BIRMINGHAM LAW SOCIETY

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BIRMINGHAM LAW SOCIETY DISPUTE RESOLUTION COMMITTEE RESPONSE TO THE CIVIL JUSTICE COUNCIL COSTS WORKING GROUP'S CONSULTATION PAPER ON COSTS

OCTOBER 2022

The Birmingham Law Society ('the Society') is the largest provincial local law society with a membership of some 5,000, representing solicitors, barristers and paralegals working in the West Midlands area. This response has been prepared by the Society's Dispute Resolution Committee ('DRC') in response to the Civil Justice Council's ('CJC') Costs Working Group Consultation Paper on ('the Consultation Paper'), published in June 2022.

The DRC is a committee formed of legal practitioners who deal with many different areas of law and come from various sizes of practice. Its members have experience in both claimant and defendant litigation, as well as some having invaluable judicial experience. The DRC exists to give a voice to local practitioners and lobbies on their behalf.

Reform of the costs regime is welcomed generally by the DRC, for the reasons outlined in this document. We seek to respond to the Questions asked at Annex B to the Consultation Paper.

General submissions

To assist in contextualising the Society's responses, we have considered the purposes of cost budgeting, namely:

- to meet the aims of the overriding objective in dealing with cases at a proportionate cost;
- to provide information to opponents on their potential costs exposure;
- to provide a tool for managing that exposure in advance; and
- to streamline the assessment process at the end of a case, with a view to higher recovery.

Our responses therefore consider how far the current cost budgeting regime meets the intended purposes.

In respect of the questions asked in Annex B, we respond as follows:

COSTS BUDGETING

Is costs budgeting useful?

The benefits of cost budgeting can be seen in the context of clinical negligence and personal injury cases. Claimants are often not personally responsible for their own costs (often being represented on a Conditional Fee Arrangement or similar) and with qualified one-way shifting, Defendants have a direct interest in keeping the Claimant's costs proportionate. Members of the DRC who are members of the judiciary observed that in their experience contested budgets tend to occur in these practice areas.

However, our experience is that there is less benefit in commercial cases (particularly low to mid value), in which some parties may treat cost budgeting as a perfunctory exercise whilst others spend significant time and cost with cost draughts people; the approaches fall below or go beyond the intention of the budgeting process.

For smaller claims cost budgeting is felt to be disproportionately time-consuming and overly rigid process. For example, at 1.5 hour costs and case management conferences a mere 5 – 10 minutes can be dedicated to directions whilst the remaining time is spent on the cost budgets. This is not a proportionate use of judicial time or the parties' money. Similarly, applications to vary the cost budgeting process itself and the detailed assessment process are considered unduly costly and take away from the time and money that could be focused on the substantive issues in dispute.

Some practitioners commented that Judges at County Court appeared unfamiliar with cost budgeting and therefore the cost budgeting process is rendered futile as a result, as amended cost budgets are approved without formal application or explanation.

When considering settlement, practitioners felt that in smaller claims, cost budgets are not always considered in detail, or at all. More generally, settlement often occurs by way of global figures. Others commented that cost budgeting could lead to greater recovery at assessment and/or settlement stage as there may be less room for dispute when it has already been approved by the Court. Practitioners did not regularly undertake detailed cost assessment proceedings, limiting the number of claims in which the benefits of the cost budgeting regime is felt.

Some practitioners felt that cost budgeting was most helpful in larger value cases (i.e. over £1m in value), including those which under the current regime are outside of the automatic application of the processes due to the scale of damages sought, especially where some parties are represented by large London based firms. Others felt that cost budgeting is useful in specialist Courts such as the Technology and Construction Court. Another advantage is holding Counsel to account to cost estimates which aids in managing and providing oversight of costs. However, the Courts generally appear unwilling to closely examine the fee negotiated with Counsel, despite close scrutiny of rates and fees agreed with Solicitors.

What if any changes should be made to the existing costs budgeting regime?

The scope of the existing regime should be reduced to higher value claims only, i.e. £1m and above.

In respect of claims with a value below that level, it has been observed that a similar process to that in Family proceedings – whereby non-binding indications of current and future costs are provided by the parties under a statement of truth – may be useful in achieving the purpose of cost budgeting in a proportionate manner. This would assist in requiring parties to continue to have consideration of their costs and potential cost exposure.

Should costs budgeting be abandoned?

Yes, for county court and lower value claims.

If costs budgeting is retained, should it be on a "default on" or "default off" basis?

If it the scope is restricted to larger value claims in the High Court, "default on".

Otherwise, “default off”. This could be combined with a simplified approach such as that used in the Family Courts, with the option for the parties to agree or apply for full cost budgeting.

Some practitioners felt that the general CPR principles of the unsuccessful party paying the successful party’s reasonable and proportionate costs is a sufficient approach. Others felt that disclosure ought to be budgeted for, and that Trial could be budgeted for at the Pre-Trial Review.

For cases that continue within the costs budgeting regime, are there any high-level changes to the procedural requirements or general approach that should be made?

See responses above.

GUIDELINE HOURLY RATES

What is or should be the purpose of GHRs?

GHR should be a good benchmark across the country. However, practitioners feel that hourly rates are not given close scrutiny, but rather only overall figures and practitioner roles tend to be considered.

Some practitioners feel that the purpose should be to ensure that an unsuccessful party is not required to, in effect, pay costs on an indemnity rate owing to the fact that the successful party could afford to instruct more expensive lawyers.

Do or should GHRs have a broader role than their current role as a starting point in costs assessments?

Should GHRs be adjusted over time and if so how?

Many practitioners felt that GHRs ought to be subject to annual or biennial adjustment rather than being left for long periods of years before being updated.

What would be the wider impact of abandoning GHRs?

Are there alternatives to the current GHR methodology?

COSTS UNDER THE PRE-ACTION PROTOCOLS/PORTALS AND THE DIGITAL JUSTICE SYSTEM

What are the implications for costs associated with civil justice of the digitisation of dispute resolution?

What is the impact on costs of pre-action protocols and portals?

Is there a need to reform the processes for assessing costs when a claim settles before issue, including both solicitor own client costs, and party and party costs?

Parties can be left significantly out of pocket where they successfully defend a threatened claim or a prospective claimant achieves a settlement without the need to issue proceedings. The successful party should not be penalised by having to meet considerable, irrecoverable cost expenditure.

What purpose(s) does the current distinction between contentious business and non-contentious business serve? Should it be retained?

CONSEQUENCES OF THE EXTENSION OF FIXED RECOVERABLE COSTS

To the extent you have not already commented on this point, what impact do the changes to fixed recoverable costs have on the issues raised in parts 1 to 3 above?

Are there any other costs issues arising from the extension of fixed recoverable costs, including any other areas in which some form of fixed costs or costs capping scheme may be worth consideration? If so, please give details.

Parties shouldn't be deterred from relying on the justice system to recover what they are due, where they know to do it will simply mean they end up losing a tonnage in legal fees, thus rendering the process academic. If a party is unsuccessful, they should simply have to pay a standard percentage of what the successful party incurred. That's the penalty of bringing or defending a duff claim to trial. If they want to avoid it, because a dispute is not clear-cut, then mediate a sensible compromise to avoid the penalties.

Should an extended form of costs capping arrangements be introduced for particular specialist areas?