between two and four hours, with just one solicitor taking over five hours. 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.

115. See also Brown, HHJ (2012) *Costs Control. Costs management & docketed judges: are you ready for the big bang next year?",* NLJ 6 & 13 April, page 498: "More worryingly, it appeared that clients who attended had not been told what their own lawyers were proposing to spend on their behalf, let alone what bill might be landed upon them, if unsuccessful, by an uncontrolled budget on the other side."

116. See Jackson, LJ, *Final Report,* chapter 40, paragraph 2.2, referring to the guidelines for the Birmingham Pilot: "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 Solicitor's Code of Conduct 2007. Accordingly, no costs should be involved on either side in the preparation of such estimate."

117. Jackson, LJ, *Final Report*, chapter 40, paragraph 1.5 (vi).

One solicitor was worried that costs management might be rolled out into all areas of litigation, which would be a 'big ask'. Completing such a detailed budget form could be justified in cases involving several hundred thousands of pounds. However, if the dispute value were only about £20,000 it would not be fair on the parties to ask them to do the same.

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 the costs management procedure outweigh the disadvantages. A clearer picture should have emerged by the end of 2013.

13 Feedback from Judges' questionnaires and interviews

As at 15 March 2013, a total of 144 questionnaires for judges have been returned.

Telephone interviews were conducted with four Mercantile Judges, four TCC Judges and one High Court Judge. In addition, meetings took place with three District Judges, one High Court Judge and one Deputy High Court Judge. At the Mercantile Court in Birmingham, seven CMCs were witnessed, followed by interviews with the parties' solicitors and barristers on a confidential basis.

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

Costs management or costs 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 costs 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.

A senior High Court Judge explained[118] that the real purpose of costs management is to control the costs by case managing. This includes asking the parties questions such as "Which experts do you need?"; "Are these issues or documents relevant?" etc. Recoverable

118. The High Court Judge answered several questions in a meeting with the Pilot's monitoring team.

costs should be what you have in your budget. Cost capping only applies where you do not have an approved budget. Parties will find it difficult on detailed assessment to have their budget increased if they have not previously applied for an increase, in accordance with the New Rules. The High Court Judge pointed out that the primary management role is for solicitors. The judge functions as the gatekeeper. If judges had to argue or discuss each item on the budget form, costs management would never get off the ground.

Costs Management Orders

From April 2013 it is expected that CMOs will be made in most cases. How judges approach costs management varies.

At the TCC Judges and Recorders Biennial Conference on 6 July 2012, a High Court Judge involved in the implementation of the New Rules said that there are two extremes:

A micro-management watch-makers solution at one end, and rough figures of what costs might be at the other end of the spectrum. The micro-management approach seems much like a detailed assessment in advance, such that how the costs are allocated to each stage becomes much more of an issue. At the other extreme, the judge is looking holistically at the whole budget.

The judge concluded that the answer should lie somewhere in the middle of the two positions. Somehow you have to strike the balance between the two extremes: You look at the total figure for each item and you look at the overall figure. He emphasised that costs management should NOT be a detailed assessment in advance, nor a rough total figure as it often happened in the past.

The most common reason given in the judges' questionnaires 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'. 'Equal footing' and 'equality of arms' were further reasons for making a CMO.

Where a CMO is made - under the Pilot or under the New Rules - it has an impact on the assessment of costs. When assessing costs on the standard basis, the court will have regard to the receiving party's last approved or agreed budget for each phase of the proceedings and "*will not depart from such approved or agreed budget unless satisfied that there is good reason to do so*".[119]

A Mercantile and TCC Judge in Bristol has done over 100 CMOs during the Pilot. He kindly shared the highlights of his experience with us. Whenever he expressly disapproves a budget, he identifies the areas of costs which in his view are too high and indicates a ballpark total budget that he would be willing to approve. He then directs revised budgets within 7 days. In all but two instances the revised budgets came down to a total within the figure, as indicated by the Judge. In the other two cases the solicitors wrote a very detailed letter justifying their figures, and the judge approved their budgets after all. The judge estimates that the cost of each of these letters must have been £1,500.

This Mercantile and TCC Judge noted that frequently the pre-action costs already incurred (usually on Protocol compliance) are very high. He then makes a CMO expressly confined to future estimated costs. He finds that the costs management system works well with budgets up to about £200,000 in trials up to 5 days. Whereas in lengthy cases involving

119. CPR 3.18 is a slightly amended version of PD 51G, paragraph 8; see chapter 12 above.

budgets in excess of £500,000 the process is much more difficult.

A real problem noted by this judge is budgets not being submitted on a common basis: Even if you get the budgets in advance and in the right form, there is a problem if they are not made on a common basis, for example one budget for a four-day trial, the other party's budget for a six-day trial, one with two experts, one with only one expert. The only solution is to determine the appropriate directions and then call for a revised budget from any party whose present budget does not fit the template of directions. These revised budgets then are ordered to come in 7 days later, the file has to come back to the judge to look again and approve/not approve the budgets. All this is quite time-consuming. Substantially more judicial time must be devoted to the case management stage.

In the context of CMOs, Judge Simon Brown QC (Specialist Mercantile Judge in Birmingham) said during a PLC Podcast that the task in hand is to identify what is really in issue, despite what may be in the pleadings. Pleadings are often too lengthy. Judge Brown emphasised that costs management is part of case management; he usually asks the parties for *"a list of issues to see what really needs to be tried"*, and to find out whether it is a document case or a witness case *"because there is no point in having a lot of disclosure about documents which don't prove to be of adversarial support of a party's case"*.[120]

What happens if the parties agree a costs budget?

The new CPR 3.15 reads as follows:

"Costs management orders

3.15. *(1)*	*In addition to exercising its other powers, the court may manage the costs to be incurred by any party in any proceedings.*
(2)	*The court may at any time make a "costs management order". By such order the court will—*
(a)	*record the extent to which the budgets are agreed between the parties;*
(b)	*in respect of budgets or parts of budgets which are not agreed, record the court's approval after making appropriate revisions.*
(3)	*If a costs management order has been made, the court will thereafter control the parties' budgets in respect of recoverable costs."*

Several judges asked for clarification of the meaning of CPR 3.15(2)(a). If the parties have agreed a costs budget, ***is the court's role confined to the "administrative function" of recording such agreement?***[121]

Paragraph 2.3 of PD 3E states:

"2.3 ***If the budgets or parts of the budgets are agreed between all parties, the court will record the extent of such agreement.*** *In so far as the budgets are not agreed, the court will review them and, after making any appropriate revisions, record its approval of those budgets. The court's approval will relate only to the total figures for each phase of the proceedings, although in the course of its review the court may have*

120. PLC Podcasts, PLC Dispute Resolution: Costs Management (Part 1), 13 February 2012.
121. Judges asked this question at the TCC Judges and Recorders Biennial Conference on 6 July 2012 and also during telephone interviews under the Pilot.
122. Emphasis added by the authors of this report.

> *regard to the constituent elements of each total figure. When reviewing budgets, the court will not undertake a detailed assessment in advance, but rather will consider whether the budgeted costs fall within the range of reasonable and proportionate costs."*[122]

Neither CPR rule 3.15(2) nor paragraph 2.3 of PD 3E provide a clear answer to the question whether judges may intervene in cases where parties agreed the budgets. A Mercantile and TCC Judge referred to the Judicial College Training of 7 January 2013, which in his view delivered the clear message that the court has no jurisdiction to interfere at all when the budgets are agreed between the parties. This judge believes that CPR rule 3.15(2)(a) is potentially undesirable because it could undermine the new concept of proportionality.[123]

A costs judge (who is very familiar with the judicial training taking place in view of the Jackson reforms) does not see any room for interpretation in the new CPR 3.15(2)(a) either and said that it was very clear: If the parties agree a costs budget, the court's role is confined to the function of recording such agreement. The court would not have jurisdiction to intervene if the parties have agreed the budget.[124]

However, in an interview with a senior High Court Judge it was suggested that judges should intervene if they regard a budget as not proportionate. This approach would seem to be in line with the new emphasis placed on proportionality.

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 PD 51G: 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*".

Under the New Rules, parties can apply to the court to have a revised budget. The question will be: Have there been any developments that justify the parties increasing

123. Feedback provided during a telephone interview under the Pilot.
124. Feedback was provided on a confidential basis during a meeting with three judges in Leeds. The three judges were unanimous in their view that the parties' agreement on budgets could potentially undermine costs management, and could certainly weaken the court's power to introduce proportionality.

their budgets? If the budget cannot be agreed between the parties, it has to be decided by the court.

Could the costs management procedure be improved?

During the early days of the Pilot, 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) PD 51G. 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 PD 51G.

One of the judges expressed the opinion that filing a costs estimate provides the material to enable an answer to be given to the "*finance director's question*" (i.e. how much will this litigation cost?), and that there is real commercial sense in preparing a costs budget in all cases including the larger 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.

