

Response of Commercial Court Judges to Civil Justice Council Costs Consultation

1. The Judges of the Commercial Court have common views on two of the areas on which the Working Group has asked for responses and reactions, namely 1) Costs Budgeting, and 2) Guideline Hourly Rates. They do not wish to comment on 3) Costs under pre-action protocols or 4) Consequences of the extension of FRC.
2. By way of an initial comment, we fully endorse the points made in paragraph 7 of the Consultation Paper. A functioning civil justice system is the bedrock of the economy; and a functioning civil justice system must entail the resolution of disputes both within a reasonable time, and in a proportionate manner, which includes being proportionate as to costs.

Costs Budgeting

3. Given the terms of CPR 3.12, and what the Consultation Paper calls the 'default off' position for cases over £10 million, there are many cases in the Commercial Court where costs budgeting is not required to be conducted.
4. Our view is that, in the great majority of cases in which costs budgeting does occur in the Commercial Court, it is not useful, and has a tendency to increase rather than reduce costs.
5. The main disadvantages of costs budgeting in cases of the type which are heard in the Commercial Court are that:
 - (1) It tends to manufacture disputes. The subject matter of the case may well not conform to a standard fact pattern, and the costs likely to be incurred for various particular steps may be debatable. The current process of costs budgeting tends to produce arguments between the parties' representatives on granular issues. Furthermore, in such arguments, the parties' representatives' proposed conduct of the action is often subject to actual or perceived criticism and this increases both the number of points which remain in issue at a CCMC and the vehemence of dispute. In many cases, costs

budgeting simply provides another opportunity for an interlocutory skirmish between adverse parties.

- (2) Costs budgeting can be used tactically in order to put pressure on the opposing party.
 - (3) As a consequence of (1) and (2), costs budgeting is itself costly, especially if it leads to contests at the CCMC.
 - (4) There is a clear risk that, if a budget is ordered for particular steps or stages, it will be spent, even if not in fact needed. Further, specific budgeted amounts for different steps or stages may lead to the conduct of litigation being skewed by there being an approved budget, rather than being focused on what is actually required for the most effective and economical prosecution of the litigation as it develops.
 - (5) Even with some training and guidance, Judges who do not deal with the detailed assessment of costs as daily fare are not well-equipped to decide specific issues as to the appropriate amount to be included in costs budgets.
6. We are not aware of any evidence that costs budgeting has achieved any material reduction in costs in cases in the Commercial Court, and strongly suspect that it has not and that, instead, it tends to increase costs, (a) because of the expense of costs budgeting, (b) because legal representatives may err on the side of generosity in the amount of costs they seek and (c) because of the danger that, when a budget is set, it will be spent.
 7. We recognise that our views are the product of judicial perception, and are not based on data which establish that costs budgeting in the Commercial Court increases rather than decreases costs; but equally those views are not contradicted by any such evidence.
 8. Further, we consider that there are some limited categories of the cases brought in the Commercial Court in which costs budgeting is of use. In particular we have in mind cases in which there is a relatively standard fact pattern, and where the parties' representatives are likely to have a good idea of the typical costs involved in disputes of that sort. Examples may be disputes under personal guarantees, or some insurance claims. Equally, there may be cases in which the action concerns, at least in part, a re-litigation, for example in the context

of a professional negligence or E&O insurance claim, of a dispute which has already been before the courts. Here the prior experience may mean that costs budgeting is effective.

9. Our preferred course would be for the rules to be changed so that, unless otherwise ordered, there is no costs budgeting for cases in the Commercial Court or the CCC (or at least the LCCC), irrespective of the amount at issue. We do not favour that there should be a specific provision in the rules that in deciding whether, exceptionally, to order costs budgeting the court must carry out a costs/benefit analysis, but we would envisage that such an exercise would ordinarily form part of the process of deciding whether budgeting should be ordered.
10. As an alternative, and considerably less favoured, approach we would support the restriction of costs budgeting in the Commercial Court and the CCC (or at least the LCCC) to smaller value cases, with a 'default off' for cases where the claim is for £5 million or more.
11. If and to the extent that costs budgeting is to be retained, we see no alternative to its being conducted by the Judges of the Commercial Court and the LCCC, because it would have to be integrated into case management, which is, and should continue to be, conducted by Judges of the Commercial Court and LCCC. If there is costs budgeting, the parties should be required to work consensually to arrive at reasonable budgets, with the expectation that only points of difficulty should go before the Judge; and this might be encouraged by possible costs sanctions.
12. In relation to the question of which should come first in costs budgeting (ie an identification of the work to be done, or of the overall budget with the work then being agreed within that budget), we are of the view that the latter is usually preferable, as being more likely to be helpful and less likely to impose undesirable constraints on or biases in the conduct of the litigation.
13. Accordingly, and by way of summary, we would answer the specific questions posed by the Consultation Paper in relation to Question 1:

1.1 Is costs budgeting useful? In general, in the Commercial Court the answer is no.

1.2 What if any changes should be made to the existing costs budgeting regime? Dealt with in answers to 1.3 – 1.5.

1.3 Should costs budgeting be abandoned? Yes, at least for cases in the Commercial Court and LCCC.

1.4 If costs budgeting is retained, should it be on a ‘default on’ or a ‘default off’ basis? Default off.

1.5 For cases that continue with the costs budgeting regime, are there any high-level changes to the procedural requirements or general approach that should be made? It is usually preferable to start with an overall budget and work then being agreed within that budget.

Hourly Rates

14. We consider that Guideline Hourly Rates, as a starting point for summary assessments, are useful. It is important that litigation in the Commercial Court and the CCC should be capable of being conducted at proportionate cost, and that the message should be given to actual and potential litigants that

‘The touchstone [as to recoverable costs] is not the amount of costs which it was in a party’s best interests to incur but the lowest amount which it could reasonably have been expected to spend in order to have its case conducted and presented proficiently, having regard to all the relevant circumstances. Expenditure over and above this level should be for a party’s own account and not recoverable from the other party.’ (Kazakhstan Kagazy PLC v Zhunus [2015] EWHC 404 at [13] per Leggatt J).

15. In our view, the use of Guideline Hourly Rates helps send this message, and provides Judges with guidance as to how to put it into effect in specific cases. Clearly, and as already contemplated by the guide, hourly rates in excess of the guideline figures may sometimes be appropriate, but they should be ordered only when there is a clear and compelling justification given (as indicated by the Court of Appeal in Samsung Electronics Co Ltd v LG Display Co Ltd [2022] EWCA Civ 466 at [6] per Males LJ).

16. The use of Guideline Hourly Rates in this way presupposes that they are up to date: otherwise they will either be ignored, or their application will be unfair. We are not well-placed to assess the best way of ensuring that such rates are kept up to date, but would consider that the use of an index such as SPPI Legal Services, coupled with periodic and scheduled reviews by the Civil Justice Council, is probably the best way forward.