

CJC COSTS CONSULTATION RESPONSE OF ALAN TUNKEL

1. COSTS BUDGETING

We have at present three litigation tracks, namely small claims, fast track and multi-track.

We have at present three costs regimes, namely no lawyer's costs, fixed costs and costs budgeting.

It is arguable that the criteria for the three tracks and the three costs regimes should be aligned.

Multi-track is split between the High Court and the County Court, with high value cases normally being tried in the High Court.

The existing CB scheme is too detailed and time-consuming. A simplified scheme could usefully be applied in those multi-track cases heard in the County Courts, with the existing scheme retained only for the high value, multi-track cases being tried in the High Court.

The result would be as follows:

Small claims track	no lawyer's costs recovered
Fast track	fixed costs regime applies
Multi-track in county court	simplified costs budgeting
Multi-track in high court	detailed costs budgeting

2. GUIDELINE HOURLY RATES

These must be index-linked or reassessed on an annual basis.

3. COSTS PRE-ACTION AND DIGITISATION

Costs pre-action

There needs to be an identifiable starting point for the recovery of pre-action costs. The suggestion is that it starts with the sending of a pre-action protocol letter of claim. There are two reasons for this. The first is that it is readily identifiable. The second is that it will encourage compliance with the pre-action protocols. At present, there is no effective sanction if they are ignored. This suggestion will provide a sanction and thus an incentive to comply.

However, costs incurred in a pre-action dispute resolution process should not normally be recoverable. Pre-action dispute resolution needs to be encouraged and the evidence is that the risk or fear that one party will have to pay all the other party's costs if the case goes to court will discourage engagement in the resolution process.

Digitisation

The underlying requirement is that digitisation increases access to justice.

Digitisation requires access to computers, the internet and a familiarity with IT. Many of the elderly and poor – the most vulnerable in society – will have no such access or familiarity. They will be forced to use lawyers and this will increase their costs. And if they cannot afford lawyers, it will decrease their access to justice.

This is but one factor in weighing up the overall pros and cons.

What is needed is survey data, which considers what effect digitisation will have on access to justice for different sections of the public.

4. FIXED RECOVERABLE COSTS

These must be index-linked or reassessed on an annual basis.

The fixed recoverable costs for fast track cases have not been increased since 2009 and this is outrageous.

Frozen legal aid rates have been a disaster for the criminal bar and a similar situation cannot be tolerated for the civil bar.

Where a client is vulnerable, their lawyer's costs are liable to increase because more time is needed to explain matters etc. FRC must take account of this.

As a practical suggestion – there should be a tick-box on Claim Forms and Acknowledgement of Service Forms (similar to the existing Human Rights tick-box).

Each Form should ask 'Is the Claimant considered to be a vulnerable person, Yes No' or 'Is the Defendant considered to be a vulnerable person, Yes No'. If the Yes box is ticked then (i) the judge will have a discretion to allow an increase in the FRC if appropriate, and (ii) the other party will be given notice of this at the outset.

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