Towards the end of the Pilot certain logistical problems became clearer. In a telephone interview a senior High Court Judge said that at present he experiences major logistical problems. With regard to his case load, it happens 3 to 4 times per week that either one party fails to submit Form HB, or neither party submits Form HB. Currently he has a stack of files on his desk where neither party has submitted a costs budget. Hence he will have to tell them to comply with the Pilot. Then nothing happens for 4 to 5 weeks. Then he has to remind himself of the case and chase the parties again to submit costs budgets. If he then has real queries about the budgets, he has to send them letters etc. If only one party produces Form HB, then he tells the other party "You had better get yours in". Then the other side makes comments on this budget, and then he can deal with it in writing.

All this wastes a lot of his time and is a major drain on judicial resources.

When all parties comply with the Pilot and complete and submit Form HB *before* the hearing, it is possible to have a sensible discussion about the budgets at the CMC. However, in a large amount of cases one or both parties fail to comply with the rules. He suspects that this will improve with time, when more solicitors are fully aware of the new costs management regime. All the big law firms are aware of the New Rules, but many others are not.

With regard to submitted costs budgets, usually costs are reasonable, and usually the parties do not object to the other party's budget. However, one must bear in mind that it is quite difficult to judge whether estimated costs are reasonable or not when you are not the solicitor on the case and you don't know what will be involved: "You are very much in the hands of what the solicitor says". It is very difficult for the judge to disagree, particularly when he does not know what is involved in disclosure etc. There is no benchmark. All you can say is: 'Bearing in mind the issues of the case and my experience – are these costs proportionate?' It is easier if both side's costs are comparable."

This senior High Court Judge referred to a recent case about oil drilling in Jordan. The

claim was for £10 million. The claimant's costs budget was for £1.9 million and the defendant's budget for £900,000. The latter appeared to be complete guesswork. The judge made a CMO allowing £1.275 million for the claimant, "on the basis that this was the highest proportionate figure he could think of". The High Court Judge understands that the claimant's costs may be a bit higher than the defendant's because the claimant has to run the case. However, in this case "it hit you in the face that these were rather ridiculous figures".

In one of the questionnaires submitted by this judge under the Pilot, he stated that it is "difficult to form clear views about the reasonableness of costs bills in big cases". During the telephone interview the judge agreed that this would be true for small cases also, but said that he believes that there is a tendency to increase costs with the size of the claim, giving the example of a multi-million claim where the only issue is the interpretation of one contractual clause. How could costs of £1 million be justified in a case like this?! His observation is that costs seem to grow with the claim.

Despite a certain amount of scepticism regarding the Pilot ("There are a lot of guess figures"), this High Court Judge acknowledges that it is a good discipline for the parties to concentrate on what their costs are likely to be.

The judge also said: "One of the risks we face is that solicitors will push their figures as high as possible to protect their clients when it comes to detailed assessment - adopting a pessimistic view on costs and inflating the budget to build a cushion. They want to err on the side of caution and put higher figures in. Some of the costs management advantages might thus be undermined."

The High Court Judge concluded: 40 to 50 hours of his time are currently being wasted per year due to late costs estimates.

The parties' approval of the budget

A Birmingham Mercantile Court judge reported early on in the Pilot 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*."

A senior High Court Judge disagreed with this view. His position is that the solicitor's signature is sufficient. The court must not become the policeman of solicitors' conduct towards their client.[125]

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

125. This feedback was provided during a meeting on a confidential basis. For a more detailed analysis of this issue, see chapter 12 above (Clients' approval of the budget / Statements of truth).

great difficulties preparing the budget and completing Form HB. Some solicitors have asked this judge for advice on how to do their budgets. Clearly, some guidance should be given to lawyers on how to prepare their budgets.

Some (solicitors and judges) regard it as a substantial problem that barristers in the past had very little involvement with costs issues; and that most judges were barristers before being appointed as judge.

One judge who spent the last 16 years "on the bench" said that he had no practical experience with most of the contentious costs issues. He said he personally feels under-equipped for detailed costs management under the Pilot scheme; and that there are several issues that ought to be clarified.

A question raised by this judge was: "How much detail am I supposed to go to as a judge?" He understands that the Pilot is not meant as a preliminary assessment of costs, but feels that it remains unclear what level of particularity judges are supposed to descend to.

This judge further said that it remains unclear to him if he is meant to focus on (a) the individual stages; OR (b) the overall costs figure. He concluded by saying that "the whole object of the Pilot is for us to exercise some kind of control over costs." Usually (not always) the parties are roughly on an equal footing, i.e. are budgeting on a similar level. He finds it very difficult for a judge to intervene unless something is strikingly out of line. In other words, it is difficult for judges to take the initiative if both budgets are on a similar level.

When judges apply the new proportionality test to the budget, as Sir Vivian Ramsey explained in his Costs Management Implementation Lecture on 29 May 2012, they will consider whether the total sums on each side are proportionate. The court will also consider the cost impact of its directions. The primary focus will be on the total costs and the overall costs for each stage of the proceedings. However, the court is not embarking on a detailed assessment in advance.[126]

A Mercantile and TCC Judge who attended the Judicial College training on 7 January 2013 reported in a telephone interview that two main things have emerged from the training day: The implementation of the new Civil Procedure Rules in April 2013 will have a pretty radical effect that Her Majesty's Courts and Tribunals Service ("**HMCTS**") has probably not foreseen. Standard CMCs are usually listed for 30 minutes, but as a result of the New Rules an hour will be needed. The initial impact during the first 2 years will be a considerable slowing-up of the list, provided that the New Rules are faithfully applied and provided that costs management is taken seriously.

He believes that on balance, costs management is a very good thing. However, case management (including costs management) will become a major feature in litigation. The second important lesson learnt at the Judicial College training was that 'doing nothing' is not an option. Simply deciding "not approved" is not an option either. You have to grapple with the budget, you have to give guidance.

At the Judicial College training this Mercantile and TCC Judge noted that several District Judges took a draconian approach to costs management, cutting costs in a much tougher way than he would. He is certain that there will be appeals against such cost cutting. He explained his view that you cannot artificially reduce your costs, i.e. solicitors cannot run their business at a loss. For example, if the claim lies somewhere between £80,000 and £100,000, the costs budget will be more than two thirds of the claim, on any basis. In

126. Ramsey, J (2012) *Costs Management Implementation Lecture,* 29 May, paragraphs 16, 17 and 21.

a case like that you cannot say 'only £30,000 is allowed'. In terms of "chipping away at costs" there is a limit to what you can do. For example, in a case of a high-value claim, with big City firms charging £600 per hour and QCs also charging their high fees, you are presented with a costs budget of £900,000 – what do you do? Perhaps costs of £700,000 might be justified, but it is very difficult to determine which level of costs is appropriate or proportionate.

His experience of the Pilot is that solicitors in the specialist courts (such as the Mercantile Courts in Bristol or Birmingham) are usually from the big firms and they get the whole costs management procedure very quickly. In cases with respectable law firms on both sides, they usually don't snipe at each other's budgets. Whereas smaller country firms will struggle more and not always get the budgets right. Litigants in person are not likely to know anything about costs budgets and will be difficult and argumentative, especially as they do not have to produce a budget themselves.

A costs judge pointed out that the Judicial Training of January 2013 would be done in one single day: *"an action in a day, covering case and costs management stage by stage"*. Referring to the training material, the judge said that in future there will be much stricter adherence to timetables: *"Woolf with teeth!"*

The Judicial College has provided training at a number of seminars held in Leeds, Warwick, and London in January and February 2013 for all District and Circuit Judges. Some High Court Judges and Masters attended these seminars but, in addition a series of seminars have been arranged for High Court Judges and Masters covering the same material on case and costs management. This means that all the full-time judiciary will have received training before the implementation of the New Rules, with the part-time judiciary obtaining training through their professional CPD schemes. With regard to this training, the costs judge said that judges' position generally on costs management is cynical. The planned training is not sufficient to equip the entire judiciary with the required tools. There will be no rigorous costs management if judges are not trained adequately. The second costs judge present at the meeting recommended that in certain cases costs judges should sit alongside the designated (other) judge if necessary, just for the costs management part.[127]

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, where it remains for a couple of years, until the suggestion is made to transfer the case to the TCC.

The question then arises whether, in a case like this, a CMO still ought to be made. This judge pointed out that in any event, there is invariably advantage in the parties filing costs estimates in form HB, albeit later than would otherwise have been the case; but the earlier on in a case that a CMO can be made, the better.

With costs management applying across all jurisdictions from 1 April 2013, this should be less of a problem.

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.

127. Feedback was provided on a confidential basis during a meeting with three judges in Leeds.

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 identify 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. The budget building process helps the parties to focus on the likely problem areas. 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 are unaware of any case in which a litigant in person has been asked to complete Form HB. The New Rules expressly exempt litigants in person from filing costs budgets, as already done under the Defamation Pilot.[128] However, litigants in person obviously are involved in the costs management process in relation to the other parties' costs.

