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FSB response to the costs consultation

The Federation of Small Businesses (FSB) welcomes the opportunity to respond to the Civil Justice Council's costs consultation.

FSB is a non-profit making, grassroots and non-party political business organisation that represents members in every community across the UK. Set up in 1974, we are the authoritative voice on policy issues affecting the UK's 5.5 million small businesses, micro businesses and the self-employed.

It is critical that the justice system is able to keep pace with any developments including technological and remain accessible and affordable to its users. Small businesses in comparison to larger ones are much less equipped to deal with disputes, and costs can quickly get out of hand meaning that for many resolving a dispute may go beyond their means.

The average cost of resolving a dispute for a small business is nearly £17,000, in comparison to the average value of such a dispute of £18,000. Given that small businesses typically have less financial reserves, time and legal expertise to deal with disputes, it is evident that unresolved or difficult to resolve disputes can put them in significant financial difficulty, with substantial impact on the economy. Therefore, an effective, just and fair costs system that does not disincentivise small businesses from seeking resolution must be in place to allow them not only to anticipate costs but also help to avoid needless financial risks.

Similarly, any delay or additional costs that small businesses face when they are involved in a dispute, must be resolved proportionately and reasonably with focus on early-stage dispute resolution processes and mechanisms. Costs, whether in the early stages or through the courts, should be clear and transparent from the outset.

We urge that this costs review also considers a review of the track limits, increasing the Small Claims Track limit to £25,000, and increasing the Fast Track limit to £100,000 in order to reflect inflation, the increased value of smaller business disputes, and their impact on the wider costs discussion. It is critical that small businesses are able to resolve disputes in a cost-effective manner and that they are not disadvantaged within the courts system.

We have not responded to every question in this consultation, only to those where we can offer a valuable and unique perspective.

Part 1 – Costs Budgeting

1.1 Is costs budgeting useful?

Yes. Costs budgeting is critical for management of financial risk and expectations. It enables parties to effectively anticipate costs from the beginning of litigation and for the court to have a regard for the proportionality of costs when considering the overriding objective. Budgeting is valuable to help ensure that costs are not disproportionate, and that there is some control or

measurement mechanism in respect of the costs that are claimed to be recoverable at the end of litigation. Those controls are also valuable in helping to ensure that recoverable costs are within the anticipation and means of parties involved at the lower end of the Multitrack.

1.3 Should costs budgeting be abandoned?

No. We believe that it should remain in appropriate higher value or very complex cases, and with flexible discretions in place to enable to court to disapply it where just and proportionate.

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

We believe that it should be retained on a "default on" basis as this would mean that its appropriateness would be considered for all affected cases and apply unless the court directed otherwise. It is important that consideration of costs takes place as early as possible in a case, and budgeting helps to prevent unfairness and difficulty arising due to unanticipated spiralling costs.

The risk with the "default off" basis is that it will lead to uneven application and disproportionate costs for those that need budgeting controls the most, making later costs assessment and recovery more challenging.

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?

Flexibility should be offered to judges to adapt costs budgeting as required. Clear court guidance as to how discretions might be exercised and what criteria might be relevant would provide more certainty as to what procedural requirements would be expected. Costly satellite costs related applications should be discouraged.

Part 2 – Guideline Hourly Rates

2.1 What is or should be the purpose of GHRs?

The purpose should be to provide a yardstick whereby litigants can assess and measure an estimate or bill of costs and evaluate a costs budget. Official guidance on charge rates across England and Wales is extremely helpful for those not familiar with legal costs, and sets a fair expectation of the default position for litigants. Without such a yardstick it would be extremely difficult for both litigants and the court to assess the reasonableness or otherwise of differential proposed charging rates without conducting an expensive forensic accounting exercise.

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

Possibly. It would be helpful to consumers and small businesses to know what a reasonable and fair charge rate for a competent and efficiently run legal practice should be, or at least what the expected range should be for different types of legal service. This is however a matter for the legal services regulators when applied outside litigation and court processes

2.3 What would be the wider impact of abandoning GHRs?

If there are no alternative or equivalent measures or yardsticks to GHRs, it will be practically very difficult to assess the reasonableness or otherwise of proposed rates, which is likely to

result in litigants being saddled with increasing rates, unreasonable and unchallengeable unexpected costs, and being left without any easy means of redress.

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

It would be reasonable for there to be a periodic review of GHRs taking into account inflation, but there must also be taken into account whether new technological and other improved efficiencies should have reduced overheads and fed through into reduced costs rates. Lawyers should not mark their own homework, so some objective criteria with regard to the reasonable charge rates for a competent and efficiently run legal service should be taken into account.

If GHRs are to be periodically reviewed, then other litigation costs such as witness allowances, and travelling expenses should also be reviewed at similar intervals. Additionally, the costs recovery regime (if indeed the current rules can be called a 'regime') for litigants in person urgently requires updating and clarifying. In respect of business litigants in person, there should be an automatic assumption that the business will incur costs by undertaking the litigation tasks during its normal working hours, displacing otherwise profitable work. To save complicated rules and guidelines, old yardsticks based on a percentage of GHRs as a default position may be a practical solution. The position with regard to consumer litigants in person requires separate consideration. A pilot scheme for business litigants in person, backed up by clear provisional guidance. should be considered.

2.5 Are there alternatives to the current GHR methodology?

Not in our view.

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

Pre-action protocols are critical for ensuring that genuine attempts are made to resolve a dispute before any court action takes place. Given the costs associated with court action, it is clear that dispute resolution has greater prospect of success as early as possible and prior to any court action or preparation for court action which would involve significant costs being incurred by the claimant party. For that reason, we have long advocated for a 'Dispute Resolution Service' akin to ACAS conciliation, to triage a dispute as early as possible and recommend the most appropriate process or mechanism to resolve it.

