RESPONSE TO THE CIVIL JUSTICE COUNCIL'S COSTS CONSULTATION

ON BEHALF OF THE COUNTY COURT AT CENTRAL LONDON

AND THE MAYOR'S AND CITY OF LONDON COURT

Introduction

1. The County Court at Central London and the Mayor's and City of London Court together form the largest civil-only court centre in England and Wales. The two courts will be referred to as CLCC in this response. They comprise 15 Circuit Judges and 6 District Judges. (We should have 12 District Judges, but we have not had a full complement for several years). We have four Senior Circuit Judges, three of whom are Senior Chancery Circuit Judges. Four of our District Judges specialise in Business and Property, insolvency and IPEC work. Two Designated Civil Judges and a Deputy DCJ sit at the courts.
2. CLCC deals with the full range of general civil work as well as a substantial amount of B&PC work. Much of the work is transferred to this court from the three Divisions of the High Court. We hear all the multi-track cases for London over £50,000 and below the level of the High Court and we are responsible for the triage of all the MT cases which are destined for courts within the Greater London area.
3. This response is on behalf of the judiciary at CLCC. The views in it are not necessarily shared by all our judges; some have submitted their own responses.
4. We have responded principally to the questions relating to costs budgeting and Guideline Hourly Rates, being the issues of which we have direct and extensive experience.

Part 1 – Costs Budgeting

1.1 Is costs budgeting useful and 1.3 Should costs budgeting be abandoned?

5. CLCC conducts approximately 1250 costs and case management conferences ("CCMCs") each year. The standard time estimate for a CCMC is one hour, but often directions are given with a 90-minute time estimate. When costs budgeting was introduced, we initially had a 45-minute time estimate, but it became clear this was inadequate. This is a very significant commitment of judicial time. In addition, there are the not infrequent applications for relief from sanctions which have to be heard, as well as applications to vary the budgets.
6. All multi-track cases which are transferred to CLCC on receipt of a defence are subject to a triage process on a daily basis by the urgent CJ and DJ who give directions for the listing of a CCMC. This is classed as urgent work for our listing team. We currently have 247 CCMCs waiting to be listed, although some of the backlog is due to the ongoing problems with ListAssist. CCMCs make up about 60% of our urgent listing.

7. Despite these systems, the waiting time for a CCMC is several months. Before CCMCs were introduced, our waiting time for a case management hearing was about 6 weeks.
8. We agree that it is of crucial importance to focus the parties' attention on costs and to control costs at an early stage, but the experience of this court is that the process of costs budgeting has failed to achieve that aim. The cost of the exercise to the parties, the delay it causes to the proceedings and the judicial time it consumes outweigh the benefits.
9. Costs budgeting *per se* has not resulted in practitioners focussing on conducting litigation at proportionate cost. One might say that the imperative to meet billing targets works in the opposite direction. Where there has been costs restraint, this has come about from other forces, most notably the use of panel rates for those acting for insurers and the Government.
10. Those acting for privately paying parties of modest means often prepare suitably modest budgets, which are then agreed between the parties.
11. Most contested budgets are those of claimants in personal injury and clinical negligence cases. In these CCMCs, the court is faced with the defendant's budget at panel (or "artificially low") rates and what is often a disproportionate claimant's budget which has clearly been inflated as a cushion against the cuts expected during the costs budgeting process. The fact that the court may reduce such a budget by, say, 50% is not evidence that costs budgeting 'works'; rather it illustrates the sterility of the process and the 'gameplaying' in which some parties engage. It is also not apparent what benefit there is in costs managing defendants' budgets in PI cases when their costs will generally not be recoverable under QOCS.
12. A feature which has become more pronounced in claimant PI work and which tends to inflate budgets is a tendency to ask for permission for every conceivable expert and to leave it to the court to decide whether the evidence is reasonably required. This may be with an eye to guarding against complaints from/ claims by clients.
13. It is noticeable that since the rules were changed to confirm that the costs of the CCMC come within the incurred phase, the average costs of that phase have increased from about £3500 to between £8000-£10,000. This might illustrate the costs of complying with the process or may be another example of tactical 'padding' of the budget. In either case, the costs budgeting process has failed to control those costs.
14. The costs budgeting process has two inbuilt weaknesses which militate against effective costs control. The first is the ability of the parties to agree each other's budgets. It is not uncommon to see cases where both parties have produced wholly disproportionate budgets which are then agreed, removing any control by the court. If all litigation should be conducted at proportionate cost, then those with deep pockets should not be able to effectively opt out of the process.
15. The other weakness is the lack of any control over incurred costs, leaving the court only with the option of recording its views when it considers that the incurred costs are excessive. Others may have evidence as to whether such recorded views have any impact on a subsequent detailed assessment. The extent to which practitioners

frontload costs varies considerably but incurred costs can form a substantial proportion of the total budget.