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 well in the TCC and Mercantile Courts because the same judge deals with a case from start to finish. To date, this is not given in other courts. This judge has concerns 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 without there also being judicial continuity in the process.

A solicitor (who is a regular user of the Birmingham Mercantile Court) agreed with this view and said that it is a differentiator, or even "a notable weakness" if it is not the same judge who deals with a case from beginning to end, as it happens in many other courts.

The system of assigning a case to one judge from the issue of proceedings up to and including trial is referred to as "docketing". The "docket" is the collection of cases which a particular judge is managing. Lord Justice Jackson recommended to promote the assignment of cases to designated judges with relevant expertise, but at the same time acknowledged that *"it is extremely difficult to operate a docket system in England and Wales, because of the way that the judiciary are organised."*[129]

The docketing of files at Leeds County Court and Registry has been evaluated in a pilot

128. PD 51D, paragraph 3.2; and CPR 3.13.
129. Jackson LJ (2009), the Preliminary Report, paragraph 5.9, p.433.
130. Taylor, N & Fitzpatrick, B (2012), *Evaluation of the Pilot of the Docketing of Files at Leeds County Court and Registry*, January.

study, which resulted in many interesting findings.[130] The pilot involved the formal introduction of the docketing of cases to district judges for pre-trial management, not the trial itself (the **"Docketing Pilot"**). Prior to the Docketing Pilot, Leeds already had a system of 'own listing' and judicial specialisation, which allowed for a smooth introduction of docketing. However, circuit judges were not included in the Docketing Pilot because that would have required much more fundamental change. Circuit judges work in different jurisdictions and different locations, which makes the introduction of docketing very difficult.[131]

The Docketing Pilot came to the conclusion that the administrative staff are the key players in ensuring a docketed case gets back to the right judge at the right time. The district judges who participated in the Docketing Pilot noted the following advantages brought through docketing and judicial continuity:

- Satisfaction in bringing a case to settlement or trial.
- More consistent case management.
- Greater opportunity to steer the case; and less opportunities to mislead the judge.
- Potential for time to be saved in preparation and at trial.[132]

The main disadvantage of docketing seems to be reduced flexibility. Reduced flexibility in judges' itineraries is even more problematic in small court centres.[133]

From 1 April 2013 more docketing is being introduced across all jurisdictions. However it is subject to the limitations on availability where judges deal with cases in different courts or jurisdictions and therefore cannot provide continuity.

Extra burden on case managing judges

Feedback provided by a Mercantile and TCC Judge in a telephone interview emphasised that there will be a considerable extra burden on case managing judges. The costs management procedure is an invaluable tool, but it adds significantly to time taken in case management. A standard first CMC in a specialist case is listed for one hour. On average, between 20 and 30 minutes can be added to preparation time for costs budgets and about 10 minutes can be added to the hearing. If revised costs budgets have to be filed, an average of 30 minutes "box-work time" is to be added. As a result of this, the maximum number of CMCs he can list for a Friday is four. It all adds quite substantially to the time spent. He has a 5-day week. Between 1 and 1.5 days are spent doing pure box-work. It is getting stretched.

He said that undoubtedly there will be a net saving in judicial time at the detailed assessment end of the spectrum once the system really gets going; but he is also quite certain that HMCTS will not have realised the extra burden on case managing judges. HMCTS need to factor this into listing from 1 April 2013.

14 Summary of the results

As highlighted above, due to the relatively limited responses to the questionnaires issued during the Pilot, these responses are only indicative and not statistically significant due to small sample size. However, the data gives an indication of the relevant issues and

131. In the multi-track the classis position is that case management will be undertaken by a district judge, but the case will be tried by a circuit judge. Lord Woolf also recognised the difficulty of introducing docketing to a tiered and multi-jurisdictional judiciary. For further details see the Docketing Pilot, pages 4 and 23-25.
132. See Docketing Pilot, page 4, and pages 14 – 21.
133. Ibid, pages 27-28.

concerns with regard to costs management.

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 the majority of respondents took between 2 and 4 hours to complete Form HB, and only 7 out of 39 solicitors spent over 5 hours on the budget form. 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 under the Pilot.

Another concern is the difficulty of predicting costs accurately at the early stages of litigation. The work required to bring a case to trial can change as the case progresses and costs also depend on how difficult the opponent is.

Having said this, solicitors interviewed seem to acknowledge that completing the budget form would become easier once familiarity with it increased, and the improved aspects of Excel Form H may also assist the process. Most solicitors agreed that the Pilot did assist with early attention to costs, that this allowed their clients better to understand their potential liabilities (including their potential liability to the other party if they did not win), and could also assist with settlement.

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 much improvement. Other advantages included that it aided case management as well as controlling future costs. Feedback received from judges towards the end of the Pilot was more critical in that the extra burden on case managing judges had become clearer, and that the costs management procedure adds significantly to time taken in case management. However, we would note that the majority of responses from judges came from a limited number of individuals and courts and accordingly any findings should be treated with caution.

15 The New Rules and Practice Directions

The New Rules and PD 3E are annexed to this report as Appendices 3 and 4, respectively.[134]

In summary, the New Rules are:

3.12. (1) The rules on costs management apply to all multi-track cases commenced on or after 1 April 2013, unless the proceedings are the subject of fixed costs or scale costs or the court otherwise orders, ***except***

(a) cases in the Admiralty and Commercial Courts;

(b) such cases in the Chancery Division as the Chancellor of the High Court may direct; and

(c) such cases in the TCC and Mercantile Courts as the President of the Queen's Bench Division may direct.

The exemption in rules 3.12(1)(b) and (c) is contained in a direction[135]: The costs management regime shall not apply to cases in the Chancery Division, the TCC and Mercantile Courts where the sums in dispute exceed £2 million, excluding interest and

134. The New Rules are contained in Section II of CPR 3 (Appendix 3) and in PD 3E (Appendix 4).

135. See the Amendment Notice: a direction containing the limited exceptions will be made under the amended CPR 3.12(1).

costs, except where the court so orders.

3.12. (2) The **purpose** of costs management is that the court should manage both the steps to be taken and the costs to be incurred by the parties to any proceedings so as to further the overriding objective.

3.13. All parties except litigants in person must **file and exchange budgets** as required by the rules or as the court otherwise directs.

3.14. Unless the court otherwise orders, any party which fails to file a budget despite being required to do so will be treated as having filed a budget comprising only the applicable court fees.

3.15. The court may at any time make a **CMO**. By such order the court will—

(a) record the extent to which the budgets are agreed between the parties;

(b) in respect of budgets or parts of budgets which are not agreed, record the court's approval after making appropriate revisions.

Thereafter the court will control the parties' budgets in respect of recoverable costs.

3.16. Where practicable, **costs management conferences** should be conducted by telephone or in writing.

3.17. When making **any case management decision**, the court will take into account any available budgets and the costs involved in each procedural step.

3.18. In any case where a CMO has been made, when assessing costs on the standard basis, the court will—

(a) have regard to the receiving party's last approved or agreed budget for each phase of the proceedings; and

(b) not depart from such approved or agreed budget unless satisfied that there is good reason to do so.

(Attention is drawn to rule 44.3(2)(a) and rule 44.3(5), which concern proportionality of costs.)[136]

The Commercial Court exemption

Lord Justice Jackson identified a widely held view that costs management would not be appropriate for the high value cases which generally pass through the Commercial Court. In chapter 40 of his Final Report he refers to:

> *"those very large enterprises which litigate in the Commercial Court and tell me they are unconcerned about the level of costs."*[137]

Lord Justice Jackson concluded:

> *"I readily accept that no case has been yet made out for introducing costs management into the Commercial Court."*[138]

In March 2012 he confirmed this view in an interview with Professor Dominic Regan, who

136. See chapter 17 below.
137. Jackson, LJ, *Final Report*, chapter 40, paragraph 7.3 and footnote 124.
138. Jackson, LJ, *Final Report,* chapter 40, paragraph 7.4.

asked: "*How extensive will costs management be in multi-track work which is outside a fixed costs regime?*" Sir Rupert answered:

> *"I hope that the costs management procedure will be used in every jurisdiction. The judiciary are being trained on this now. The only exception is in the Commercial Court, where no one is seriously concerned about costs at all. This may, of course, change. It should be remembered that significant reforms to Commercial Court procedures, consistent with many of my current proposals, were introduced four years ago."*[139]

This led to the Admiralty and Commercial Courts being exempt from the costs management rules by the version of rule 3.12(1) which was included in The Civil Procedure (Amendment) Rules 2013 to come into effect in April 2013.

Under the Pilot, costs management has been applied in all Technology and Construction Courts and Mercantile Courts regardless of the value of the claim. Only the Admiralty and Commercial Courts were exempt from the costs-management rule.

