C L I F F O R D

C H A N C E

CLIFFORD CHANCE LLP
10 UPPER BANK STREET
LONDON
E14 5JJ
TEL +44 20 7006 1000
FAX +44 20 7006 5555
DX 149120 CANARY WHARF 3

www.cliffordchance.com

Civil Justice Council
Civil Justice Council Room
E205
Royal Courts of Justice
Strand
London WC2A 2LL

Our ref: STJ
Direct Dial: +44 20 7006 8405
E-mail: simon.james@cliffordchance.com

13 October 2022

Dear Civil Justice Council

Costs Working Group Consultation Paper, June 2022

We write to comment on certain of the issues raised by the Civil Justice Council's Costs Working Group's Consultation Paper of June 2022. In particular, we comment on costs budgeting and guideline hourly rates.

This firm's experience is almost entirely in the commercial sphere, and our comments are made in that context alone.

Costs budgeting

Before the introduction in 1999 of the Civil Procedure Rules (the Woolf reforms), Professor Michael Zander QC made various comments of the proposed reforms. These comments included the following:

> "The proposition that judicial case management will reduce costs has the ring of common-sense plausibility about it. But common-sense is often wrong. It may be that in large and untypical cases like the Lloyds' litigation it is true. But in ordinary run-of-the-mill cases it is not true. Judicial case management does not save money, it positively adds to the costs. The recent RAND study both establishes that as a fact and explains the reason. "Early judicial case management [also] is associated with significantly increases costs to litigants, as measured by attorney work hours". The reason? Case management generates more work for lawyers…" (1997 CJQ 208, at 219)

CLIFFORD CHANCE LLP IS A LIMITED LIABILITY PARTNERSHIP REGISTERED IN ENGLAND AND WALES UNDER NO. OC323571. THE FIRM'S REGISTERED OFFICE AND PRINCIPAL PLACE OF BUSINESS IS AT 10 UPPER BANK STREET LONDON E14 5JJ. THE FIRM USES THE WORD "PARTNER" TO REFER TO A MEMBER OF CLIFFORD CHANCE LLP OR AN EMPLOYEE OR CONSULTANT WITH EQUIVALENT STANDING AND QUALIFICATIONS. THE FIRM IS AUTHORISED AND REGULATED BY THE SOLICITORS REGULATION AUTHORITY UNDER SRA NUMBER 447778.

Lord Woolf rejected sternly Professor Zander's comments (1997 CJQ 302). Lord Woolf did, however, accept that additional costs that necessarily flowed from greater case management could only be justified "if the savings and other benefits which can be achieved justify that expense", but he was apparently convinced that those savings would be achieved.

The application of the CPR in practice showed that, on this point at least, Professor Zander was right. A decade on from the introduction of the CPR, Sir Anthony Clarke MR appointed Sir Rupert Jackson (who had been involved in the Woolf reforms – see, for example, the introduction to Lord Woolf's interim report) to conduct a review of costs in civil proceedings because of concern about the increased costs generated by the introduction of the CPR. In paragraph 1.2 of his Interim Report, Sir Rupert observed that:

> "… it must be accepted that some of the costs increases since 1999 do appear to be consequential on the Woolf reforms. Pre-action protocols and the requirements of the CPR have led to "front loading" of costs. Also the detailed requirements of the CPR and the case management orders of courts cause parties to incur costs which would not have been incurred pre-April 1999. Where cases settle between issue and trial (and the vast majority of cases do settle) the costs of achieving settlement are sometimes higher than before…"

The remedy offered by the Jackson reforms for the additional costs caused by the case management and other requirements of the CPR was even more case management in form of "costs management". This failed to take into account the key point made by Professor Zander, namely that imposing extra work on lawyers - whether under the guise of case management, costs management or anything else - generally serves only to increase the cost of litigation, not to reduce it. Costs budgeting required lawyers to take extra steps that they had not previously needed to take (and required judges to spend time reviewing those budgets, a task that, understandably, few relish). The extra work created by costs budgeting has inevitably increased the costs of litigation with no subsequent compensatory reduction in tasks or costs. The extra costs of costs budgeting commonly exceed the recoverable costs of costs budgeting allowed by CPR 3.15(5).

Before costs budgeting was introduced, comparable work was only required in those small minority of cases that went to costs assessment. Lawyers invariably gave their clients early in the litigation an estimate of their own costs and an estimate of the costs they might recover if they were to win and of the costs they might have to pay if they were to lose, but the work involved in providing such estimates was significantly less than producing a Jackson costs budget. Providing a formal budget to the court that will, absent good reason, cap a client's costs recovery, and considering the other's side's Jackson budget in order to try to cap a client's

potential liability, must be treated seriously by lawyers and, as such, is necessarily time-consuming.

Costs budgeting does not even control or manage the actual costs of litigation. It is only directed to *recoverable* costs, which are not the same as the fees that lawyers charge their own clients (save where the lawyers' only right of recovery is the costs recovered from the other side). Costs budgeting provides more precise information, in the form of a cap in most cases, as to the maximum that the losing party will have to pay by way of costs and that the successful party will recover. Why the CPR should impose the considerable additional costs of preparing budgets in order to provide this cap, or, indeed, should be so concerned to ensure that the losing party has the benefit of a cap, is not obvious.

