CMS Cameron McKenna Nabarro Olswang LLP

Cannon Place
78 Cannon Street
London EC4N 6AF

DX 135316 London Cannon Place

T +44 20 7367 3000
F +44 20 7367 2000

cms.law

Civil Justice Council
The Chairperson
Costs Working Group

Our ref ELWL/CAP

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Dear Chairperson

CJC Costs Working Group – Consultation Paper – June 2022

We write in response to the consultation paper published by the Costs Working Group in June of this year. CMS appreciates the opportunity to contribute on this important topic. The views set out below are based on discussions with colleagues within CMS (primarily partners and senior associates in the Litigation & Arbitration, Insurance & Reinsurance, Lifesciences & Healthcare, and Infrastructure, Construction and Energy Disputes groups) as well as a number of our clients.

1. COSTS BUDGETING

1.1 Is costs budgeting useful?

Costs budgeting is very useful when used correctly. Our clients value the process and the clarity it brings on costs. It is able to provide very clear information on what costs have and are likely to be incurred, allowing both parties to assess their costs risk.

When not used correctly, however, budgets can amount to little more than an assessment of what level of costs would be proportionate to the sums at stake, artificially retrofitted into a budget. This tends to occur in circumstances where there is insufficient information to produce an accurate estimate, and renders the exercise somewhat meaningless.

We are aware that some concerns have been expressed that costs budgeting results in detailed assessments taking longer and costing more, but that has not been the experience at CMS.

We are aware of an alternate proposal under which budgets would be exchanged, but no formal costs management order made. In our view, that will not assist and will simply take parties back to the previous system of providing estimates. From either side, exchanging budgets with no costs management order would be a meaningless exercise. Our defendant clients fear that claimants would simply file exaggeratedly high budgets, knowing they are not going to be scrutinised, which would then allow them to incur high costs and point to the budget by way of justification at the conclusion of the case.

Likewise, some defendants would undoubtedly file unrealistically low budgets to make the claimant's budget appear excessive. This happens already, but removing judicial scrutiny at the CMC stage would simply encourage it. This is an argument to support budgeting remaining in its current guise.

Another alternative might be to commission a study of the level of budgets that have been approved historically, correlated to factors such as the value of the claim, number of parties, number of witnesses and experts, etc, and use that to calculate a guideline percentage of the value of the claim that will normally be considered appropriate. The court could still depart from this percentage where necessary, but if neither party makes an application to that effect, there would be no need to file budgets. This would simplify the procedure and associated costs, while still offering clients the transparency and predictability they value. In our experience, it is particularly the process of assigning time and costs to specific phases that is time-consuming and costly.

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

We doubt whether it is possible to address this question fully without seeing the results of the separate consultations on set-off and Part 36. We think that a greater priority is to ensure that budgeting is consistently applied in all courts. However, one possibility is that defendants could be exempted from the need to file budgets in QOCS claims. The current requirement is inefficient and a waste of costs.

Costs budgeting also should not be required when fixed recoverable costs (FRC) apply.

1.3 Should costs budgeting be abandoned?

We do not believe that it should be abandoned. Other than the use of FRC, there is no reasonable alternative proposal to ensure that costs are controlled.

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

We believe it should be mandatory in low-to-medium value litigation. In our experience, where costs budgets are filed in such cases, they do not go to detailed assessment, saving time and costs.

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?

We believe that the court should be informed of the hourly rates to be charged and the estimated time to be incurred in each phase of the matter. There is no other way to realistically estimate the base cost of the work proposed and to ensure fairness to both parties.

2. GUIDELINE HOURLY RATES

2.1 What is or should be the purpose of GHRs?

The purpose of GHR is to assist courts and parties as to the reasonable level of costs that can be recovered for any type of civil work. They should be a starting point for summary and detailed assessment, to simplify the process. The geographical bandings are sensible. The utilisation of appropriate grades of fee earner for different types of work is also crucial here.