Further exemptions from automatic costs management

The Statutory Instrument 2013/515 Civil Procedure (Amendment No.2) Rules substitutes CPR rule 3.12(1) to read as follows:

> *"**3.12**.—(1) This Section and Practice Direction 3E apply to all multi-track cases commenced on or after 1st April 2013, except —*
>
> *(a) cases in the Admiralty and Commercial Courts;*
>
> *(b) such cases in the Chancery Division as the Chancellor of the High Court may direct; and*
>
> *(c) such cases in the Technology and Construction Court and the Mercantile Court as the President of the Queen's Bench Division may direct,*
>
> *unless the proceedings are the subject of fixed costs or scale costs or the court otherwise orders. This Section and the Practice Direction 3E will apply to any other proceedings (including applications) where the court so orders."*[140]

At the same time a direction is made under the amended CPR 3.12(1) in these terms:

> *"Pursuant to CPR rule 3.12(1)(b) and (c), the Chancellor of the High Court directs that in the Chancery Division and the President of the Queen's Bench Division directs that in the Technology and Construction Court and Mercantile Courts, Section II of CPR 3 and Practice Direction 3E shall not apply to cases where at the date of the first case management conference the sums in dispute in the proceedings exceed £2,000,000, excluding interest and costs, except where the court so orders."*[141]

The exemption from automatic costs management where the amount at stake exceeds £2 million (excluding interest and costs) was made to avoid *"inappropriate forum shopping"* between different courts, given the concurrent jurisdictions between the Admiralty and Commercial Courts, the Chancery Division, the TCC and the Mercantile Courts.[142]

The disappointment of litigators and judges about these last-minute exemptions from automatic costs management for the TCC, the Chancery Division and the Mercantile Courts

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139. Regan, D (2012), *Jackson on Jackson. Dominic Regan reports from the front line.* NLJ, Vol. 162, Issue 7504, 9 March, page 326.
140. See SI 2013 No. 515 Civil Procedure (Amendment No.2) Rules, which came into force on 1 April 2013.
141. As announced in the Amendment Notice.
142. Ibid.
143. Ibid.

seems as widespread as the sense of victory of the opponents to costs management.

However, the Amendment Notice makes clear that these exemptions are an interim measure and that, even when the exemptions apply, the use of costs management should always be considered.[143] Therefore it is possible that in time automatic costs management will be applied in large cases also.

A Specialist Mercantile Judge with years of experience in costs management firmly believes that costs management as part of case management has to be across the board without anomalous exceptions. No rationale has been given for exempting the Admiralty and Commercial Courts. He finds the exemptions announced in the Amendment Notice illogical. There is no good reason for allowing cases of over £2 million arbitrarily to be exempt from costs management. The Overriding Objective requires all cases to be dealt with at proportionate costs. The principle of proportionality allows for large cases to be dealt with at high, but proportionate costs. He points out that costs management is really about (active) case management, for example by limiting disclosure, requesting witness statements to be shorter and more-to-the-point, and by limiting experts. Therefore costs management should apply regardless of the value of the claim to all multi-track cases in a county court, the Chancery Division of the High Court, the TCC and Mercantile Courts, and also in the Admiralty and Commercial Courts.[144]

Feedback received in telephone interviews with TCC, Mercantile and High Court judges during the Pilot indicates that many judges share the feeling that there is no principle for the exemption of the Commercial Court from the costs management regime, and that they find this very unsatisfactory. A senior High Court Judge said that he doesn't quite know why the Commercial Court is exempt and that the Commercial Court certainly was very much opposed to costs management Feedback received in telephone interviews included comments that judges have not been given any guidance or reasons for exempting the Commercial Court. The smart end of the Chancery Division or the TCC have just as many (foreign) litigants willing to spend large sums of money on litigation, particularly in the construction industry.

The cynical view is that there are so many foreign litigants in the Commercial Court (*Berezovsky v Abramovich* etc.) that the decision had been made to allow litigants to continue earning very high fees in the Commercial Court. Consequently big firms might choose to start proceedings in the Commercial Court for a "free for all", instead of using courts of choice such as the Mercantile Courts in Bristol or Birmingham. Why should a Mercantile Judge be forced to tell Barclays Bank and HSBC that they cannot spend more than X on their expensive City firm solicitors when the Commercial Court is free from this obligation? Judges clearly resent that no guidance was given on this.

A partner in an international legal practice based in London believes that the last-minute amendment of CPR 3.12(1) is due to the *"power and intransigence of the Commercial Court"*. Some pressure to accept automatic costs budgeting had been placed on the Commercial Court, but it refused to give in.

Another solicitor expressed the view that the exemptions announced in the Amendment Notice should last no more than a year, as the Master of the Rolls has indicated. He believes the exemption for the Commercial Court only came in through heavy lobbying by the London Solicitors' Litigation Association. In this context solicitors and judges commented that, particularly from a practical point of view, they cannot see any sound reason for the exemptions. Experience shows that larger cases need budget control from the outset just

144. Feedback was provided to the Pilot's monitoring team on a confidential basis.
145. Feedback was provided to His Honour Judge Simon Brown QC on a confidential basis.

as much as smaller ones.[145]

Professor Dominic Regan said:

> *"The announcement is a result of judicial turf wars. Those caught by budgeting resented those excluded. In particular, they feared litigants would shun them by issuing in a budget-free zone. The exclusion is bizarre. A case worth more than £2m arguably screams loudest for the judicial scrutiny and discipline which goes to the heart of budgeting. Those most profligate will evade the rule."*[146]

However, the revised CPR 3.12(1) is an interim measure. The exceptions announced on 18 February 2013 might not be necessary because the costs management rules give discretion not to make a CMO. The courts' exercise of such discretion in particular cases *"could deal with any remaining concerns as to the appropriateness of costs management in high value cases."*[147]

The Amendment Notice concludes:

> *"… it is envisaged that costs management orders would be made in all cases except where there is good reason not to do so. Even when the exceptions in the rule and the direction apply, the use of costs management should always be considered."*[148]

Thus the use of costs management is encouraged in all cases. The announcement dated 18 February 2013 introduces a (temporary) exemption from costs management in cases where the claim exceeds the value of £2 million ***"except where the court so orders."***[149]

Therefore judges have discretion to apply costs management in the TCC and Mercantile Courts regardless of the value of the claim. Feedback from senior judges also suggests that, if a court wishes to obtain automatic costs budgets for the first CMC in all cases, including those above £2 million, then there is nothing to prevent such court from doing so.

Accordingly, if a judge in the TCC or Mercantile Court decides that costs management should apply in a case that exceeds the £2 million threshold, the parties will have to produce budgets in Form H. The judge can then exercise his discretion as to whether to make a CMO. In this context a Mercantile and TCC Judge remarked that he had found it difficult in the past to grapple with costs budgets well in excess of £500,000.[150]

16 Precedent HB and the new Precedent H

Precedents H, HA, HB, and the new Precedent H

Precedent H was the form that parties were required to use to lodge estimates of costs at the time when Lord Justice Jackson prepared his Final Report. Many litigants ignored this requirement.[151] Precedent HA is the form that parties are required to use if they are subject to the Defamation Pilot.

Precedent HB ("**Form HB**") is the form that parties are required to use if they are subject to the Pilot.

The new Precedent H

The new Precedent H ("**Form H**") is annexed as Appendix 5 to this report. Form H is now

146. Regan, D (2013), *Jackson judicial "turf war" – "U-turn" on costs management rules causes shock waves,* NLJ, 1 March, page 220.
147. See the Amendment Notice.
148. See last paragraph of the Amendment Notice.
149. See CPR rule 3.12(1) in the Amendment Notice.
150. Feedback was provided to His Honour Judge Simon Brown QC on a confidential basis.
151. Jackson, LJ, *Final Report*, chapter 40, paragraph 1.3.
152. For example, the draft PD 3E required Form H to be completed in a 12 point typeface, which was incompatible with Form H written in 7.5 point typeface. Paragraph 1 of PD 3E now refers to an "easily legible typeface" to be used for the budget in Form H.

a working spreadsheet in Excel and addresses many of the criticisms of its predecessor Form HB. For example, the cells of the 'fully functioning' Excel Form H now expand as required and all the calculations are done automatically. Practitioners' requests to improve the mechanical aspects of the budget form have been met. Discrepancies between PD 3E and Form H have been ironed out.[152]

Guidance Notes on Form H can be found on

http://www.justice.gov.uk/courts/procedure-rules/civil/pdf/update/new-precedent-h-guidance.pdf

Since the Guidance Notes on Form H were not part of the Pilot, we have not received any feedback on these notes. An article posted on www.litigationfutures.com on 27 February 2013 described the new Precedent H guidance as *"a recipe for confusion and uncertainty"*, one of the criticisms being that the guidance note states that the pre-action phase does NOT include "any work already incurred in relation to any other phase of the budget". One of the responses to costs lawyer Matthew Harman's article reads:

> *"You seem to be equating "Pre-Action" with "Pre-Budget". If costs have been incurred then they will be entered as such regardless of the phase they are attributed to. That will make it clear they were incurred before the date of the budget."*[153]

Following a "last call for comments on costs management and the pilot scheme under PD 51G" issued by Practical Law Company (PLC) on 7 March 2013, a costs lawyer sent the following comments to the Pilot's monitoring team:

> *"I prefer the old precedent H form for costs budgeting, which contained separate columns for costs incurred and costs estimated. The new precedent H form has boxes to be ticked to show whether the costs are incurred and/or are estimated, however, costs management is to apply to solely the estimated costs and therefore it is unclear how this can be done where the two groups of costs are not necessarily separated."*
>
> *"There should be an additional section within the precedent H form for work in relation to quantum, such as preparing a Schedule of Damages and considering a Counter Schedule."*

He concluded that:

> *"[…] practical difficulties are unlikely to come to the fore until budgeting comes into force in earnest (rather than as part of the pilot schemes)."*

A costs judge criticised the "one-size-fits-all" approach of Precedent H and believes it to be unsuitable for many cases.

