Response of the Association of HM District Judges to the Civil Justice Council Costs Working Group Consultation Paper (June 2022)

Introduction

The Association of HM District Judges ("the ADJ") represents around 380 District Judges sitting in the County and Family Courts of England and Wales. District Judges have the widest experience of any level of judiciary of the practical workings of the various aspects of costs in the civil justice system.

The ADJ encourages the CJC to undertake a more wide-ranging review of costs in litigation. The consequence of numerous changes since 1998 need to be evaluated. Does QOCS work? Have the various reforms improved access to justice increased ? Was the system prior to the 2013 reforms preferable to the current system?

Furthermore the changes have all concentrated on personal injury cases without any thought to the impact on many other types of litigation, in particular non-damages cases. The latter type of case has suffered as a result, thereby reducing access to justice.

Part 1- Costs budgeting

1.1 **Is costs budgeting useful?**

On balance, costs budgeting in its current form is a useful mechanism to control costs and promote greater certainty. However, whether its advantages outweigh the disadvantages is far from clear cut. Costs budgeting requires a considerable amount of civil district judge ("DJ") time which could probably be better spent. Delays in being able to list CCMCs inevitably mean that costs have increased by the time of the hearing and/or the progress of the litigation is unnecessarily delayed - it would be interesting to see data on the extent to which detailed assessment hearings have been reduced, as against the court and judicial time taken up in costs budgeting, if such data exists. Anecdotally, the experience of the district bench is that in many cases, the fact that the majority of the costs have been costs budgeted results in the issue of costs being resolved at any JSM. If this were not to be the case, it is likely that we would see a considerable increase in the number of detailed assessment hearings taking place, many occupying several days of court time.

Furthermore, at least in the personal injury field where QOCS applies, the experience is that budgets are not necessarily realistic, as Claimants fear almost inevitable reduction as part of the budgeting exercise, and Defendants have no incentive to prepare a realistic budget as the only role for their costs is as a comparator with the Claimant's budget.

It might be worth exploring a simplified process. Rather than budgeting to the penny a system could be devised where budgets use figures in bands i.e. £5000 - £10,000.00 for this phase or £20,000 – £30,000 for this phase. This would enable budgets to be more readily agreed. If not agreed the CCMC would be shorter.

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

The most significant change for the district bench will be the introduction of FRC for cases with a value of up to £100,000. This will result in many cases being taken out of the costs budgeting regime, freeing up a considerable amount of court and DJ time.

We are concerned, however, that the level fixed for such cases is unrealistically low. The quality of work is likely to suffer, and successful parties will lose money from the damages awarded. Fixed costs need to be realistic to enable professionals to make a decent profit. The current levels will result in fewer solicitors offering to undertake civil litigation, thereby reducing access to justice.

Otherwise, there should be more encouragement to reach agreement as to estimated costs. As to incurred costs, the facility to make "comments" as to incurred costs should either be made more useful (for example, unless there is a comment, the incurred phase could stand approved), or abolished altogether, as the "comments" are of no real assistance to the costs judge on any detailed assessment.

1.3 **Should costs budgeting be abandoned?**

On balance, no, although the ADJ would like to see persuasive evidence as to actual, as opposed to theoretical, benefits.

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

"Default on" basis (with exceptions) so as to attempt to deal with civil litigation at reasonable and proportionate cost. Otherwise, more satellite litigation will be generated. "Default off" in a case in which any party is a litigant in person, with the facility for that party to request budgeting of the other parties' costs. Another approach might be for parties to certify that their costs will not exceed a certain percentage of the amount in issue in the claim, by reference to settlement at certain stages/phases, eg 25 % by exchange of witness statements, 125 % by trial, with the ability to request budgeting at a particular stage/phase if it is envisaged that this proportion might be exceeded.

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?**

Generally no, and the ADJ would not recommend any changes to how the court deals with incurred costs. In practice, these are often dealt with by the parties by consent (at for example at a JSM), and where there is a dispute they are either dealt with by way of a provisional assessment or a detailed assessment. Any perceived benefits of setting hourly rates at the budgeting stage would be far outweighed by the court time taken up by arguments as to rates in a far greater number of cases than currently go to assessment.

Unless costs budgeting were to be reserved for a much smaller number of cases, it is not practicable for it to be dealt with solely by costs judges. Further training would benefit those judges recently appointed, and act as a refresher for judges previously trained (particularly fee paid judges, who may deal with costs far less frequently). However, if this were to take place, face to face training through the Judicial College (as opposed to videos posted online which judicial office holders are expected to watch in their own time) is essential.

