Capsticks LLP response to CJC Costs Consultation

THE QUESTIONS

Part 1 – Costs Budgeting

1.1 Is costs budgeting useful?

We consider costs budgeting has not controlled costs and indeed, has led to an increase in costs. In our opinion, costs budgeting incentivises lawyers, concerned about under-budgeting, to err on the side of caution when preparing costs budgets. In combination with this, the failure to scrutinise hourly rates at the costs budgeting stage and the difficulty the paying party has in challenging budgeted costs at the conclusion of the claim, has only led to an overall increase in the starting point for costs recovery. Therefore, in respect of budgeted costs once the end of the claim is reached, the impression is that the costs are now higher than they would have been and are not controlled in a way that is proportionate to the value of the claim. This is particularly the case in many claims which settle at significantly lower than the sums sought.

In addition to the above, the process of costs budgeting has had the unintended consequence of becoming an industry in itself. More and more detailed information is required of parties, more time is spent and more fee earners involved. Ultimately, this too has led to an increase in costs and an increase in the number of disputes between parties in respect of costs.

In our experience, costs budgeting can be a useful exercise for significantly large claims valued at £500,000 or above to provide control (alongside case management) where there are a significant number of experts and disbursements. Our experience, however, is that this is only of value where the claim is suitably large enough and continues long enough for this to have any impact. Costs Budgeting therefore has very little impact in controlling the costs in the majority of lower-value cases which settle shortly following after the CCMC.

In our opinion, we recognise the principle of controlling the costs is right to protect litigants who are paying what can be significant levels of costs *inter partes* whatever their source of funds. This is particularly the case in lower value claims where costs recovery is sought which will be entirely out of proportion with the damages recovered. No private paying individual would pay the sorts of sums of money claimed in costs and budgeted to recover damages sought up to £100,000.

We consider that there must be a mechanism which controls costs in order to achieve the twin objectives of: a) having the court set a proportionate level of costs in advance

to provide certainty; and: b) providing the ability to effectively challenge costs at the conclusion of the claim, when the costs claimed are not proportionate (eg: where claims settle much earlier than anticipated or at a significantly lower level than claimed).

It should be noted that clinical negligence will not be part of the wider Fixed Recoverable Costs ('FRC') scheme up to £100,000 and the proposal is for FRCs up to £25,000. Therefore, in clinical negligence, it is important that costs budgeting should continue in claims £25,000 and above, but in a new more effective process.

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

Defendant's costs budgets in clinical negligence claims (and personal injury)

Where Qualified One-Way Costs Shifting ('QOWCs') is in place for personal injury claims (including clinical negligence) we propose that costs budgets are not required for Defendants. Whilst QOWCs is not a bar on the Defendant obtaining a costs order in principle, QOWCs represent a limit on the enforcement of costs orders up to the level of damages obtained. Because of the above, we consider that budgeting of Defendants' costs is superfluous on many occasions in personal injury claims where QOWCs applies. It is accepted that an indication of costs incurred to date or an estimate could still be provided but we consider that the process of costs management of defendant's budgets in clinical negligence claims where QOWCs applies is unnecessary.

Excluded cases & cases above £10million

In our opinion, should the existing system continue, there should be greater control of costs in large clinical negligence cases including those above £10million and in particular, excluded cases involving children. We consider there is benefit in the court controlling cases with significant numbers of experts and disbursements.

CPR 3.18 & ***Harrison***

In our opinion, the interpretation of CPR 3.18 following ***Harrison v University Hospitals Coventry and Warwickshire NHS Trust*** **[2017] EWCA Civ 792** leads to an increase in the costs claimed in respect of budgeted costs (ie: the estimated costs approved at the budgeting stage) when it comes to detailed assessment.

In our experience, where a Claimant who has been successful recovers costs and is within budget for the budgeted costs of a phase, the Claimant's costs have no further scrutiny unless the Defendant can show a 'good reason' to depart downwards. We

consider this to be a perverse incentive and means that even though the Claimant's hourly rates might not have been allowed in respect of incurred costs, they do not face any scrutiny in respect of the budgeted costs. The current system relies on costs budgeting fixing the estimated costs at a level which includes a reduction to the hourly rates but where the rate is not set. In our opinion, this is not a satisfactory state of affairs and leads to an increase in the budgeted costs that are recovered compared to a situation where no costs budgeting would apply.

We propose that if costs budgeting is to continue there should be a rule change that the 'good reason' test should only apply to sums over the budgeted amount for the phase and not to departing downwards from the budgeted amount.

Consideration of Hourly Rates on Budgeting

Connected with the above is the issue of a failure to consider hourly rates when undertaking the costs budgeting exercise. In our view unless a court significantly reduces the estimated costs, very high hourly rates may well still be recovered in respect of the Budgeted costs – even though they would not be allowed in respect of the incurred costs on detailed assessment for a claim of that size and nature. We are of the opinion that if the above rule change is not viable, then costs budgets should be set on the basis of Guideline Hourly Rates or hourly rates.

1.3 Should costs budgeting be abandoned?

We consider there is a need for a mechanism which controls costs by a) setting the level of proportionate costs in advance; b) provides the ability to effectively challenge costs at the conclusion of the claim, when the costs claimed are not proportionate. We therefore consider that costs budgeting should *only* be abandoned where there is a suitable replacement. We therefore propose the options to:

a) Replace costs budgeting with a Guideline Costs Recovery system with a corresponding set of rules; or
b) Replace costs budgeting for cases up to £500,000 with Costs Budgeting continuing on those cases over £500,000.