Separate costs incurred from estimated (future) costs

> "*2.4 As part of the costs management process the court may not approve costs incurred before the date of any budget. The court may, however, record its comments on those costs and should take those costs into account when considering the reasonableness and proportionality of all subsequent costs.*"[154]

17 Proportionality

Proportionality is the most important principle of the new costs rules; and proportionality

153. http://www.litigationfutures.com/news/new-precedent-h-guidance-recipe-confusion-uncertainty
154. PD 3E, paragraph 2.4.
155. See Neuberger L, MR (2012) *Proportionate Costs: The Fifteenth Lecture in the Implementation Programme,* paragraph 10, Law Society, 29 May.

will be implemented before the issue of the claim form, throughout the life of proceedings, and at the end of proceedings when costs come to be assessed.[155]

In his lecture on proportionate costs in May 2012, Lord Neuberger referred to the point made by Lord Devlin in 1970:

> *"It is a fallacy to think that time and money are no object where the operation of the civil justice system is concerned. Parties and their lawyers must keep firmly in mind that they ought to expend no more than a proportionate amount of money in the pursuit of justice. If they wish to spend more, they must appreciate that such sums will not be recoverable from their opponent. That is proportionality, proportionate costs, as between the parties."*[156]

The approach taken in *Lownds v Home Office*[157] of allowing costs which were considered reasonable and necessary to the litigation is to be reversed. The aim of achieving substantive justice must be counterbalanced by the need for economy, efficiency, and proportionality.[158] Necessity does not render costs proportionate.[159] Lord Neuberger recommends removing the reference to necessity because of its potential to mislead, and instead assess costs by reference to reasonableness, and by reference to proportionality itself.[160]

The Civil Procedure (Amendment) Rules 2013 introduce the new 'proportionality test' in CPR rule 44.4(5):

> *"44.4(5) Costs incurred are proportionate if they bear a reasonable relationship to—*
>
> *(a) the sums in issue in the proceedings;*
>
> *(b) the value of any non-monetary relief in issue in the proceedings;*
>
> *(c) the complexity of the litigation;*
>
> *(d) any additional work generated by the conduct of the paying party; and*
>
> *(e) any wider factors involved in the proceedings, such as reputation or public importance."*

Lord Neuberger concludes:

> *"The law on proportionate costs will have to be developed on a case by case basis. This may mean a degree of satellite litigation while the courts work out the law, but we should be ready for that, and I hope it will involve relatively few cases."*[161]

An effect of CPR 44.4(5) will be that reasonable costs incurred by a party in pursuing or defending a claim will not necessarily make such costs proportionate, and thus recoverable from an opponent. The intention of the new rule is that proportionality should prevail over reasonableness. In an assessment of costs on the standard basis, it seems likely that the court's approach will be first to assess if the costs spent were reasonable, and then to consider whether the total figure is proportionate.

In an interview with a Deputy High Court Judge (who also sits as Recorder), the judge expressed a rather sceptical view on the new proportionality test. The Deputy High Court Judge referred to proportionality as the Achilles heel of the reforms[162] and asked (slightly provocatively): "What is the meaning of 'proportionality'? Can you give a one-line definition of proportionality? Proportionality has to cover more than the "damages-to-

156. Ibid., paragraph 8.
157. *Lownds v Home Office* [2002] 1 WLR 2450.
158. See for instance Jackson, LJ, Final Report, chapter 40, paragraph 5.
159. Neuberger L, MR (2012) Proportionate Costs: The Fifteenth Lecture in the Implementation Programme, paragraph 5, Law Society, 29 May.
160. Ibid, paragraph 6.
161. Ibid, paragraph 15.
162. Wikipedia definition of Achilles heel: a deadly weakness in spite of overall strength that can actually or potentially lead to downfall.

cost-ratio". Does it take into account the effect on an individual?" The judge concluded that parties are going to have their own view on what is proportional, and warned: "If proportionality means what a judge wants it to mean, we go back to judicial uncertainty".

The Deputy High Court Judge would very much welcome a list of criteria that would help a judge decide if costs are proportional or not, and said that the judiciary would benefit greatly from a checklist. The judge believes that clear guidance on what is proportional is needed. There have to be more objective criteria than there currently are, and stricter guidelines on the meaning of proportionality. The judge gave as an example the checklist available in family law cases, where the law is concerned about the children's welfare and asks all kinds of questions such as 'Have you taken into account the effect on the child's education? etc.

Amendment to the overriding objective

The Civil Procedure (Amendment) Rules 2013 amend the overriding objective (CPR 1.1) by inserting *"and at proportionate cost"* in paragraphs (1) and (2), and by adding sub-paragraph (f) as follows:

"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 ***and at proportionate cost****.*

2) Dealing with a case justly ***and at proportionate cost*** *includes, so far as is practicable*

a. ensuring that the 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;
d. ensuring that it is dealt with expeditiously and fairly;
e. allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases; and
f. enforcing compliance with rules, practice directions and orders.*"*

18 Conclusion

Feedback received under the Pilot generally indicates that costs management is a new discipline that requires skill and practice, but which can be learnt. The costs management procedure effectively shifts the focus of costs control from retrospective, as it used to be, to prospective, with the court focusing upfront on how much should be spent (or at least recovered) in the litigation. More certainty as to the other side's costs and as to the likely overall costs at the beginning of the litigation seems widely to be regarded as a positive factor of costs management.

The majority of solicitors who provided feedback under the Pilot acknowledged several

benefits of costs management, namely that:

- it makes the parties focus on the issues early on, and more thoroughly analyse what is necessary to prosecute the action;
- it helps to focus on the costs of the future conduct of the case;
- it informs the parties about each other's budgets for the litigation and provides an insight into the opponent's tactics;
- it introduces a degree of certainty to the planned amount of work and costs for the client, and provides a strong incentive to keep within the budget;
- it may avoid lengthy detailed assessments of costs at the end of the litigation; and
- it informs the parties about the cost of not settling at an early stage and thus can encourage settlement.

With regard to the unavoidable costs of the costs management process itself, it is perhaps too early to be certain how expensive it will be. However, costs management under the New Rules will introduce a new discipline in respect of incurring litigation costs. The findings of the Pilot suggest that it is likely that the overall effect of costs management will be to bring down the total costs of the litigation.

What can be said about the client's perspective? Solicitors are obliged to provide cost information and estimates of costs for litigation. Most commercial clients have for many years requested costs over time estimates so they can consider the cost-benefit risk and cashflow requirements of funding litigation. It is too early to say how clients really feel about the new regime. Some might find to their surprise that their cost recovery is limited by a CMO. However, many will no doubt welcome the importance now placed on the cost recovery implications and the increased information which provides for a better assessment of the settlement options during the proceedings, and generally more transparency about costs.

Appendix 1

REVIEW OF
CIVIL LITIGATION COSTS

THE RT.HON.LORD JUSTICE JACKSON
The Royal Courts of Justice, Strand, London, WC2A 2LL

COSTS PILOT: QUESTIONNAIRE FOR JUDGES

This pilot has been set up in accordance with the recommendations in chapter 40 of the Civil Litigation Costs Review Final Report. The purpose of 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.

In order that the pilot can be monitored, I would be most grateful if you could complete this questionnaire and return it to by post to Nicholas Gould, Centre of Construction Law & Dispute Resolution, The Old Watch House, King's College London, Strand Campus, Strand London WC2R 2LS after:

- each case management conference;
- costs management hearing;
- pre-trial review; and/or
- any hearing where costs are assessed after judgment or settlement

where costs budgets are considered by the Court.

If you wish to expand on your answers, please use continuation sheets. We estimate that the questionnaire will take no longer than **five minutes** to complete.

The monitoring team is headed by Nicholas Gould, who is a Senior Visiting Lecturer at King's College, London and a partner in Fenwick Elliott LLP. Any published data or report following this pilot will be suitably anonymised and all data will be handled in accordance with Data Protection Act 1998. You can withdraw your data at any time prior to finalisation of the final report by notifying Nicholas Gould in writing.

