HILL DICKINSON

Response to the Civil Justice Committee Working Group Consultation Paper – June 2022

About Hill Dickinson LLP

Hill Dickinson LLP is an award-winning international commercial law firm made up of more than 950 people including 200 partners and legal directors.

The firm is a trusted adviser to businesses, institutions, public bodies and individuals across a wide range of specialist sectors.

This Response is informed by the experience of Hill Dickinson's leading defendant clinical negligence practice, and its in-house costs team of some 30 costs specialists (which has CCS and NHS Resolution panel appointments). It draws in particular on data collated over the last 27 months, including approximately 4,000 concluded costs claims and 800 costs management / budgeting instructions.*

* Note: All figures quoted in the discussion of costs management / budgeting exclude the 1% and 2% costs management figures, VAT (as these are excluded from the budget) and additional liabilities (likewise excluded from the budget), unless specifically.

Part 1 – Costs Budgeting

1.1 Is costs budgeting useful?

The response depends upon whether the question is asked as a matter of principle or related directly to current practice / experience.

The concept and the intention behind costs budgeting is entirely worthy. Unfortunately, from the outset there were difficulties. Even before implementation the judiciary were openly warning that there were insufficient resources to undertake the budgeting process without severely impacting on the ability of the courts to manage cases. It was also readily apparent to defendant practitioners that claimants would simply inflate their budgets in order to ensure that their margins were not impacted after deductions, and that there were no safeguards to prevent that.

Our experience of budgeting in practice leads us to note the following:

- In reality, budgeting has failed to control the costs incurred by claimants, which in most cases remain disproportionate to the damages. On cases where damages are reserved below £50,000 the average claimant budget is **£145,995**. On cases where damages are reserved under £100,000 the average budget claimed is **£279,652**.

- Although a direct comparison with pre-budgeting cases isn't possible, based on experience of those cases we consider budgeting has indeed led to adverse behaviours, including the front loading of costs. On the raw data, an average **29.76%** of the costs claimed within a budget have already been incurred. On analysis, however, considering that less than 0.5% of cases conclude at trial (NHSR annual report 2021/22, page 38) and therefore removing costs associated with the trial preparation and trial phases, as well as the CMC phase (which is treated as an incurred cost, CPR 3.17(3)(A)) the percentage of costs claimed within a budget which are incurred increases to **44.9%**. In short, almost half of the costs being claimed fall outside the budgeting process.

- Given incurred costs are outside the scope of the budgeting process, but form such a significant part of a final bill, defendants are still obliged to pursue detailed assessment procedures.

- The fact that hourly rates are not addressed is a major defect in the process and again complicates matters at the conclusion of a case.

- The overall approach of claimant's draftsmen and the court has led to a situation whereby claimants' budgets are very rarely agreed. [It was anticipated, optimistically, that a majority of budgets would be agreed, thereby avoiding costs management hearings.]

- The approach to defendants' budgets falls almost invariably at one end or the other of two extremes: they are either agreed without contest because, being so much lower than claimant's budget there is no prospect of reduction; or they are contested on the curious basis that they have been deliberately understated to accentuate the disproportion of the claimant's schedule. In reality, there is almost no value in the preparation of defendants' budgets.

- There is no consistency amongst the judiciary and budgeting is a lottery, where we experience a wide range of outcomes in broadly similar categories of claims. On analysis of a broadly similar basket of cases, using two courts as an example, where we have data from at least five hearings the average reduction recorded to estimated costs were 30.3% and 33.3%. However the range in reductions between judges in those courts is between 18.75% - 33.4% in the first and 19.4% and 41.4% in the second. Even a relatively small difference in approach can be significant where 90% of the budgets we see are claimed in excess of £100,000.

- We have not seen any improvements or efficiencies through embracing technology. In all costs managed cases the fees for drafting the budget were capped at 1% of the approved budget. The costs are *never* less than this. Most firms should have time recording software and the ability to record time by the phase of litigation. If this was in place there should be more automation with the production of budgets and a reduction in costs for costs management.

- Claimants are typically granted too much latitude in being able to increase their budgets during the course of a case.

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

- Roll out of a significant judicial training programme to ensure consistency across the country, with a review of the Civil Procedure Rules to the extent that may be required.
- Defendants no longer required to prepare budgets.
- Claimant's budgets to be prepared *after* case management directions have been ordered. [This will mean that budgets are prepared with regard to how the case will actually progress, rather than being aspirational.]
- Hourly rates to be considered as standard.
- Insofar as there are technological advances from time to time, the adoption by the judiciary should be mandated and it should not be open to individual courts to adopt their own arrangements.
- Regional benchmarking of reductions to budgeting to be introduced to identify outlying areas where additional training may be required.
- Penalties to be introduced for inflated budgets, where reductions exceed a specified percentage or amount.
- Deviation from budgets to be permitted only in exceptional circumstances.