Part 2 – Guideline Hourly Rates

2.1 **What is or should be the purpose of GHRs?**

The purpose of GHRs is and should be as set out in the Guide to the Summary Assessment of Costs. They are a useful starting point for cases which have no standout features pursuant to CPR 44.3 as representing rates which are presumed to be reasonable and proportionate for the particular grades. In summary assessment, they are indispensable. Removal as a starting point in detailed assessment would encourage more unnecessary and time consuming argument as to rates. In particular, until FRC are introduced and we see how they work in practice, it is premature to change things.

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

The ADJ does not suggest that GHRs should have any broader role.

The reality is that guideline rates have taken on a wider role in that they form the basis for a starting point for the rates solicitors charge to clients. This was so under the previous system which included mark ups now incorporated into the rates. The CJC recognise the reality here and that the hourly rates accurately reflect the sums solicitors need to charge to be profitable. A simple calculation of chargeable hours multiplied by rates demonstrates this to be the case.

2.3 **What would be the wider impact of abandoning GHRs?**

It is expected that there would be a significant lack of consistency across the country (and within Regions) as to the hourly rates allowed by Judges. Those Judges who were not solicitors in private practice or costs advocates would have nothing to refer to. With the increasing number of Deputy District Judges and Recorders being appointed, who may also have little or no experience in practice of dealing with the costs of litigation, that would be a matter of concern.

2.4 **Should GHRs be adjusted over time and how?**

It is essential that GHRs are regularly reviewed. To do so properly, actuarial evidence is necessary, which would prove expensive, in circumstances where previously none of the stake holders have been prepared to fund obtaining such evidence. Perhaps the best that can be done in those circumstances is to ask Regional Costs Judges to provide details of rates they are allowing (as was

done for the last review), and to base any review on those rates. The use of indices might assist this process (but should not be the sole determinant).

2.5 **Are there alternatives to the current GHR methodology?**

Yes, but this would involve considerable expenditure which no one is prepared to fund. Often the consequences of change outweigh the perceived benefits and so it is better to make no changes.

Part 3 - Costs under pre-action protocols/portals and the digital justice system

3.1 **What are the implications for costs associated with civil justice of the digitisation of dispute resolution?**

Until this is more established it is difficult to say with any certainty what the implications are likely to be. We suggest that the digitalisation process needs to conclude before we can make any conclusions. The final format of digitisation remains uncertain. Current judicial observation suggests that digitised systems introduced by HMCTS require more judicial time (particularly DJ time) than paper-based systems, although it is appreciated that there are savings in administrative time and costs. This needs to be considered once further evidence and data is available.

3.2 **What is the impact on costs of pre-action protocols and portals?**

If followed, this should lead to a reduction in costs. When not followed, we suggest that there should be costs consequences for the defaulting party. If followed by all parties, we see no reason why there should not be some type of fixed recoverable costs regime (as is envisaged for cases up to £100,000). Costs incurred with a view to potential litigation should be treated consistently with the way litigation costs are addressed (whether incurred before or after issue).

3.3 **Is there a need to reform the processes of assessing costs when a claim settles before issue, including both solicitor own client costs, and party and party costs?**

Costs only proceedings generally work well for bringing party and party costs only disputes before the court. This straightforward process would benefit from the introduction of a fixed costs regime.

There are strong arguments either way as to whether reform of the solicitor/ own client regime which applies to claims which settle before issue is required. On balance, as there are so many different types of cases that can take such different amounts of time to resolve, and as clients vary considerably as to the demands they place on their solicitors or counsel, the ADJ considers it inadvisable to change the current position.

3.4 **What purpose(s) does the current distinction between contentious business and non-contentious business serve? Should it be retained?**

The current distinction between contentious business and non-contentious business, and the specific provisions applying to the County Court, are anachronisms. If this area is to be the subject of fundamental review, there is no reason to retain such distinctions. The client care letter and other documentation should make it clear whether the costs potentially recoverable from the client might exceed costs recoverable from the other side.

There does however need to be certainty for solicitors. The many changes to costs with CFAs and QOCOS have resulted in much satellite litigation. We refer you to the Belsner litigation in this regard.

Part 4- Consequences of the extension of Fixed Recoverable Costs

These questions are partly answered by our answers to the above questions. What will be essential is that the costs allowed by any fixed recoverable costs regime are regularly reviewed, and that the costs allowed are sufficient to persuade solicitors and barristers to undertake this work. Unless this happens, then there is a serious access to justice issue for litigants, particularly vulnerable litigants.

We repeat as above the need for the rates to be realistic and the new rates are not.

6 October 2022