Thank you for your help.
Rupert Jackson

PART A: TO BE COMPLETED BY COURT STAFF

1. Court Name: ____________________

2. Claim Number: ____________________

3. Was the hearing a:

- [ ] Case Management Conference
- [ ] Costs Management Hearing
- [ ] Pre-Trial Review
- [ ] Assessment of Costs after judgment or settlement

PART B: TO BE COMPLETED BY THE JUDGE

4. Did you make a Costs Management Order for this claim? [ ] Yes [ ] No

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

____

____

____

____

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

____

____

____

____

7. What was the value of the claim?

[ ] Under £50,000	[ ] £50,000-£99,999	[ ] £100,000-£249,999
[ ] £250,000-£499,999	[ ] £500,000-£999,999	[ ] £1 million-£4,999,999
[ ] £5 million-£9,999,999	[ ] £10 million-£19,999,999	[ ] £20 million or above

8. How long did you spend preparing for this hearing? _______ hours _______ mins

9. How much of that time was spent studying the budgets? _______ hours _______ mins

10. How long did the hearing last? _______ hours _______ mins

11. How much time at the hearing was spent dealing with approval/amendment of the budgets? _______ hours _______ mins

12. From your perspective what are the benefits of the Costs Management Procedure?

____

____

____

13. From your perspective what are the disadvantages of the Costs Management Procedure?

14. Could the procedure be improved? ☐ Yes ☐ No

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

16. Would you like to be provided with the results of this survey once they are published? ☐ Yes ☐ No

17. If yes, what are the names and phone numbers of yourself and your clerk?

Your Name: ______

Name of Clerk: ______

Your Clerk's email address: ______

Telephone Number of Clerk: ______

18. Are you willing to amplify your answers by telephone? ☐ Yes ☐ No

REVIEW OF
CIVIL LITIGATION COSTS

THE RT.HON.LORD JUSTICE JACKSON
The Royal Courts of Justice, Strand, London, WC2A 2LL

COSTS PILOT: QUESTIONNAIRE FOR SOLICITORS

This pilot has been set up in accordance with the recommendations in chapter 40 of the Civil Litigation Costs Review Final Report. The purpose of 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. In order that the pilot can be monitored, I would be most grateful if you could complete this questionnaire and return it to **nicholas.gould@kcl.ac.uk**[1] after:

- case management conference where costs budgets are considered;
- pre-trial review where costs budgets are considered; and/or
- costs management hearing where costs budgets are considered;
- at the end of the case once the issue of who is to pay costs, and what amount, has been finally determined

We estimate this questionnaire will take five minutes to complete if your case has not completed and eight minutes to complete if it has completed. If you wish to expand on your answers, please use continuation sheets.

The monitoring team is headed by Nicholas Gould, who is a Senior Visiting Lecturer at King's College, London and a partner in Fenwick Elliott LLP. Any published data or report following this pilot will be suitably anonymised and all data will be handled in accordance with the Data Protection Act 1998. You can withdraw your data at any time prior to finalisation of the final report by notifying Nicholas Gould in writing.

Thank you for your help.
Rupert Jackson

<u>PART A</u>: TO BE COMPLETED BY THE COURT

1. Court Name: ______________________________

2. Claim Number: ______________________________

[1] If it is not convenient to send the completed questionnaire back by email, please send it by post to Nicholas Gould, Centre of Construction Law & Dispute Resolution, The Old Watch House, King's College London, Strand Campus, Strand London WC2R 2LS.

3. Was the hearing a:

☐ Case Management Conference

☐ Costs Management Hearing

☐ Pre-Trial Review

☐ Assessment of Costs after judgment or settlement

PART B: TO BE COMPLETED BY THE PARTIES' SOLICITORS

4. Which party do you represent?

☐ Claimant

☐ Defendant

☐ Other ________________ Please specify

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

____

____

____

6. What was the value of the claim including counterclaims?

☐ Under £50,000	☐ £50,000-£99,999	☐ £100,000-£249,999
☐ £250,000-£499,999	☐ £500,000-£999,999	☐ £1 million-£4,999,999
☐ £5 million-£9,999,999	☐ £10 million-£19,999,999	☐ £20 million or above

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

☐ Under 1 hour	☐ Over 1 hour but under 2 hours	☐ Over 2 hours but under 3 hours
☐ Over 3 hours but under 4 hours	☐ Over 4 hours but under 5 hours	☐ 5 hours or over

8a. Did you revise Form HB for a subsequent hearing? ☐ Yes ☐ No

8b. If you answered "yes" to question 8a, how long did it take you to revise it for a subsequent hearing (if applicable):

☐ Under 1 hour	☐ Over 1 hour but under 2 hours	☐ Over 2 hours but under 3 hours
☐ Over 3 hours but under 4 hours	☐ Over 4 hours but under 5 hours	☐ 5 hours or over

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

____
____
____

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

☐ A - Solicitors with over 8 years' PQE including at least 8 years' litigation experience

☐ B - Solicitors and legal executives with over four years' PQE including at least 4 years' litigation experience

☐ C - Other solicitors, legal executives and fee earners of equivalent experience

☐ D - Trainee solicitors, paralegals and other fee earners

☐ E – Costs Draftsmen

11. What were the benefits of the Costs Management Procedure?

____
____
____

12. What were the disadvantages of the Costs Management Procedure?

____
____
____

13. How do you think the Costs Management Procedure could be improved?

____
____
____

14. Have you got any suggestions as to how Precedent HB could be improved?

____
____
____
____

15. Has the case concluded? ☐ Yes ☐ No

If you have ticked "No", go to question 23 below.

16. What was the outcome of the case?

____
____

17. Were any monies (excluding costs) awarded by the Court? ☐ Yes ☐ No

18. Who was the receiving party(s) (*please tick all that apply*)?

☐ Claimant ☐ Defendant

☐ Other

_______________________ Please specify

19. How much was the receiving party awarded by the Court (*excluding any costs*)? (*If there was more than receiving party please specify how much each party received*).

£____

____

20. If the case has concluded, were the costs paid to the receiving party:

☐ Agreed

☐ Assessed by the Court

21. What was the amount of the costs paid to the receiving party or parties?
£____

____

22. What was the amount of costs anticipated by the receiving party as likely to be incurred by them in their last approved budget? £_______________________

23. Would you like to be provided with the results of this survey?

☐ Yes ☐ No

If yes, please provide:

Name: ____

Email address: ____

Telephone Number: ____

24. Are you willing to amplify your answers by phone?

☐ Yes ☐ No

STATUTORY INSTRUMENTS

2013 No. XXX (L.XXX)

SENIOR COURTS OF ENGLAND AND WALES
COUNTY COURTS, ENGLAND AND WALES

The Civil Procedure (Amendment) Rules 2013

"SECTION II

Costs Management

Application of this Section and the purpose of costs management

3.12.—(1) This Section and Practice Direction 3E apply to all multi-track cases commenced on or after 1st April 2013 in—

(a) a county court; or

(b) the Chancery Division or Queen's Bench Division of the High Court (except the Admiralty and Commercial Courts),

unless the proceedings are the subject of fixed costs or scale costs or the court otherwise orders. This Section and Practice Direction 3E shall apply to any other proceedings (including applications) where the court so orders.

(2) The purpose of costs management is that the court should manage both the steps to be taken and the costs to be incurred by the parties to any proceedings so as to further the overriding objective.

Filing and exchanging budgets

3.13. Unless the court otherwise orders, all parties except litigants in person must file and exchange budgets as required by the rules or as the court otherwise directs. Each party must do so by the date specified in the notice served under rule 26.3(1) or, if no such date is specified, seven days before the first case management conference.

Failure to file a budget

3.14. Unless the court otherwise orders, any party which fails to file a budget despite being required to do so will be treated as having filed a budget comprising only the applicable court fees.

Costs management orders

3.15.—(1) In addition to exercising its other powers, the court may manage the costs to be incurred by any party in any proceedings.

(2) The court may at any time make a "costs management order". By such order the court will—

(a) record the extent to which the budgets are agreed between the parties;

(b) in respect of budgets or parts of budgets which are not agreed, record the court's approval after making appropriate revisions.

(3) If a costs management order has been made, the court will thereafter control the parties' budgets in respect of recoverable costs.

Costs management conferences

3.16.—(1) Any hearing which is convened solely for the purpose of costs management (for example, to approve a revised budget) is referred to as a "costs management conference".

(2) Where practicable, costs management conferences should be conducted by telephone or in writing.

Court to have regard to budgets and to take account of costs

3.17.—(1) When making any case management decision, the court will have regard to any available budgets of the parties and will take into account the costs involved in each procedural step.

(2) Paragraph (1) applies whether or not the court has made a costs management order.