For the same reason, we have also suggested in a previous response that there should be a more neutral first stage 'protocol' entitled 'Dispute Resolution – First Steps' ('DRFS') or similar. We believe that the misconception with regard to the title 'Pre Action Protocols' it may be that it implies 'action', and in particular court action, which is likely to be off-putting to many disputants, whereas a more neutrally described process that sought to achieve a similar outcome and allowed disputants to view all resolution possibilities from the outset, would be potentially more effective. A more formal Pre Action Protocol applicable if court action were inevitable in any case (for instance where a decision as to principle or of law was required) could of course be part of the list of dispute resolution options presented in the first stage.

If 'pre action' work has been undertaken under any protocol but there has been no court action then there must be clarity as to what costs, if any, are recoverable and in what circumstances. There is a great difference between the costs necessarily and reasonably incurred in relation to engagement with an ADR process including negotiation, and the costs necessarily and reasonably incurred in preparation for a court claim. The former costs should be far less extensive than the latter, and the work should be proportionate and appropriate to the ADR process utilised. There should be a distinction between the former 'ADR related costs' and the latter 'litigation preparation costs'. It is a matter for the legislature to decide where the line should be drawn and we suggest that only the latter, controlled by appropriate rules and guidance to achieve clarity, should be recoverable in respect of any steps taken court action is prepared and issued. Any required assessment procedures for those recoverable costs should be simple and summary, save in exceptional cases which an appropriately circumscribed discretion could identify.

The digital justice system and engagement with any pre-action protocols, must be easy to access, and protocols should continue to focus on early resolution. It is critical that users are not discouraged by use or functionality or by the threat of costs liability if they engage with them. Greater use of digital processes mean that there is a risk that some disputants may not have the relevant technical facilities available to them and may be excluded and disadvantaged in the process. There must be appropriate safeguards in place which would allow additional time or support in those instances, or if needed, alternative options.

With regard to sanctions for non-compliance with the requirements of any pre action protocols there are a number of considerations. Court related protocols will have to warn disputants of those possibilities, and such a formal notice might in itself be off-putting and discourage protocol engagement for the reasons we have outlined above. Sanctions should not apply to any early 'Dispute Service – First Steps' protocol of the type we have suggested above. With regard to court related protocols, there must be clarity, and it is possible to foresee costs wasted on satellite arguments if that is not achieved. In most cases it will be clear that failure or refusal to engage in the protocol should be penalised in some way. Partial engagement becomes a more difficult area to evaluate. Whatever the process and mechanism for engagement with it, including any digital justice systems, there should be sufficient time allowed for compliance or response, with clear notice being given to disputants (especially those who are unrepresented) prior to any sanctions action being taken.

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?

Yes. We refer to what we have suggested above. A simple and cost effective summary process will suffice in most cases and be more in tune with the nature of the protocols and ADR.

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

There is no need for a formal distinction in general terms, but the assessment of charge rates for different types of work will obviously itself be different, as the necessary overheads and levels of expertise required will vary enormously. We have not reviewed all of the instances where the current distinction is important, but if there are any specific areas of legal activity which the consultation has in mind, we would be happy to comment upon them.

Part 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?

Costs associated with resolving a dispute can often outweigh the value in dispute, which is why small businesses are often disincentivised to use the court system. Fixed recoverable costs allow businesses to assess and anticipate the financial risks associated with court action, and are therefore extremely useful to businesses when considering raising or defending a claim.

In our experience, the parties most engaged in making representations with regard to fixed or costs caps are the legal professions who may be affected by them, and who try to paint fixed costs as being prejudicial to smaller businesses who can still be outspent by larger businesses or who may find costs deliberately driven up by them. Those factors have to be balanced against the greater benefit of having costs fixed. Lawyers in other jurisdictions seem to cope with lower costs caps in some areas, and the key to successful caps or fixed costs regimes is two- fold. First, the parties' lawyers must strictly comply with the overriding objective and not engage in unfair or oppressive litigation tactics, which may drive up costs and which should be penalised where appropriate, and possibly identified in suitable guidance in the same way as unfair business practices are identified in some consumer protection legislation.

Secondly, the court must in those cases seek to streamline and adapt the procedures and timescales involved by for instance strictly limiting disclosure, issuing directions and CMC dates with a claim, and so on. Lawyers may object, but need to be encouraged to abandon more relaxed approaches to time limits and adopt less rigorous more proportional practices. There should always be a court discretion or the ability for litigants to apply to vary automatic time limits or procedures in appropriate cases.

Given our suggestion that charge rates and allowances should be reviewed periodically, we believe that such review would also sensibly be a good opportunity to review Track limits for the Small Claims Track and Fast Track, which we have suggested above should also be increased now. Increasing these limits will help to ensure that small businesses in particular are able to afford to cost effectively address disputes, without jeopardizing their day-to-day business and profitability, or even their survival.

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 support recovery of reasonably incurred fixed costs that are not disproportionate to the amount that was in dispute. We would flag that where costs are capped or fixed, the rules needs to be clear as to what the detailed capping or fixing rules mean, as division of those costs into stages of a case without accommodating possible variations in procedure such as summary judgment or other applications, may lead to difficulty. Suitable practice direction guidance should resolve potential issues.

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.

It may be worthwhile introducing a pilot fixed costs regime for the Shorter Trials Scheme, but it will very much depend on the parameters set for qualification. Fixing must go hand in hand with procedural and lawyer behavioural alterations as we have outlined above, if such a scheme is to work successfully in practice.

Thank you for considering our response to this consultation. If you would like to discuss any of the points further, please contact me via my colleague Kristina Grinkina, Policy Advisor, on Kristina.Grinkina@fsb.org.uk.

Yours sincerely,

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