FIXED RECOVERABLE COSTS
"Preparatory next steps"
Workshop
11th March 2016

25 representatives from the judiciary, professions, academia, court users and Government were present.

Welcome

The chairman, Knowles J, introduced the event. It was noted that the government had expressed interest in extending the fixed recoverable costs (FRC) regime. Discussion had also been stimulated by Jackson LJ's speech. The LCJ had also talked of incremental change when appearing in front of the Justice Committee.
In the context of change – HMCTS reform and CCSR.

Wanted this to be the reaction of a group of individuals rather than representative of groups. Hadn't invited everyone – though aimed to do in the future, with the help of those present. Chatham House Rules – asked those present to use their discretion. Not a forum for persuasion – but to identify the issues and how best to work on those. It was about principle rather than detail.

Approach

On programme, in discussing an approach to the subject, had mentioned user-centred**,** technology, HMCTS reform and the Civil Courts Structure Review (CCSR), and proportionality. Was there anything missing? What were the watchwords?

- Simplicity and certainty.
- As much simplicity as can be achieved – but not to the exclusion of all else. System must produce just results.
- Justice
- Remember the overriding objective
- Clarity
- Need for regular review
- Scope and extent of exceptions. Can cater for exclusions in the body of the system.
- Evidence based – meaningful basis that underpins proposals or objectives.
- Scope – how to avoid 'Balkanisation'
- Definition of what we're trying to achieve, in order to be able to measure.

- Is the objective to **reduce costs, or to fix them**? It is to reduce costs to prevent rule of law being undermined. It is about the practical ability of people to use the system. It's both. About **how different approaches come together**, and what's the

- **What's the problem**? Is it **disproportionate costs of low value claims**? So, proportionality. Is the problem only when costs are higher than amount in dispute?

- Must be vigilant to unintended consequences. There is already a new costs regime – costs budgeting, etc. Are they working? Have they been given an opportunity to work? No need to rush into new scheme.

- Depends on particular case. **Value is not sole determinant of proportionality.** If costs are too high, should the system be simpler, so that we stop frontloading costs? In commercial field, have shorter trials worked? They have no costs budget. Is it a matter of identifying those parts that attract a figure and reducing process?

- Feeling that there is a problem. Low value claims **incur costs before the budgeting stage** is reached. (Sometimes left to parties to negotiate away?). Matter of convincing public that lawyers' costs are not disproportionate.

- So to what extent **does costs budgeting solve the problem**? Parties can agree a budget, but agreement that in many cases costs had already been incurred. Also, litigants run out of money and become LIPs. It is possible to predict certain budget figures for certain types of case. But message not getting across to judges. Too early to tell on costs budgeting. There had not been much assessment of budgeted cases yet. Budget doesn't stop someone paying more to their own lawyer. Also, differences regionally. Too early to tell if it's working. Jackson LJ had spoken about pre-issue budgeting, with an element of control at an early stage.

- Reminder that this is only about recoverability – can't legislate on what lawyers charge. It is about the '**reasonable contribution'** that the losing party should pay. To put another way - a schedule of costs and costs budget won't stop a lawyer charging their rate. It will just reduce the contribution made.

- Shouldn't costs be more **bespoke** to the nature, facts, circumstances and behaviour in the case? Fixed costs are a blunt, unfair tool. But in IP, means that cases are heard that otherwise wouldn't be. The fixed costs aren't the same as the costs budget – but allow litigants to **measure their exposure**. It's about certainty for businesses. **Not one size fits all** – there may be a 'greater commercial advantage' outside the case. Paying party can price into business models.

Structure

- Is it about:
    1. What the case costs – in which case, **evidence** needed, or
    2. A contribution. In which case, who is paying the rest? The client? Or the wrong-doer? There is a chance that the wrong doer will end up paying less and the client more.

- Fixed costs can affect **behaviour** of parties. Also, **make procedure simpler** and reduce costs in that way. With the Portal, an attempt was made to tackle procedure first and then fix costs. There didn't seem to be a great cut in costs immediately afterwards.

