Kennedys' response to the Civil Justice Council consultation on costs

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Kennedys

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About Kennedys

Kennedys is a global law firm with expertise in dispute resolution and advisory services. Founded in 1899, we have a rich history of delivering straightforward advice, even when the issues are complex.

With over 2300 people and 67 offices around the world, including eleven offices across the UK, we are a fresh-thinking firm and are not afraid to bring new ideas to the table beyond the traditional realm of legal services.

Our lawyers handle both contentious and non-contentious matters, and provide a range of specialist legal services, for many industry sectors including insurance and reinsurance, aviation, banking and finance, construction and engineering, healthcare, life sciences, marine, public sector, rail, real estate, retail, shipping and international trade, sport and leisure, transport and logistics and travel and tourism. But we have particular expertise in litigation and dispute resolution, especially in defending insurance and liability claims.

Our core principle is to help clients become less reliant on our lawyers, using us only when we add real value to an outcome, and we are doing this through the progressive development of client-focused technologies. We combine talent, specialist technology and commercial perspectives to create the best outcomes for every one of our clients.

Our niche focus on insurance and disputes permeates every part of our global network and allows us to always offer rich and diverse perspectives.

Our Corporate and Public Affairs team are experts in the political process and are skilled in identifying thought leadership opportunities on behalf of clients. They provide valuable insight into government and issues shaping today's corporate landscape. Proven results include published market research on Brexit, driverless vehicles, climate change, COVID-19 and technology in care. Kennedys also has an extensive track record in engaging with policymakers with regard to many aspects of civil justice reform. That includes the Jackson reforms, the personal injury discount rate, the whiplash reforms and the modernisation of the court system, more widely. We care about helping our clients understand drivers of change and are committed to representing our clients' interests in policy-led changes.

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Contact information

Any enquiries about the response or requests for further information should be addressed, in the first instance, to Deborah Newberry, Corporate Affairs Director for Kennedys.

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Response to questions

1.1 Is costs budgeting useful?

In our view, the current system of costs budgeting can be a helpful tool in allowing parties to litigation to understand and plan for potential costs liabilities and recovery. This is even though defendants do often have a fairly good understanding of the level of costs that may be incurred in particular types of claim, for example, in clinical negligence cases.

However, absent legislative guidance or additional training, concerns do arise as to the ability of the courts to apply sufficiently robust decisions in respect of costs budgeting. Such issues largely relate to the overall application of proportionality, where we believe additional guidance is necessary.

For paying parties, the current high-bar test to justify an upwards departure from an approved budget ensures accurate reserving and for the financial impact of specific steps in litigation to be known at an early stage.

For receiving parties, similarly, costs budgeting assists with conducting claims at a proportionate cost and in accordance with the overriding objective; providing clients and solicitors with certainty as to the costs likely to be recoverable from the paying party. Consequentially, we believe that claimants benefit from budgeting so that any planned expenditure outside the budget and potential shortfalls do not come as a surprise and can be discussed between solicitors and their clients.

The knowledge that only proportionate costs in a claim will be recoverable if successful provides a greater incentive for likely receiving parties to be reasonable in their conduct of litigation. In addition, costs budgeting arguably protects all litigants from unknown and potentially open-ended risks on costs, thereby promoting access to justice.

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

Although our general view is supportive of the costs budgeting regime, we do, however, consider that there is scope for reform to both improve the effectiveness and focus of the system, whilst also reducing the costs burden for paying parties.

Where costs budgeting is suitable, we advocate for streamlining the current process of exchanging and agreeing court directions, in tandem with the costs budgeting regime. In our view, the current system can lead to parties budgeting on fundamentally different assumptions, such as the number and identity of expert disciplines. This can not only waste court time but also result in adjournments and/or budgeting on an ad hoc basis which in our view is undesirable and expensive.

Rather, we suggest that the budgeting exercise should be separated from setting the directions. The court would have draft budgets available at the directions hearing to consider any issues relating to proportionality, but the approval of the budgets could then be addressed at a separate hearing or if appropriate, on paper. In complex cases, we also suggest that consideration should be given to utilising the expertise of the Senior Courts Costs Office judiciary in setting budgets, again either at a hearing or on paper.

Our proposal is that prior to the costs budgets being submitted, the parties should be obliged to exchange draft directions two months before the date of the Costs and Case Management Conference (CCMC), with the first month thereafter to be used to seek agreement of those directions. We believe this would allow for the issues to be narrowed and for the parties' budgets to be based on the same or similar assumptions.

We suggest that budgeting is limited to up to the Pre-Trial Review (PTR) and Alternative Dispute Resolution (ADR) phases of the Precedent H, as only a very small number of cases proceed to trial. We believe the requirement to budget these phases beyond PTR and ADR creates greater scope for disagreement between the parties, takes up unnecessary court time and increases the costs of drafting the budget. The Trial Preparation and Trial phases could be budgeted at the PTR, if appropriate and necessary. An alternative model could be for the budgeting of the Trial Preparation and Trial phases to be always 'default off'.

