Pound stretchers

Rani Mina and **Tom Duncan** investigate a new costs management pilot scheme that is set to be rolled out in the autumn

Lord Justice Jackson's goal of controlling costs in civil litigation has inched another step closer with the Civil Procedure Rules Committee's decision to roll out its costs management pilot scheme.

Currently running in the Birmingham Mercantile Court, the pilot has been deemed a success by the committee, which wants to see it extended to all technology and construction courts from 1 October. This pilot is likely to be rolled out more generally in due course.

So, it's probably time to get up to speed with what new techniques this pilot is testing. The associated practice direction (PD51F) states:

1. The parties are to exchange and submit their detailed budgets to the court before the first case management conference. This should follow a standard template, which is attached to the practice direction and includes a costs estimate for each of the specified activities to be undertaken; for example, pleadings, disclosure, witness statements, expert reports, mediation and any other appropriate steps. The budget allows for 'identifiable' contingencies.
2. The parties are encouraged to discuss their budgets while they are being prepared and before each case management conference and other hearings.
3. The court will review these budgets and, if it decides to make a 'costs management order', may make 'appropriate revisions' before approval of the budgets. The court may also order attendance at a subsequent cost management hearing in order to monitor expenditure.
4. If a costs management order is made, a party must notify and explain to the court any increase in the budget and the court may approve or disapprove of departures from the budget. When subsequently assessing costs, the court will not depart from the approved budget without good reason.
5. Any party may apply to the court if it considers another party is "behaving oppressively in seeking to cause that party to spend money disproportionately on costs". It is not clear what order the court may make in these applications.

Appropriate revisions

Clients already expect their solicitors to provide estimates for the various stages in any litigation and require the case to be managed consistently with the estimate. The difference is that the court will now be expected to take an active role and make 'appropriate revisions' to the budgets.

In many cases the revisions may involve using other case management powers, such as limiting the number of technical experts, ordering a trial of preliminary issues or ordering a split liability and quantum trial, but this may not always be the case. The practice direction gives a wide discretion and appropriate revisions might include:

- limiting the time spent on preparation of witness statements;
- questioning the use of larger law firms or senior counsel in cases where the sums in dispute are modest;
- increased insistence on joint experts or 'hot tubbing'; or
- insisting on competitive tendering for expert services.

These are areas where the court's views and the client's interests may diverge but, at the very least, it is clear that the parties will have to justify the steps to be taken as proportionate. This is likely to increase the costs of the case management process and use up more court time but these potential drawbacks will be outweighed, in many litigants' eyes, by the increased transparency about an opponent's plans and costs.

The emphasis on holding parties to the budget should enable litigants to assess their financial risks with more certainty and at an earlier stage. This will allow more informed decisions to be made about the merits or otherwise of pursuing a case or settling.

Tactical thinking

There will be other consequences. Litigation strategies and tactics are adapted to reflect rule changes. For example, if one party benefits from more limited evidence, its budget may be correspondingly lower. If its opponent is keen to have a more detailed evidential inquiry, its budget will be higher but it will have to justify this to the court.

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Paragraph 4.5 of the practice direction (see point 5 above) is particularly ripe for use as a tactical weapon. It is most likely to be deployed where one party has virtually unlimited resources and the other side does not, in an attempt to level the playing field.

It may also be used by parties with relatively equal resources to, for example, object to lengthy and repetitive pleadings, resist requests for further information or to resist wide-ranging or oppressive disclosure requests. How the courts respond to such applications will be crucial in determining how widespread such tactics become.

The committee is treating this pilot scheme with caution, which is understandable. But it is perhaps no bad thing that they have decided to follow it up on a larger-scale pilot. It represents an opportunity for lawyers and their clients to engage more effectively with each other and the court in our continuing efforts on the road to proportionality.

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