- Might unbundling offer another way of reducing costs? Technology is not just about saving costs, but also about making the system more approachable and understandable. The evidence base must be budgeted cases – hard when so many settle. As ever, devil in the detail - what is excluded from the fee? Disbursements, counsel's fee?

- The experience from the attempt of the CJC to look again at the GHR was that firms are reluctant to let us have access to the necessary data. **Would evidence be forthcoming** this time?

- **Rule 44.3.2A** ('Where the amount of costs is to be assessed on the standard basis, the court will …only allow costs which are proportionate to the matters in issue. Costs which are disproportionate in amount may be disallowed or reduced even if they were reasonably or necessarily incurred') gave a test for those costs not within the fixed fee.

- **How do we gather evidence?** Does HMCTS have data? Criminal cases had the equivalent on sentences. The budgets in clinical negligence cases were approved, so record kept? Some info was needed, rather that pulling figures out of the air. Firms hold MI. Also, budgeted cases can end in a detailed assessment. Firms gather data on the costs of a case, the disbursements and damages.

- Though phases agreed and approved in a costs budget, costs incurred in those phases were not distinguished in detailed assessment.

- There is a vested interest in not producing **'detailed data'** from the start. Could start with the Jackson figures and say 'show us that they're wrong.' So not done is a vacuum.

- Contrast between **user-centred approach and evidence-based approach**. Which was most important? Costs were a tangible obstacle to users.

- Insurers provided loads of data. Realistically, **how much time should be spent** on a case of a particular level? And should the lawyer do all of it? How much could the client take on?

- In order to agree costs, need to work out an appropriate level of hourly rate, and in order to do that need to get a handle on the underlying costs. Should the costs be worked out **retrospectively or prospectively**? Who bears the risk – the user or the law firm?

- What are we worried about – access to justice or lawyers being paid fairly?
- Is there a standard basis for assessing costs as part of a summary assessment?

There are also complex, challenging cases where it is about access to justice.

Wider dimensions

- Jackson LJ has suggested capping costs by stage. It's not a fixed fee. Summary assessments are material. Can also get evidence from insurers – and data on costs budgeting.
- Need to make sure data is representative - Rule 44.3.2A again. Also remember that most cases are PI – already fixed – and many more are LIPs.

- Some judges left it to the paying party to negotiate an amount. This was a failure to look at proportionality.

- Without evidence base, figures are arbitrary. The same would go for any % uplifts. How do you determine those? But there is a degree of fixed costs already from budgeting. Shorter trial scheme asked for schedule of costs to be put in before knowing who had won.

- There is evidence out there, even if it's not as good as it could be. Not great evidential value if parties are agreeing budgets without judicial involvement.

- Should these cases should be in court at all? It's a matter of having some 'skin in the game'. Defendants don't recover costs in a large number of cases. So the **commercial decision** is, how important is the point? If not important, cheaper to settle.

- Were there to be a large shortfall, the defendants would be delighted. Not a level playing field. If there's a shortfall and a CFA, the risk is transferred, further chopping down of compensatory damages if recoverable costs also cut down.

- Assessment of risk and certainty. Consumers – about risk communication. Be certain that someone has understood the risk and that they have modified their behaviour accordingly. **Different categories of law, but also of consumer**, segmentation might work for some but not others.

- Fixed costs can be used as a **tactic** – requires vigilance if extending their use. Can include an uplift for behaviour. Claimants were limited by them, not defendants. There needed to be control mechanisms. But this was just robust case management. Needed to be part of feasible package.

- **IPEC** works because not about money or damages, but often about getting an injunction and protecting a monopoly. There was always a hefty chunk of irrecoverable costs to be paid. The thing was whether what they were getting was justified by those irrecoverable costs. The business case was not about money. Fixed costs meant you got nothing for pre-action processes, settlements, or the time spent

- IP Enterprise Court cases were lengthy and complex and required rigorous case management. The list of issues was condensed. There was no opportunity to run up huge costs. They were overall caps, not fixed costs. You don't necessarily complete all stages. The choice was between IPEC and the High Court. There was an element of **rough justice**. It was about certainty on costs exposure. Bear in mind that these clients have a choice. The only certainty is that it won't be more than x. But it does allow lawyers to budget for their own lawyer's costs and their costs exposure. The value of the claim was the value of the right being protected at issue.