Assessing costs on the standard basis where a costs management order has been made

3.18. In any case where a costs management order has been made, when assessing costs on the standard basis, the court will—

(a) have regard to the receiving party's last approved or agreed budget for each phase of the proceedings; and

(b) not depart from such approved or agreed budget unless satisfied that there is good reason to do so.

(Attention is drawn to rule 44.3(2)(a) and rule 44.3(5), which concern proportionality of costs.)

PRACTICE DIRECTION 3E – COSTS MANAGEMENT

This Practice Direction supplements Section II of CPR Part 3

Contents of this Practice Direction

Title	Number
Budget format	Para. 1
Costs management orders	Para. 2

Budget format

1 Unless the court otherwise orders, a budget must be in the form of Precedent H annexed to this Practice Direction. It must be in landscape format with an easily legible typeface. In substantial cases, the court may direct that budgets be limited initially to part only of the proceedings and subsequently extended to cover the whole proceedings. A budget must be dated and verified by a statement of truth signed by a senior legal representative of the party. In cases where a party's budgeted costs do not exceed £25,000, there is no obligation on that party to complete more than the first page of Precedent H.

(The wording for a statement of truth verifying a budget is set out in Practice Direction 22.)

Costs management orders

2.1 If the court makes a costs management order under rule 3.15, the following paragraphs apply.

2.2 Save in exceptional circumstances-

(1) the recoverable costs of initially completing Precedent H shall not exceed the higher of £1,000 or 1% of the approved budget;

(2) All other recoverable costs of the budgeting and costs management process shall not exceed 2% of the approved budget.

2.3 If the budgets or parts of the budgets are agreed between all parties, the court will record the extent of such agreement. In so far as the budgets are not agreed, the court will review them and, after making any appropriate revisions, record its approval of those budgets. The court's approval will relate only to the total figures for each phase of the proceedings, although in the course of its review the court may have regard to the constituent elements of each total figure. When reviewing budgets, the court will not undertake a detailed assessment in advance, but rather will consider whether the budgeted costs fall within the range of reasonable and proportionate costs.

2.4 As part of the costs management process the court may not approve costs incurred before the date of any budget. The court may, however, record its comments on those costs and should take those costs into account when considering the reasonableness and proportionality of all subsequent costs.

2.5 The court may set a timetable or give other directions for future reviews of budgets.

2.6 Each party shall revise its budget in respect of future costs upwards or downwards, if significant developments in the litigation warrant such revisions. Such amended budgets shall be submitted to the other parties for agreement. In default of agreement, the amended budgets shall be submitted to the court, together with a note of (a) the changes made and the reasons for those changes and (b) the objections of any other party. The court may approve, vary or disapprove the revisions, having regard to any significant developments which have occurred since the date when the previous budget was approved or agreed.

2.7 After its budget has been approved, each party shall re-file and re-serve the budget in the form approved with re-cast figures, annexed to the order approving it.

2.8 A litigant in person, even though not required to prepare a budget, shall nevertheless be provided with a copy of the budget of any other party.

2.9 If interim applications are made which, reasonably, were not included in a budget, then the costs of such interim applications shall be treated as additional to the approved budgets.

PRACTICE DIRECTION 3F – COSTS CAPPING - *supplements Section III of CPR Part 3.* For the contents of Practice Direction 3F, please see:

http://www.justice.gov.uk/courts/procedure-rules/civil/pdf/update/cpr-60-update-pd-making-document.pdf

SUBSECTION 3 OF THIS PRACTICE DIRECTION – COSTS BUDGETS

Costs budgets

3.1 In any case where the parties have filed budgets in accordance with Practice Direction 3E but the court has not made a costs management order under rule 3.15, the provisions of this subsection shall apply.

3.2 If there is a difference of 20% or more between the costs claimed by a receiving party on detailed assessment and the costs shown in a budget filed by that party, the receiving party must provide a statement of the reasons for the difference with the bill of costs.

3.3 If a paying party—

(a) claims to have reasonably relied on a budget filed by a receiving party; or

(b) wishes to rely upon the costs shown in the budget in order to dispute the reasonableness or proportionality of the costs claimed,

the paying party must serve a statement setting out the case in this regard in that party's points of dispute.

3.4 On an assessment of the costs of a party, the court will have regard to the last approved or agreed budget, and may have regard to any other budget previously filed by that party, or by any other party in the same proceedings. Such other budgets may be taken into account when assessing the reasonableness and proportionality of any costs claimed.

3.5 Subject to paragraph 3.4, paragraphs 3.6 and 3.7 apply where there is a difference of 20% or more between the costs claimed by a receiving party and the costs shown in a budget filed by that party.

3.6 Where it appears to the court that the paying party reasonably relied on the budget, the court may restrict the recoverable costs to such sum as is reasonable for the paying party to pay in the light of that reliance, notwithstanding that such sum is less than the amount of costs reasonably and proportionately incurred by the receiving party.

3.7 Where it appears to the court that the receiving party has not provided a satisfactory explanation for that difference, the court may regard the difference between the costs claimed and the costs shown in the budget as evidence that the costs claimed are unreasonable or disproportionate.

Source: http://www.justice.gov.uk/courts/procedure-rules/civil/pdf/update/cpr-60-update-pd-making-document.pdf

Costs budget of [Claimant / Defendant] dated [ ]

In the: [to be completed]
Parties: [to be completed]
Claim number: [to be completed]

PRECEDENT H

Work done / to be done	Assumptions	Incurred		Estimated		Total (£)
		Disbursements (£)	Time costs (£)	Disbursements (£)	Time costs (£)	
Pre-action costs		£0.00	£0.00	£0.00	£0.00	£0.00
Issue / pleadings		£0.00	£0.00	£0.00	£0.00	£0.00
CMC		£0.00	£0.00	£0.00	£0.00	£0.00
Disclosure		£0.00	£0.00	£0.00	£0.00	£0.00
Witness statements		£0.00	£0.00	£0.00	£0.00	£0.00
Expert reports		£0.00	£0.00	£0.00	£0.00	£0.00
PTR		£0.00	£0.00	£0.00	£0.00	£0.00
Trial preparation		£0.00	£0.00	£0.00	£0.00	£0.00
Trial		£0.00	£0.00	£0.00	£0.00	£0.00
ADR / Settlement discussions		£0.00	£0.00	£0.00	£0.00	£0.00
Contingent cost A: [explanation]		£0.00	£0.00	£0.00	£0.00	£0.00
Contingent cost B: [explanation]		£0.00	£0.00	£0.00	£0.00	£0.00
Contingent cost C: [explanation]		£0.00	£0.00	£0.00	£0.00	£0.00
GRAND TOTAL (including both incurred costs and estimated costs)		£0.00	£0.00	£0.00	£0.00	**£0.00**

This estimate excludes VAT (if applicable), court fees, success fees and ATE insurance premiums (if applicable), costs of detailed assessment, costs of any appeals, costs of enforcing any judgment and [complete as appropriate]

[Statement of truth]

Signed

Position　　　　Date

In the: [to be completed]
Parties: [to be completed]
Claim number: [to be completed]

		RATE (per hour)	PRE-ACTION COSTS				ISSUE / PLEADINGS				CMC			
			Incurred costs	Estimated costs		TOTAL	Incurred costs	Estimated costs		TOTAL	Incurred costs	Estimated costs		TOTAL
			£	Hours	£		£	Hours	£		£	Hours	£	
	Fee earners' time costs													
1	Partner	£0.00			£0.00	£0.00			£0.00	£0.00			£0.00	£0.00
2	[fee earner]	£0.00			£0.00	£0.00			£0.00	£0.00			£0.00	£0.00
3	[description]	£0.00			£0.00	£0.00			£0.00	£0.00			£0.00	£0.00
4	[Ideally add extra lines]	£0.00			£0.00	£0.00			£0.00	£0.00			£0.00	£0.00
5	**Total Profit Costs (1 to 4)**		**£0.00**		**£0.00**	**£0.00**	**£0.00**		**£0.00**	**£0.00**	**£0.00**		**£0.00**	**£0.00**
	Expert's costs													
6	Fees					£0.00				£0.00				£0.00
7	Disbursements					£0.00				£0.00				£0.00
	Counsel's fees [indicate seniority]													
8	Leading counsel					£0.00				£0.00				£0.00
9	Junior counsel					£0.00				£0.00				£0.00
10	**Court fees**					£0.00				£0.00				£0.00
11	**Other Disbursements**					£0.00				£0.00				£0.00
12	Explanation of disbursements [details to be completed]													
13	**Total Disbursements (6 to 11)**		£0.00		£0.00	£0.00	£0.00		£0.00	£0.00	£0.00		£0.00	£0.00
14	**Total (5 + 13)**		0			**£0.00**	0			**£0.00**	0			**£0.00**

In the: [to be completed]
Parties: [to be completed]
Claim number: [to be completed]

