

Cost Law Services

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Dear Sirs,

The below submissions to the cost consultation are sent on behalf of Cost Law Services, a nationwide legal cost company offering a full spectrum of Legal Aid and Inter Partes Costs services. Our clients include a national law firm with a focus on legally aided clients.

The four areas of the consultation will be addressed in turn below.

1) Costs Budgeting;

Cost budgeting is a helpful tool ensuring costs are given attention by the parties (and the court) at an earlier stage in litigation. A Costs Management Order (CMO) is also helpful in narrowing issues at detailed assessment stage; for example fewer issues tend to arise where the costs allowed by the court within the CMO have not been exceeded.

The original Jackson Report asserted that costs and case management should go hand in hand. Whilst this is commendable in theory the reality is that the approach by the judiciary varies greatly and can cause problems when advising clients on possible outcomes. We noted with interest the recent comments of Master Gordon-Saker where he lauded the potential for costs to be considered at a separate hearing following the handing down of directions. We have long taken the view that budgeting is a more meaningful and cost effective exercise when carried out once directions have been set.

If costs budgeting were to be removed from the case management conference we would suggest there is merit in the court still being made aware of the incurred costs at the case management hearing for the sake of transparency. We would suggest full Precedent H documents (including detail of estimated costs and assumptions) be served within 14 days of the CMC Order. Whilst budgeting can be a time consuming exercise the process is far easier for all parties when directions are known and the path a case is likely to take is definable. Budget Discussion Reports and subsequent discussions are more likely to be fruitful where directions are known by the costs lawyers involved. We would suggest cost management hearings could take place remotely for expediency and be carried out by specialist judges who are well-versed on key issues in the budgeting process.

A major concern with budgeting presently relates to inconsistency in approach with some judges taking a somewhat granular approach and others applying the very broadest of brushes. As such, moving the costs management element to a specialist could ameliorate the process.

Certainly we do not consider any benefit would be gleaned from abandoning cost budgeting in its entirety. Rather, we take the view budgeting should be "default on" for all cases up to £10m with the potential for the limit to be pushed higher by virtue of the extra capacity the court's may have following the extension and procedural simplification of a raft of claims following the extension to the fixed cost regime.

2) Guideline Hourly Rates

The GHR form the cornerstone of considerations around hourly rates. Whilst we agree with reliance on the GHR it is important that flexibility exists to depart from the GHR when warranted. In order to protect access to justice we would consider it important for GHR to be enhanced by a reasonable and proportionate level where vulnerable clients are being represented that requires specialist knowledge not readily available within the general legal market.

We consider that abandoning GHR would be a negative move and would likely result in greater levels of cost-centric litigation with parties likely widely divested in their views on rates without GHR offering abroad backstop position.

The biggest challenge with GHR, as can be seen in the years leading up to the increase in 2021, is ensuring they remain economically relevant. Whilst geographical location has been touted as an area that could be removed as a determining factor we consider it to still be a key element that warrants maintaining the current approach. Whilst Covid-19 accelerated firms embracing remote working and changed how some firms engage with their employees the majority of firms still retain offices in the same locations as were present pre-Covid. Further, whilst remote working is now more prevalent the geographical centre of gravity (location of claimant, instructed solicitor, Court) remains important.

We would suggest GHR should be revisited once every 2 years, a longer period would risk the GHR not reflecting economic reality. We appreciate annually, whilst preferable, could be too onerous on the stakeholders involved. In terms of the arithmetic used to produce the 2010 GHR, the considerations will have included cases for which costs will be fixed from 2023; future considerations should address the reality that GHR will largely concern cases valued at £100k and above.

The need to retain the GHR is valuable to practitioners who undertake legal aid work; the GHR are a sword which can be the life or death of a legal aid practice, and in turn the Clients they represent, most of whom are vulnerable and fall below a certain threshold of income also, where legal representation is unaffordable.

We noted with interest the idea shared within a CJC online sessions of GHR being moved from specific rates to bands. In such a model the rate allowed could start at a central position but then be moved up or down based on complexity (or lack thereof). We consider this approach to have some merit as it would allow for variance based on complexity, as well as judicial input, but also ensures rates awarded fall within a broad range. The banding could either be defined as codified figures or a percentage increase/decrease.

3) Costs under pre-action protocols/portals and the digital justice system;

For the impact of digitisation to be enhanced beyond the current level a greater level of integration between Portals and court systems is undoubtedly required. Whilst blue-sky thinking could point to an entirely digitised court system the reality is that infrastructure is simply not present to support it. However, the ability to commence Part 8 proceedings direct from one of the pre-action portals should not be thought to be unachievable and would have tangible benefits. All information required to issue is contained within the Claim Notification Form, Stage 2 negotiations and Court Proceedings Pack. As a result it should be possible to remove the requirement to manually produce and print a Claim Form. The court issue fee could be paid by PBA removing the need for a physical cheque. The efficiencies obtained by such a process would benefit both solicitors and the courts and should speed up the process if agreement were not to be reached at Stage 2.

We offer no comment on the solicitor own client costs/inter partes costs element nor contentious/non-contentious dichotomy pending *Cam v Belsner* decision given these elements were covered in submissions to the court and determination (as well as further comment) is awaited.

4) Consequences of the extension of FRC;

The extension to fixed costs could impede access to justice but we shall not address this point further given the scope of the present consultation.

As was covered in the CJC Panel discussion in London, fixed recoverable costs could have few detractors if the level of recovery were excluded from consideration. Receiving parties will often chime that sums are too low and paying parties predictably argue the opposite. Some of the issues with fixed costs relate to the blunt nature of the tool and the difficulty in accounting for complicating factors and extenuating circumstances. The issue could be addressed by a larger number of "get-out" clauses that would allow fixed costs to more closely reflect the reality of work required on individual matters. However, we accept that as the numbers of exceptions increases, the chief benefits of fixed costs, namely simplicity, diminish.

A further key issue with the extension to the fixed cost regime is the delay in specific provisions being announced and rule changed being given effect. Law firms are unable to reasonably forecast revenue streams and plan accordingly given the uncertainty. However, we accept that is not within the remit of the CJC consultation and we will not elaborate upon the impact of this issue further.

We are grateful for the work being carried out by the Civil Justice Council in this important area and hope the above will be of assistance. Should further information be required we will be happy to assist further.

Yours faithfully

Cost Law Services