The above proposals seek to address concerns as to the difficulties in seeking to prepare costs budgets at a time when the direction of any specific case is unclear (particularly in high value or complex litigation). The costs involved in the costs budgeting process can appear disproportionate in such instances (despite the potential for saving of costs in relation to detailed assessment to conclusion) and therefore these proposals seek to provide certainty when preparing budgets.

We also believe that the current rules in relation to poor behaviour by the parties in the budgeting process are ambiguous and rarely used by the court and when they are

used, are used inconsistently. We consider that these should be revised and strengthened to sanction both:

- A party's failure to engage constructively in the process of negotiating a budget; and
- Where a budget is substantially reduced by the court.

Finally, we are concerned that the current rules and process do not incentivise the production of realistic claim budgets, particularly in personal injury cases valued between £100,000 and £1 million. Whilst we are aware of the potential consequences of any rule changes, and do not wish to see frequent satellite litigation in relation to the costs of the costs budgeting exercise, a requirement to negotiate with appropriate sanctions for clear failure to engage could be addressed effectively by determination of the issues on paper.

1.3 Should costs budgeting be abandoned?

Whilst in our view there are inconsistencies and faults with the current regime in its application, we consider that these can be remedied and ameliorated by the reforms suggested in response to Q1.2.

Our experience and claims data suggests that the proportion of budgeted multi-track claims requiring recourse to a detailed assessment hearing is significantly lower than for claims settling in the 12 months directly before the introduction of costs budgeting and also for non-budgeted cases since 2013.

Our view is that overall the increased certainty achieved by the current system of costs budgeting warrants the expenditure involved in the process and, therefore, it should not be abandoned.

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

We consider that for the majority of claims, costs budgeting should be 'default on'.

To retain costs budgeting in principle for wide categories of claims, but to allow for judicial discretion in its application, would in our view promote unnecessary and unwelcome uncertainty and inconsistency between courts and individual judges.

Budgeting can add a disproportionate additional layer of costs to claims with a value of under £100,000, but this will be addressed by the extension of fixed costs. Our view is the £10 million upper limit for "default on" costs budgeting remains appropriate and is working well. There is a substantial body of authority to guide the application of budgeting to higher value cases, which are managed by experienced judges well versed in facilitating transparency and certainty in the costs likely to be incurred by parties to proceedings.

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?

Costs incurred in the claim at the time the costs budget is prepared remain a barrier to ensuring proportionate costs and streamlining the detailed assessment process. To achieve the twin aims of controlling costs to ensure proportionality, as well as promoting certainty, we consider that incurred costs should be addressed as part of the budgeting process.

The current rules allow for comment to be made on incurred costs at the CCMC, but this is rarely utilised, in part due to concerns over 'double jeopardy' and also not wishing to bind the hands of a costs judge assessing at conclusion.

We consider that this unwieldy system should be replaced. Checks and balances need to be in place in the Civil Procedure Rules (CPR) with regards to the costs incurred at the pre-action stage and before the first CCMC.

In our view, the frontloading of costs can lead to disproportionate costs having been incurred before the court has an opportunity to intervene and therefore, undermining the advantages of costs budgeting.

We suggest that in conjunction with the revision of the pre-action protocols, claimants are required to produce estimates of costs or confirm the predicted bracket for costs within the Letter of Claim, and again when proceedings are issued. Such estimates will have been prepared for clients and therefore, would not add an additional layer of costs burden to litigation. Judges would then have sufficient information to comment substantively at the CCMC on the costs already incurred. We also suggest that sanctions are imposed where a costs estimate is exceeded, akin to those currently set out at Practice Directions 3.1 to 3.7 to Part 44 of the CPR.

A further barrier to avoiding detailed assessment in budgeted cases remains divergences of judicial opinion as to the precise impact of a budget and the mechanism both to establish a good reason to depart and thereafter to assess costs deemed outside the budget. It is anticipated however that cases already within the court system will lead to greater clarity in this regard.

2.1 What is or should be the purpose of GHRs?

At present, in our view GHR provide for no more than a starting point in assessment of costs both on a summary and detailed assessment basis.

The purpose of GHR should relate to the provision of reliable information to all parties (including defendants facing the claim, clients instructing solicitors and litigants in person conducting their own claims). Such a role is important to all parties in seeking to understand their potential costs liability, and potentially any shortfall they may face in instructing solicitors.

GHR should also be designed to reduce the need/time required for court intervention in relation to costs (with GHR as a starting point likely to lead to a reduction in time dealing with inter-partes assessments, solicitor-own client assessments and costs management).

Whilst GHR will have limited impact in cases to which fixed costs are applied, they will still potentially impact on a solicitor own client basis and as such, remain pertinent. Given the vast majority of cases worth under £100,000 are shortly to be subject to fixed costs, GHR should be calculated on the basis that they will largely only apply to higher value cases, thus avoiding the need for 'bespoke' uplifting to account for value/complexity.

Steps have been taken during the 2021 GHR review to distinguish applicable rates relating to 'City Work'. This two-step approach in our view leads to greater clarity and would potentially merit being extended to all locations. Abandonment of National 1 and 2, instead allowing a simply 'National' rate appears likely to reduce administration of any review, with modest impact. Separate GHR in relation to specific work types appears unnecessary and, in our view, would lead to disproportionate administration as to any updates.