1.3 Should costs budgeting be abandoned?

No. The budgeting process should be improved to it is "fit for purpose".

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

"Default on".

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 budgets to be prepared after case management directions have been provided.
- Therefore the costs hearing is an entirely separate hearing, to be conducted remotely as the default position.
- GHR to be adopted as the standard rate.
- Reduce the recoverable costs of costs management.
- Remove the need for defendant budgets in QOCS cases.

Part 2 – Guideline Hourly Rates

2.1 What is or should be the purpose of GHRs?

GHRs *should* provide some certainty for the parties in the litigation as to what they can expect to recover upon assessment. At present they do not. In costs claims conducted + **95%** involve disputes on hourly rates.

GHRs should not be a starting point, they should be the expected recoverable hourly rate save in exceptional circumstances. Having greater certainty will reduce a significant area of disagreement between the parties, which should in turn reduce the number of assessments. This would also introduce greater certainty for claimants and defendants, at the outset all parties will know what the recoverable hourly rate will be. For purchasers of legal services this provides certainty to calculate a shortfall, if any, from the outset if alternate rates are agreed.

In light of the prevalence and uptake of electronic communications including emails and video calling, together with remote working we view locality bandings as now being of limited significance.

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

GHR should be the end point when considering recoverable hourly rates at all costs assessments, see 2.1.

We accept GHR will not be appropriate to all forms of litigation, but for the majority, if not all, personal injury litigation, there is no reason why GHR should not be strictly followed if set at an appropriate level and with periodic reviews, see 2.4.

There should be an ability for the GHR to be exceeded, but this should be based upon either both the case or category of work being exceptional and a proper consideration of overheads based upon an expense of time calculation, see 2.5.

2.3 What would be the wider impact of abandoning GHRs?

Abandoning GHR would increase the level of uncertainty for all parties and likely increase the level of costs assessments.

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

There should be a more regular review but allowing time to even out changes in the market and working practices. We would suggest 2-3 years. Any shorter would create more work and complexity, any longer would lead to arguments about whether the rates still relevant as occurred ahead of the last hourly rate review.

The rates should not automatically be linked to any indices for an increase. This is predicated on the expectation that rates should always increase. This fails to account for changes in actual costs and changing ways of working for example remote working and reduced overheads, which may justify rates not being increased or in fact reduced.

Data from detailed and summary assessment is of limited relevance and does not provide an accurate picture of the legal market. Our data indicates that 1.1% of cases proceed to listing for a

provisional or detailed assessment of which not all will proceed to a hearing. This is not representative of the market as a whole.

Further the figures collated as to the hourly rates claimed are skewed by the hourly rates claimed within any file which has been the subject of costs management. Hourly rates are not a consideration for costs management and it is in most receiving parties favour to have a higher hourly rate as possible. These rates will be recorded as being claimed and allowed by simple virtue of being part of the approved budget portion of any bill of costs.

Any hourly rate review should instead be based upon an expense of time calculation, and GHR should be based upon the old A and B factors.

2.5 Are there alternatives to the current GHR methodology?

The methodology should be based upon an expense of time calculation. An expense of time calculation should be based on actual costs incurred. Not simply a collation of what firms are charging. The rates recoverable should be evidence based taking into account the costs of running a practice, not simply based upon what people are asking.

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?

In the absence of specific proposals it is not possible to answer this question. However, it is a fallacy to assume that “digitisation” is an answer to costs in itself.

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

The current trial of the portal for issuing and responding to claims will have no positive implications for costs. The processes are simply not materially different to those that existed previously.

The pre-action protocols have been of variable success. As discussed above, there is a significant front-loading of costs, which at least in part is enabled (if not mandated) by the protocol.

We are concerned that mandating ADR, *even where cases are patently unsuitable*, will only serve to increase costs, and caution should be exercised.

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?

Although the answer in principle might be “yes”, it is difficult to see what reforms could be introduced in terms of the assessment of costs when cases resolve during the pre-litigation phase. It is also unclear what the basis would be for treating pre-action costs differently to the costs of litigation, in the sense of the fundamental principles of assessment that should apply.

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

We have no comments here.

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 areas where fixed recoverable costs are introduced, then plainly many of the problems in relation to budgeting and assessment fall away.

Fixed costs will be an effective way of forcing efficiency and driving down the costs of litigation, and for the matter the resources used in the administration of justice generally.

We accept there will be cases where parties may feel penalised and the level of fixed costs will not viewed as sufficient. However, experience indicates that the market always finds a way to adjust to ensure that access to justice is not jeopardised.

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.

It is high time that the courts exercised control, through cost capping, of expert fees.

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 comments here.