- Where did IPEC get figures from? **'A contribution'** meant it wasn't necessarily a model for across the board. If we put a model up, we need to show where it comes from. There are a number of courses, which may not be perfect, but we need to be pragmatic.

Safeguards:

- Was this the worst of both worlds – needing to record time spent in case it falls outside regime for e.g. behavioural reasons. But it's not necessarily an hourly basis even if it escapes the regime.

- Discussion about automatic escape clause for **Part 36** settlements. Designed to encourage good behaviour. Essential to have some mechanism to encourage good behaviour. Is there a risk of client getting less because lawyer is getting paid the same. Generally, effort reduced when the damages reduced. Still had to know how much time was spent so could measure profit. Lowering incentives generally had unintended consequences and undesirable outcomes. In Germany all payments were % based. In absence of that, likely to be consequences for behaviour. Jackson LJ had given bands, not amounts. Room for distortion of behaviour still.

- Importance of drafting. Was there a band so that people could argue that their particular case was difficult, or that the whole type of case was? Fear that negligent behaviour was consequence of fixed fee regime. Escape clauses not necessarily effective. Not unprecedented – different protocols for different areas. Suggestion that the reason escape clauses weren't used were because they were 'perfectly pitched'.

- Some ambivalence – it was swings and roundabouts. If you allowed the top end of the distribution to escape, it changed the basis on which fixed costs were calculated.

- Motor cases were large in number and homogenous. It was different and more difficult to try and adapt a scheme used for IP to, e.g. claims for damages for child abuse. And what evidence was there of the ways in which child abuse cases were different? Any scheme should not be adapted to meet the demands of effective lobbyists.

- Any objections to a proposed scheme must be backed up by evidence. And rigorous evidence – not skewed, biased or badly compiled. Will market respond with commoditisation of claims? Or won't go near expensive cases. **Ongoing monitoring and review needed.** Evidence that **some not able** to bring a claim because unable to recover costs if unsuccessful. Those unable to defend cases without certainty.

- We start from a place of challenge. Some progress towards FRC might help us move on from existing problems - so it's worth doing. **Not just about evidence of what it will cost – still needs to be proportionate.** Timing 'appalling' and should allow changes to bed down so can understand impact before overlaying with another set of changes. Or, arguably, better to tackle at time of change. It was **a logical corollary**. Costs budgeting and GHR haven't tacked costs control. Needed **access to justice for both sides in all manner of disputes**. Was it better to apply to claims for up to £25k than £250k?

Follow on:

- What's the problem? Up to £25k?
- Take forward – but in conjunction with other things, including work with LIPs. How to avoid going to court in the first place?
- Leadership and control needed. Online court too – up to £25k. Must do in parallel.
- Another meeting of this kind? Or one with more people. Document to larger group with areas for discussion.
- A formal proposal rather than in abstract.
- What is problem, scale and proposal?

Summary

- What is the problem? Disproportionate costs of low value claims. Lack of certainty

- Bringing two approaches together - what's the trade off between user focus X evidence focus; access to justice X fair payment of lawyers. Cold reality - costs of many low value cases are disproportionate to claim.

- Blunt tool? In what ways can it be modified? Control mechanisms - bad behaviour. Can exceptions be incorporated into model?

- Timing. Is it too early to judge previous regime, e.g. costs budgeting.

- How far does costs budgeting solve the problems? What about when value is sole measure? Costs incurred before budget

- Evidence. Would it be forthcoming? What sources of evidence are there? What about costs budgeting? Should it be retrospective or prospective? What is 'good enough' evidence.

- IPEC example - what can we learn? Condensed list of issues and rigorous case management. Where did they get their figures? What elements of these powers exist already?

- Level - upto £25k?

AD
14 March 2016