Part 1 – Costs Budgeting

1.1 Is costs budgeting useful?

Costs budgeting is a useful tool in appropriate cases and where used sensibly by the relevant parties, including the Court. It provides a level of certainty to court users and encourages a focus on proportionality. In addition to this, detailed costs proceedings are time consuming and costly, so measures in force to provide certainty as to costs exposure/recovery and to reduce the need for a detailed assessment hearing are welcomed.

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

Despite its theoretic advantages, costs budgeting is not appropriate or sensible in all cases and there are problems with the current regime which often requires parties to incur significant, and in our view unnecessary, costs about costs. The level of granularity in the breakdown of solicitors' fees and the costs associated with tracking and revising a costs budget imposes an often disproportionate costs burden on parties. This is particularly so when a costs budget may be being prepared at a relatively early stage in a case when the shape of the case is not yet clear.

Further, certain stages of litigation are notoriously difficult to budget for accurately at the early stage when costs budgets are required; before work on the relevant stage of proceedings has started (e.g. disclosure and witness evidence in particular).

To negate these factors, the working group should aim to strike a balance between the utility of costs budgeting (which is accepted) and the time and costs incurred by parties in preparing and monitoring a budget especially in the early stages. For example, the working group should consider requiring parties to budget by providing a high-level (ie, rough) estimate of costs to trial, within a range and based on a set of assumptions. If a Judge requires further information, a further breakdown of the budget could be provided but where the headline figure is not dissimilar to the figure for a comparable firm on the other side and reasonable based on the value and scope of the claim, a detailed granular breakdown should not then be necessary. The working group should also consider a staged approach to budgeting whereby the level of granularity required by a budget differs according to the value of the claim. For lower value cases, a rough budget based on rough numbers should be sufficient. If more detail is needed, that can be provided on request.

This would help to safeguard access to justice, to ensure the early consideration of costs by the parties and provide scope for intervention by the Court to control costs to an extent. However, it is vital that the costs associated with costs budgeting itself should never be a substantial percentage of the costs of a case.

1.3 Should costs budgeting be abandoned?

For the reasons outlined above, costs budgeting should not be abandoned but it should be better tailored to the scale of the case. Parties should be able to apply at or before the CMC

for an order that costs budgeting will not apply to a particular case regardless of the value of the case.

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

In summary, the current regime, that costs budgeting is "default on" for cases which have a value lower than £10 million but "default off" for cases in excess of this, is sensible.

The £10 million value cap is the most sensible way to ensure that the regime does not automatically apply to complex high value commercial cases. The amount of time and costs which would need to be incurred to ensure that detailed budgets and breakdowns are set up and managed effectively in complex commercial claims would be disproportionate.

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?

Any reforms should provide certainty and clarity without forcing the parties to incur disproportionate costs in creating, tracking and updating budgets, especially where the overall budgeted costs amount looks reasonable for that particular case. For further considerations, please see our response at 1.2 above.

Part 2 – Guideline Hourly Rates

2.1 What is or should be the purpose of GHRs?

The GHRs should be no more than a guideline or benchmark when considering costs incurred in summary assessments (but they should not be used in detailed assessments). This is in part because they are not reviewed on a regular basis, and so they lag behind the market and are thus less useful – all the more so in inflationary times like these. Judges should be able to deviate upwards from the guidelines (including the London 1 GHR) after considering submissions from the parties on why the GHRs should not apply or where both firms are claiming costs in excess of the GHRs. They should not act as a tramline limiting costs but as a yardstick to assist with summary assessment. Recent case law has cast doubt on this. We would welcome clarification that the GHRs may be exceeded in appropriate cases.

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

No, we submit that GHRs have some utility in summary assessment as a starting point but much less utility in detailed assessment so should not be used, even as a starting point.

2.3 What would be the wider impact of abandoning GHRs?

The GHRs provide a measure of sorts and so abandoning them would create some uncertainty and we think this is not desirable.

2.4 Should GHRs be adjusted over time and if so how?

GHRs should be reviewed more frequently than every 10 years as in the past; otherwise they became discredited and are less useful to Judges. Due to the level of work and analysis involved, it would be sensible to substantively review the rates every three years and they should increase with inflation annually. The more accurate and up to date GHRs are, the more useful they will become and remain in summary assessments.

2.5 Are there alternatives to the current GHR methodology?

The working group should consider that the current bands are not reflective of how law firms bill their clients and should instead be adjusted to be 1-2/3-4/5-6/7-8/9+ years with separate bands for “of counsel” (or comparable roles) and partners. This would make the bands more relevant and accurate to current practice.

We have not responded to Parts 3 and 4 of the consultation.

Hogan Lovells International LLP
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