16. One of the suggested benefits of costs budgeting is that it allows the parties to know their costs exposure early on. This is somewhat undermined by the ability of the parties to apply under CPR3.15A for a variation to the budget and/or to argue under CPR18 on detailed assessment that there was a good reason to depart from the budget. We do not suggest that those avenues should be closed; there may well be good reason to vary the budget if it becomes apparent that further expert evidence is required or that the trial time estimate needs to be increased. However, the 'certainty' which a budget gives may be illusory.
17. The well-ventilated objections to the costs budgeting regime are borne out in our experience. A judge is expected to come to a proportionate figure for the budget based on limited information and on the preparation which he/ she has managed to give to the case. Judges who are former barristers have no relevant experience on which to draw. Judges who are former solicitors have had such experience, but their knowledge becomes out of date within a few years of appointment. Given that the assessment of what is proportionate is unavoidably a subjective exercise, it is unsurprising that there is inconsistency between judges and areas of the country. Judicial College training has shown repeatedly that there can be a wide range of views as to what a proportionate figure might be.
18. The judge is little assisted by Counsel who largely appear at CCMCs. Although the courts have stressed that costs budgeting is not akin to a detailed assessment, Counsel's submissions usually focus on hourly rates, time and the level of counsel's and expert's fees, rather than on what is a proportionate figure for the phase. Indeed, Precedent H encourages that approach by requiring the parties to give such a detailed breakdown of each item per phase. Precedent Rs are often completed by costs lawyers who calculate their offers down to the penny.
19. The consultation paper raises the particular issue of judges' differing approaches to the question of 'what comes first – identifying the work that needs to be done or setting a budget with the work then being agreed within the budget'. We wonder whether this is more of a perceived, rather than actual, problem. The theoretical insistence that directions must follow the budget appears counterintuitive to many judges and is impractical to apply rigidly. Firstly, proportionality is a key consideration when giving directions. Secondly, there is often an overlap between the directions and the budget. If the court decides that the parties' time estimate for trial is too short, the budgets need to be increased; if the court decides that certain expert evidence included in the budgets is not reasonably required, the budgets need to be revised downwards, in both cases subject to an overall view of proportionality.
20. We do not agree that there is a need for further training of judges. The issues of inconsistency arise as a consequence of the differences between judges when exercising their discretion and also due to the inherent problems with the costs budgeting regime as set out above. There are insufficient specialist costs judges to deal with every CCMC.

21. Cases where one party is using their superior economic power to bully the other party do occur, although not frequently. These cases could be managed using costs capping (discussed below).
22. For the reasons given, we consider that costs budgeting should be abandoned. We hear on average about 25 CCMCs each week at CLCC. Assuming that the removal of costs budgeting would save 20 minutes of each CCMC, this would free up 1.5 – 2 days of judicial time each week, allowing us to list other work more quickly.
23. We suggest that other options to help ensure that cases are conducted at proportionate cost include:
    a. Before 2013 CLCC's standard practice was to require the parties to tell the court at CMC the level of the costs to the CMC and the projected costs to trial. This was a simple, cheap and expedient way of undertaking a costs/ benefit analysis at the hearing in the presence of the parties and, more often than not, their clients. The experience was that in private litigation where there were no insurers etc the case would often settle shortly afterwards, if it was going to settle at all.
    This practice could be revived, with a requirement for most parties to attend court so that they know what the case is going to cost. The figures given by the parties could be recorded on the order. The court could also record its view as to whether that total is proportionate or not, to assist in detailed assessment.
    b. The use of costs capping: the court would give a ball park figure for the total which each party can spend, leaving them to use it as they see fit. This is a simple way of limiting costs and would be considerably quicker than budgeting each phase.
    c. There are a significant number of cases worth up to about £100,000 which are not complex and which would otherwise be suitable for the fast track, except that they require a trial of longer than one day. It may be possible to create a two-day fast track category with the ability to claim the necessary additional trial fees. This may overlap to an extent with the proposals for fixed recoverable costs in certain cases up to £100,000.
    d. The scope of provisional assessment could be extended, coupled with the 'beefing up' of detailed assessment with more detailed guidance on the application of proportionality.

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

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

1.5 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?

24. If costs budgeting is retained, we reluctantly conclude that it should be on a "default on" basis. This is because a "default off" regime would undoubtedly lead to satellite

litigation as to whether a case should be costs budgeted or not, which would require an initial hearing even before the CCMC.

25. It is difficult to see how the problem of incurred costs can be tackled except by a form of detailed assessment which would add yet more time to the CCMC hearing.

Guideline hourly rates

26. We consider that GHRs have a role to play as a starting point for summary assessment. That said, they need to be regularly updated and must reflect commercial reality, or they will be largely ignored. The recently updated rates for London seem to be considerably lower than the hourly rates commonly seen in schedules of costs.

HHJ WENDY BACKHOUSE

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