		RATE (per hour)	DISCLOSURE				WITNESS STATEMENTS				EXPERT REPORTS			
			Incurred costs	Estimated costs		TOTAL	Incurred costs	Estimated costs		TOTAL	Incurred costs	Estimated costs		TOTAL
			£	Hours	£		£	Hours	£		£	Hours	£	
	Fee earners' time costs													
1	[Insert relevant]	£0.00			£0.00	£0.00			£0.00	£0.00			£0.00	£0.00
2	[fee earner]	£0.00			£0.00	£0.00			£0.00	£0.00			£0.00	£0.00
3	[description]	£0.00			£0.00	£0.00			£0.00	£0.00			£0.00	£0.00
4	[Ideally add extra lines]	£0.00			£0.00	£0.00			£0.00	£0.00			£0.00	£0.00
5	**Total Profit Costs (1 to 4)**		**£0.00**	0	**£0.00**	**£0.00**	**£0.00**		**£0.00**	**£0.00**	**£0.00**		**£0.00**	**£0.00**
	Expert's costs													
6	Fees	£0.00				£0.00				£0.00				£0.00
7	Disbursements					£0.00				£0.00				£0.00
	Counsel's fees [indicate seniority]													
8	Leading counsel	£0.00				£0.00				£0.00				£0.00
9	Junior counsel	£0.00				£0.00				£0.00				£0.00
10	**Court fees**					£0.00				£0.00				£0.00
11	**Other Disbursements**					£0.00				£0.00				£0.00
12	Explanation of disbursements [details to be completed]													
13	**Total Disbursements (6 to 11)**		£0.00		£0.00	£0.00	£0.00		£0.00	£0.00	£0.00		£0.00	£0.00
14	**Total (5 + 13)**		0			**£0.00**	0			**£0.00**	0			**£0.00**

In the: [to be completed]
Parties: [to be completed]
Claim number: [to be completed]

		RATE (per hour)	PTR				TRIAL PREPARATION				TRIAL			
			Incurred costs	Estimated costs		TOTAL	Incurred costs	Estimated costs		TOTAL	Incurred costs	Estimated costs		TOTAL
			£	Hours	£		£	Hours	£		£	Hours	£	
	Fee earners' time costs													
1	[Insert relevant]	£0.00			£0.00	£0.00			£0.00	£0.00			£0.00	£0.00
2	[fee earner]	£0.00			£0.00	£0.00			£0.00	£0.00			£0.00	£0.00
3	[description]	£0.00			£0.00	£0.00			£0.00	£0.00			£0.00	£0.00
4	[Ideally add extra lines]	£0.00			£0.00	£0.00			£0.00	£0.00			£0.00	£0.00
5	**Total Profit Costs (1 to 4)**		**£0.00**	0	**£0.00**	**£0.00**	**£0.00**		**£0.00**	**£0.00**	**£0.00**		**£0.00**	**£0.00**
	Expert's costs													
6	Fees	£0.00				£0.00				£0.00				£0.00
7	Disbursements					£0.00				£0.00				£0.00
	Counsel's fees [indicate seniority]													
8	Leading counsel	£0.00				£0.00				£0.00				£0.00
9	Junior counsel	£0.00				£0.00				£0.00				£0.00
10	**Court fees**					£0.00				£0.00				£0.00
11	**Other Disbursements**					£0.00				£0.00				£0.00
12	Explanation of disbursements [details to be completed]													
13	**Total Disbursements (6 to 11)**		£0.00		£0.00	£0.00	£0.00		£0.00	£0.00	£0.00		£0.00	£0.00
14	**Total (5 + 13)**		0			**£0.00**	0			**£0.00**	0			**£0.00**

In the: [to be completed]
Parties: [to be completed]

Claim number: [to be completed]

		RATE (per hour)	SETTLEMENT / ADR				CONTINGENT COST A: [EXPLAIN]				CONTINGENT COST B: [EXPLAIN]			
			Incurred costs	Estimated costs		TOTAL	Incurred costs	Estimated costs		TOTAL	Incurred costs	Estimated costs		TOTAL
			£	Hours	£		£	Hours	£		£	Hours	£	
	Fee earners' time costs													
1	Grade A	£0.00			£0.00	£0.00			£0.00	£0.00			£0.00	£0.00
2	Grade B	£0.00			£0.00	£0.00			£0.00	£0.00			£0.00	£0.00
3	Grade C	£0.00			£0.00	£0.00			£0.00	£0.00			£0.00	£0.00
4	Grade D	£0.00			£0.00	£0.00			£0.00	£0.00			£0.00	£0.00
5	**Total Profit Costs (1 to 4)**		**£0.00**		**£0.00**	**£0.00**	**£0.00**		**£0.00**	**£0.00**	**£0.00**		**£0.00**	**£0.00**
	Expert's costs													
6	Fees	£0.00				£0.00				£0.00				£0.00
7	Disbursements					£0.00				£0.00				£0.00
	Counsel's fees [indicate seniority]													
8	Leading counsel	£0.00				£0.00				£0.00				£0.00
9	Junior counsel	£0.00				£0.00				£0.00				£0.00
10	**Court fees**					£0.00				£0.00				£0.00
11	**Other Disbursements**					£0.00				£0.00				£0.00
12	Explanation of disbursements [details to be completed]													
13	**Total Disbursements (6 to 11)**		£0.00		£0.00	£0.00	£0.00		£0.00	£0.00	£0.00		£0.00	£0.00
14	**Total (5 + 13)**		0			**£0.00**	0			**£0.00**	0			**£0.00**

Costs Management in the Chancery Division and the Specialist Lists in the Queen's Bench Division: Amendment to CPR rule 3.12(1)

This document has been issued by the President of the Queen's Bench Division and the Chancellor of the High Court to give notice of an important amendment which will be made to CPR 3.12(1) to change the rule currently in the Statutory Instrument.

Costs Management is being introduced as an important part of the reforms arising from Lord Justice Jackson's Review of Civil Litigation Costs. He identified a general view that costs management would not be appropriate for the high value cases which generally pass through the Commercial Court. He therefore considered that whether costs management should be adopted in Commercial Court litigation should be left to the discretion of judges in individual cases but said he encouraged judges actively to adopt costs management in any lower value cases which are brought in the Commercial Court. This led to the Admiralty and Commercial Courts being excepted from the costs management rules by the version of rule 3.12(1) which was included in The Civil Procedure (Amendment) Rules 2013 to come into effect in April 2013.

On further reflection, it has been recognised that it is undesirable for an exception from automatic costs management to apply only to the Admiralty and Commercial Courts, when in many commercial cases there is an element of concurrent jurisdiction between that court, the Chancery Division, the Technology and Construction Court and the London Mercantile Court, all of which function in the Rolls Building. Equally, outside London, the Chancery Division, Technology and Construction Court and Mercantile Courts have a similar concurrent jurisdiction.

Given these concurrent jurisdictions, the Civil Procedure Rule Committee at its meeting on 8 February 2013 approved the following amended rule 3.12(1) to allow for a similar exemption from automatic costs management in all of those jurisdictions;

> *(1) This Section and Practice Direction 3E apply to all multi-track cases commenced on or after 1st April 2013, except -*
>
> > *(a) cases in the Admiralty and Commercial Courts;*
> >
> > *(b) such cases in the Chancery Division as the Chancellor of the High Court may direct; and*
> >
> > *(c) such cases in the Technology and Construction Court and the Mercantile Courts as the President of the Queen's Bench Division may direct,*
>
> *unless the proceedings are the subject of fixed costs or scale costs or the court otherwise orders. This Section and the Practice Direction 3E will apply to any other proceedings (including applications) where the court so orders.*

This rule will be included in a further Statutory Instrument which it is intended will be made so as to come into force on 1 April 2013.

At the same time a direction will be made under the amended CPR 3.12(1) in these terms:

> *Pursuant to CPR rule 3.12(1)(b) and (c), the Chancellor of the High Court directs that in the Chancery Division and the President of the Queen's Bench Division directs that in the Technology and Construction Court and Mercantile Courts, Section II of CPR 3 and Practice Direction 3E shall not apply to cases where at the date of the*

first case management conference the sums in dispute in the proceedings exceed £2,000,000, excluding interest and costs, except where the court so orders.

The Master of the Rolls has been consulted on and agrees with this direction. Parity of approach in relation to Costs Management between these Courts is considered to be important to avoid any inappropriate forum shopping as parties get used to the new rules. The revised rule is an interim measure, as it is thought that the case for any exception should be re-visited, given that under the rules there is a discretion which might be exercised in particular cases not to make a costs management order, which could deal with any remaining concerns as to the appropriateness of costs management in high value cases. Also, after that review of the position, it will be desirable for the principle finally decided on to be incorporated in rule 3.12(1) itself rather than in a direction.

Subject to the limited exceptions which will be dealt with in the direction, it is envisaged that costs management orders would be made in all cases except where there is good reason not to do so. Even when the exceptions in the rule and the direction apply, the use of costs management should always be considered

Dated 18 February 2013

Sir John Thomas, President of the Queen's Bench Division
Sir Terence Etherton, Chancellor of the High Court