Paragraph 21 of the Consultation Paper cites two possible justifications for costs budgeting. First, it says that costs budgeting allows "individual claimants to manage downside costs risk". This raises the obvious point that if this is a benefit to individual claimants, why should litigation that does not involve an individual claimant have this cost imposed on the parties? Even putting that to one side, costs budgeting does not "manage" downside costs risk in any meaningful sense. It forces the parties to incur considerable costs, the result of which is information, and usually a cap, on the quantum of the costs liability of the loser, whether claimant or defendant and whether individual or corporate. Costs budgeting quantifies precisely, but does not manage, downside costs risks by imposing considerable costs on all cases whether or not necessary or appropriate for those cases.

As we have said, it is not clear to us why the courts should mandate in all cases such expensive steps in order to provide this information. The greater concern should be to protect the successful party by ensuring that it is able to recover all the costs that it has reasonably and properly incurred in order to secure its rights.

In any event, individual claimants concerned about their costs risk are in practice likely to seek ATE insurance, which is a far more effective way to manage downside costs risk than the provision of information through costs budgeting.

Secondly, the Consultation Paper says that costs budgeting is the only sensible means by which parties can be encouraged to think about the costs of litigation from the outset. We do not agree. There are more efficient ways to achieve this. Solicitors are professionally obliged to consider costs with their clients (though the professional rules are less explicit on this point than was formerly the case), including whether the costs and the costs risks are likely to be disproportionate. An explanation of the risks inherent in litigation, including costs liability, can be left to the professional obligations of lawyers. It does not require an expensive court infrastructure imposed on all cases, still less a capping of costs recoveries at the court-approved level.

In our view, costs budgeting is an expensive process that has brought no genuine compensatory savings or other benefits to the conduct of litigation. It should be abolished. If the real aim behind costs budgeting is to reduce the cost of litigation, the way to achieve that is to reduce the amount of work that lawyers have to do in order to take a case to trial. Capping costs recoveries (whether by costs budgeting or through GHRs that do not represent market rates) is neither a proper use of the powers involved nor will it be successful in reducing the real costs of litigation.

Guideline hourly rates ("GHRs")

Whenever a court considers costs, one aspect in that consideration will be whether the costs are "reasonable". Since law firms commonly (but by no means always – see below) charge on an hourly basis, this will include whether the hourly rate is reasonable. The reasonableness of an hourly rate will depend upon the market rates for lawyers' time but it is impracticable for the court to receive (expert) evidence on market hourly rates for every costs hearing. GHRs, therefore, provide an approximation of market rates for use as a starting point, as Lord Dyson MR pointed out in 2014 (quoted in paragraph 27 of the Consultation Paper). GHRs are not - at least, should not be - a tool for judges to prescribe what legal charges should be or to seek to control the open market in legal fees.

The market rate charged by lawyers is the fee that clients in general in fact pay their lawyers. In 2014, the CJC sought to determine market rates by considering "what it costs lawyers to run their practices". To do that, the CJC sought to collect detailed metrics in order to create financial statements for a series of hypothetical law firms and, from those statements, to calculate hourly rates required by those hypothetical firms. That was a highly complicated approach and it was the wrong approach. Unsurprisingly, it failed to produce satisfactory results. The market rate is simply the rate charged in the market, not a rate based on a determination of, for example, how many hours lawyers should work, what rent lawyers should pay for their premises, what investment in technology and business development lawyers should make, what profit levels should be, and so on. The CJC, judges or, indeed, any other body, is ill-equipped to make determinations of that sort.

GHRs could be established by a simple annual survey (by the Law Society?) of solicitors, barristers and regular users of legal services as to what clients in fact pay their clients. But it is questionable whether a survey is really necessary. The legal services market is highly competitive. Any client will have a choice of lawyers. If a client has genuinely and in good faith agreed to pay a certain rate, particularly if that client is a regular user of legal services, there will seldom be any grounds to question whether that rate falls within the range of reasonable market rates. The court might consider the rate high or low but that is not the point.

Further, if the court has costs information from both parties, the court will be able to make a direct comparison of rates. From that point of view, GHRs may not be necessary at all.

We should add that the near exclusive focus on the hourly rate is unsatisfactory and stifles innovations in charging. Some clients now demand fixed fees, whether for a piece of litigation as a whole or a particular aspect of it, blended hourly rates (ie a single hourly rate for all lawyers working on the matter), rates that vary according to the total annual legal spend with a firm, even fixed annual fees for all legal work. The costs recovery system in the English courts should be accommodating to these more innovative charging methods rather than focusing solely on the hourly rate and the length of time a task takes or should take.

Whatever longer term steps are taken with regard to GHRs, it is, however, important in the short term that they are raised by an amount that reflects inflation since they were introduced.

International considerations

As a general point, historically English lawyers and the English courts have been successful in attracting international legal work to England to the benefit of HM Treasury and the country as a whole. This success has been for numerous reasons, including the reputation of English law, the independence of the judiciary and availability of lawyers, but it is potentially threatened by high litigation costs, particularly high irrecoverable costs, especially at a time when other jurisdictions are seeking to attract legal work from England as a result, amongst other reasons, of the UK's withdrawal from the EU. We note that the most recent civil justice statistics, published by the Ministry of Justice on 1 September 2022, show a considerable decline in the volume of commercial litigation in England. For example, the number of cases started in the Commercial Court fell by 25% between the first half of 2018 and the first half of 2022, and number of cases started in the Chancery Division's Business List fell by 28% over that same period.

As we have said, the focus of reform to civil procedure should be in reining back or removing steps that do not genuinely contribute to the fair resolution of disputes, in ensuring that the steps that remain are cost-effective, and in ensuring that successful parties can recover their reasonable costs of the steps that the rules require them to take.

Yours faithfully

Clifford Chance LLP