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

GHRs have a role in providing transparency for clients as to the level of costs that will be considered reasonable and. thus, the risks they undertake by litigating.

2.3 What would be the wider impact of abandoning GHRs?

We believe GHRs should be retained in the civil courts. Family courts and Court of Protection work are special cases that should not be generalised.

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

We believe an index-linked adjustment every five years would be sensible. This should be undertaken at the same time as a periodic adjustment of FRC. There should be the flexibility to conduct an earlier review if market and economic factors change significantly. It should be possible for a review to result in a decrease as well as an increase if those factors so indicate.

We make no proposals as to the appropriate index to be used. This may be a question for input from qualified economists.

2.5 Are there alternatives to the current GHR methodology?

We do not seek to put forward such alternatives in this response.

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?

Digitisation has the aim of simplifying and making more effective the pre action and litigated stages of civil disputes. However, it is a major project which must be implemented carefully to avoid unintended consequences. Any technological difficulties or failure to address the exclusion of digitally disadvantaged users risks increasing costs rather than saving them. IT systems must not be rushed through before adequate and successful testing.

If a longer implementation period is required than the two years envisaged by the Master of the Rolls, that would be more acceptable than a botched introduction or a system that is inaccessible to the digitally disadvantaged. The implementation of the Damages Claims Portal and other pilot systems do not lend themselves to confidence in such a short timetable. Lessons must also be learned from the implementation of the e-bill, which did not marry up with time recording systems and which, therefore, makes bill drafting a longer and costlier process than was the case with under the traditional paper bill.

If greater use of mediation is to be a feature of the digitised justice system, clarity will be required as to how mediators will be accredited and charge for their services (including rates). These charges should be controlled as strictly as solicitors' costs.

In our view, it is also important that any attempt to incorporate pre-action protocols (PAPs) into a digital platform should not change the fundamental nature of PAPs from codes of best practice to mandatory obligations on the same footing as the civil procedure rules themselves, with heightened powers to penalize non-compliance. To do so would we consider encourage the (increased) involvement of lawyers pre-issue, increasing costs with little obvious benefit. The logic of such a development would be a virtually automatic entitlement to pre-action costs. This would be an unwelcome development.

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

Pre-action protocols have the potential to increase costs in certain circumstances, e.g. where there is no realistic prospect that compliance will lead to settlement.

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?

There are arguments both for and against recovery of pre-action costs. On the one hand, not allowing recovery provides a perverse incentive to issue proceedings as soon as possible, and/or to delay settlement, so that costs will be recoverable. On the other hand, making costs recoverable may encourage the involvement of lawyers at an ever-earlier stage.

It also sometimes happens that pre-action protocols are not completed until after a claim has been issued, e.g. due to a limitation concern. If issue is the trigger for recoverability, this has the odd result that the same work may sometimes be recoverable and sometimes not.

On balance, however, we believe the current system provides adequate protections and procedures around costs recovery.

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

We see no reason to retain the distinction, although to remove it would require amendment to the Solicitors Act 1974.

4. CONSEQUENCES OF THE EXTENSION OF FIXED RECOVERABLE COSTS

4.1 To the extent you have not already commented on this point, what impact do the changes to fixed recoverable costs have on the issues raised in parts 1 to 3 above?

The importance of budgeting and GHR falls away for matters that are being brought within FRC (subject to any exceptions). There is a need to consider how the rules should apply to group litigation, and in particular common costs in matters whose value would otherwise fall within the FRC regime.

4.2 Are there any other costs issues arising from the extension of fixed recoverable costs, including any other areas in which some form of fixed costs or cost capping scheme may be worthy of consideration? If so, please give details.

We have no comment to make on this issue.

4.3 Should an extended form of costs capping arrangement be introduced for particular specialist areas (such as patent cases or the Shorter Trials Scheme more generally)? If so, please give details.

We have no proposals to make on this issue.

Thank you for your consideration.

Yours faithfully

Signed electronically

CMS Cameron McKenna Nabarro Olswang LLP