We propose a system akin to the JC Guidelines in damages, but these provide for guidelines for costs in particular cases with a benchmark for cases by value and also stage of the litigation reached. These Guidelines could follow the similar phases of a costs budget. This would provide certainty to the parties as to the level of costs to be recovered at the conclusion of the claim by value but also reduce costs in our opinion. This should be a simpler process at the CMC stage to apply the guideline figures for each phase without a budget being provided, with fewer arguments and

avoid the need for costs draftsman involvement and abandon precedent H or its equivalent. At the end of the claim a simple bill of costs would be provided and the guidelines applied for the value and stage that the claim had reached.

In addition, there should then be a mechanism with a set of rules to allow the parties to seek an increase or decrease from these guidelines figures at the conclusion of the case. This would be akin to the rules under provisional assessment where that party would need to meet a certain percentage increase or reduction, otherwise face the costs consequences of the challenge and/or meet penalties in respect of the costs claimed. The burden would be on the challenging party and they would carry the risk in challenging the guideline figure.

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

We do not consider that a 'default off' approach would be helpful. We consider it is likely only to lead to satellite litigation as to whether costs budgeting should apply and the majority of cases would unlikely be budgeted. We consider that a 'default on' policy is best, with the exception as outlined above where QOWCs applies for defendant 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?

See above.

Part 2 – Guideline Hourly Rates

2.1 What is or should be the purpose of GHRs?

In our experience of clinical negligence cases at the conclusion of a claim, Guideline Hourly Rates ('GHRs') are a very important comparator when dealing with the Claimant's costs. We consider they are necessary for both summary and detailed assessment.

We consider the purpose of GHRs is two fold. 1) For consumer protection; 2) as a general allowance for what a reasonable hourly rate that should be allowed for an average claim.

In our experience, Claimant's costs in personal injury claims where Conditional Fee Agreements ('CFAs) have not been subject to external scrutiny by clients or insurers. Therefore, the hourly rates have not been subject to market scrutiny as in other areas

of law, such as commercial work. As such, one purpose of the GHRs are consumer protection.

In our experience, GHRs provide most benefit in reducing excessive and disproportionate hourly rates claimed in claims that settle at a low-value but the costs claimed are significantly higher. In our experience, the lack of updated GHRs between 2010 to 2020 led to more disputes over what a 'reasonable' hourly rate should be. Without this comparator, we are concerned that much higher and excessive hourly rates would be sought.

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

We consider that in clinical negligence matters that the Guideline Hourly Rates do have a broader impact for consumer protection and provide the market with a comparator. We think this is important where, due to the operation of CFAs, the Claimant's costs have very little external market scrutiny outside of regulatory requirements, costs budgeting and detailed assessment.

2.3 What would be the wider impact of abandoning GHRs?

We consider that if Guideline Hourly Rates do not apply to detailed assessment that hourly rates would likely increase significantly for all cases. In our experience, solicitors tend to keep the same hourly rate for all their cases by type and as such, it does not matter if the claim is worth £1 million or £50,000, the same hourly rate applies. As such, the rate agreed with the client and subsequently claimed on any detailed assessment would likely be increased significantly.

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

We consider that it is useful that the GHRs be adjusted over time. Prior to the recent update on the Guideline Hourly Rates, the ten year gap meant that there was significant argument between parties on detailed assessment as to the level of reasonable hourly rates. As such, we consider that regular adjustments need to be undertaken every two years. If that is too much of an administrative burden, we would suggest every three years.

We consider that the methodology for the last update of the GHR was reasonable and took into account hourly rates that would be allowed. This is useful information for judges on both summary assessment and detailed assessment in our opinion.

2.5 Are there alternatives to the current GHR methodology?

Without significant amounts of financial data, trying to ascertain the average profit and overhead by area will not be possible.

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?

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?

The current system in place means that a Part 8 claim needs to be issued for a costs order to be in place for a bill of costs to be served under cover of notice of commencement. In our experience, most cases settled pre-issue are also settled without part 8 proceedings. However, there can be significant delays in parties providing details of costs or an informal bill of costs following a pre-action settlement. Short of issuing Part 8 proceedings, there is no sanction for a party that does not provide costs details on a pre-action claim.

In addition to the above, in low-value matters the preparation of a full bill of costs can be significant when the costs might have been capable of settlement on the basis of a schedule/statement of costs (such as an N260) with reasonable detail and disbursement vouchers. We consider a pre-action protocol for costs disputes following pre-action settlements be created. This would then also set out the information to be provided, by when and a process by which the Court, failing agreement by the parties, might summarily assess low-value cost under £75,000 – which is the same figure at which provisional assessment is carried out.

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

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?

In our experience there is reluctance to settle personal injury claims under £1,000 which would currently fall into the small claims track. We anticipate there would be

maximisation of the value of a claim to take claims out of the FRC regime. This would take place both before a claim begins and also during litigation. In our view it is therefore likely to lead to satellite litigation regarding the value of the claim, particularly in borderline cases. We are also concerned that whilst many firms currently undertake initial scrutiny of potential claims that with FRC this may not be undertaken.

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.

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.