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

In order to promote certainty, we believe GHR should be a starting point for assessment (both summary and detailed), with parties required to provide evidence as to why any particular claim should attract rates in excess of the GHR. Further, we suggest that GHR should be calculated on the basis that they will largely only apply to higher value cases, thus avoiding the need for 'bespoke' uplifting to account for value/complexity.

We also believe GHR should also be utilised within costs management, again with a view to reducing court time (and in doing so, the time required at assessment), and also aiding the assessment of proportionate costs to the matter in dispute.

2.3 What would be the wider impact of abandoning GHRs?

The abandonment of GHR in our view would lead to a paucity of information for consumers (at least those not commonly involved in litigation) and would also reduce the ability of the courts to determine appropriate rates. With the overarching aim of promoting access to justice, we believe having GHR also adds to transparency as well as consistency.

The removal of GHR would likely lead to regionalised disparity in costs recovery, which could lead to parties 'forum shopping' with an eye on cost recovery, resulting in additional necessary intervention by the court (in transferring claims to appropriate forums).

The removal of GHR would also likely lead to courts being required to rely on their own individual experience of costs matters. In our experience, this tends to lead to courts being more commonly aware of the higher rates claimed, on the basis that costs presented based on reasonable/lower rates tend to be resolved between the parties. This can lead to the court adopting the interpretation that the higher rates are the 'norm' which in turn results in the courts making allowances.

Ultimately, GHR should provide a realistic mechanism by which all parties are able to calculate their potential liability for their own and any opponent's costs. Abandoning GHR would remove that possibility.

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

In order to ensure confidence in GHR, regular review is required.

A starting point is to identify the 'cost' element of the GHR. This element alone would require ongoing adjustment (i.e. no requirement to adjust profit elements). That cost

element should be subject to adjustment on a three year basis. Such amendments in our view would promote certainty and increase confidence in GHR.

The alternative approach, namely the collating of regional information, in our view leads to the regionalised differences mentioned in our response to Q2.1 and 2.3, involves significant cost and is likely to be unreliable.

It would appear sensible to seek input from non-legal professionals, such as economists, to consider the actual cost of legal services, in order to define the actual 'cost' element together with the impact of digitisation, home working and other recent developments, the impact of which may not yet have been fully appreciated within the industry.

2.5 Are there alternatives to the current GHR methodology?

In our view, alternatives to the current GHR methodology would only arise should legal service providers agree to provide greater transparency as to operating costs. This would allow a true reflection of the GHR required in order to maintain access to justice.

Should legal service providers not be prepared to undertake such disclosure (which arguably would benefit the firms concerned), GHR can only be calculated on previous data, and adjusted according to account for likely price increases.

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

Digitisation of process has the potential to reduce costs associated with litigation to an extent but is dependent on a collaborative approach to inception to ensure all parties can also develop ways of working to maximise the benefits. Absent such approach there is potential for the requirement for data entry to increase the costs associated with dispute resolution.

With the move towards digitalisation, application programming interfaces would be a sensible way forward to allow law firms to have a common interface to link their own case management systems to the court systems. This will ensure the system continues to remain up-to-date with changes and processes. Whilst there are likely to be the upfront costs, in the long-term we believe they will balance out.

The other main issue at the moment is that there are a number of different portals, which mean law firms and insurers are running a number of different systems alongside their own case management system. We suggest that one platform to access all the portals should be introduced which would enable a much easier and costs efficient introduction of any new portals.

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

The overriding aim of the current Civil Procedure Rules is to enable cases to be conducted proportionately and promote the use of pre-action protocols to bring about early settlement so that litigation is a last resort. However, this objective is not being fully realised. The Rules 'lack teeth' as they are rarely enforced with sanctions for non-compliance. We are, therefore, of the view that more robust and rigorously enforced pre-action protocols would encourage an exchange of information and cooperation at an earlier stage. Ultimately, this would lead to more cases settling at the pre-action stage.

An obligation to provide a Letter of Notification prior to costs escalating and to cap costs that can be incurred up to the Letter of Claim would afford some control to achieve proportionality and prevent costs escalating prior to a defendant being notified of a claim or being able to respond.

Equally an obligation to share expert liability evidence supporting allegations advanced in the Letter of Claim would potentially reduce the litigation costs, since this might suffice to convince a defendant of the validity of the claim. Otherwise any defendant wishing to challenge such expert evidence should be encouraged to serve corresponding expert evidence in support of any Letter of Response denial.

With regard to portals, such as the Damages Claims Portal, the time spent on navigating the portal is balanced out by the reduction of protracted correspondence. Claims and portals where fixed costs apply, from a personal injury perspective, work well with regard to costs rules for pre-action and issued claims, where each party is legally represented.

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.

From a personal injury perspective, the extension of fixed recoverable costs provides clarity on costs for all parties. Fixed recoverable costs has assisted in streamlining the

fast-track personal injury process and enables defendants to set clear reserves from the outset. It also assists in part in providing a proportionate way of dealing with claimants' costs.