COSTS PILOT IN THE TCC

The TCC has long been at the forefront of modern case management initiatives. Practices such as fixed trial dates, set at the first case management conference, which have yet to reach other divisions of the High Court, have been standard in the TCC for many years. Handling a case in a different High Court division is quite a shock for a construction lawyer used to direct and active control of cases by a Judge. The Chancery Division, for example, seems frankly old fashioned in comparison.

The TCC is innovating yet again in its pioneering of the costs management pilot scheme.

The costs pilot has been running in the Birmingham TCC and Mercantile Courts for some months. It will be extended to all TCC and Mercantile Courts from 1 October 2011, and will apply to all cases where the first case management conference takes places after 1 October 2011. It will run until 30 September 2012.

A new Practice Direction, 51(F), governs the pilot scheme. The aim of this scheme is *"to control the costs of litigation in accordance with the overriding objective"*.

The key elements of the scheme are:

- Each party must file at Court and exchange a detailed costs budget in a standard format at the same time as filing its Case Management Information Sheet.
- The costs budget must include reasonable allowances for intended activities such as disclosure, identifiable contingencies and disbursements including mediator fees.
- The Court may make a costs management order. If it does it may revise the budget, approve it and may order attendance in person or on the telephone at subsequent Cost Management Hearings to monitor expenditure.
- Any party may then apply to Court if that party considers that another party is behaving oppressively and seeking to cause that party to spend money disproportionately on costs.
- The parties are expected to discuss their costs budgets at certain intervals.
- An updated costs budget must be filed and serve at least 7 days before any subsequent case management conference, cost management hearing or pre-trial review where the existing costs budget is no longer accurate.
- The parties' legal representatives must notify their client in writing of any cost management orders and provide them with a copy of new or revised budgets.

- When assessing costs, the Court will not depart from the approved budget unless there is good reason for it to do so.

How this will work in practice will be extremely interesting as it is applied on a larger scale to more cases. Although feedback in Birmingham seems to have been positive, there is very little in the way of articles discussing as to how it has worked in practice, or practical demonstrations of what the Courts have done.

I anticipate that there may be some difficulties with the scheme as it beds down.

Barristers, from the ranks of which the vast majority of Judges are drawn, have little or no experience of costs, how they accumulate and how to predict and control them, particularly on a big case. Costs predictions can be very difficult to get right. For example, disclosure is a particularly difficult area in which to predict costs confidently. How much disclosure your own clients may come up with is problematic enough let alone the other party's or parties' disclosure. The difficulties in predicting how much disclosure there will be has been magnified by the advent of email and electronic disclosure and the requirements laid down in the electronic disclosure practice directions. Getting a costs budget wrong will have potentially severe consequences for the client.

Parties are likely to initially over-egg the pudding and they will estimate costs to avoid the risk of being penalised later.

It will be interesting to see if a practice develops of using costs budgets tactically to put commercial pressure on a financially weaker party. The side effect of this may be that settlement rates will increase.

Perhaps, however, the most intriguing aspect of the new practice direction is the ability to make an application in the event of oppressive or unreasonable behaviour by the other party which leads to excessive costs. I can certainly think of one or two occasions in my legal career where such an application would have been a useful weapon in the armoury and it would have been tempting to threaten or make such an application in the face of an opponent's unreasonable behaviour.

Conclusion

There is no doubt that the costs of litigation can be extraordinary. However recent innovations in Court practice such as the introduction of the Pre-action Protocols have increased the costs of litigation. In addition, the advent of electronic disclosure will invariably increase the costs of litigation. The Courts must accept a share of the blame for the high costs of litigation. The costs pilot is a welcome experiment in keeping costs at a sensible level, and it will be fascinating to see how successful it is.

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