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General introduction

Whilst the introduction of the CPR may have set out to provide greater visibility to enable parties embroiled in a dispute to compromise, costs budgeting as currently provided for in the CPR has not controlled costs.

The CPR fail to acknowledge that indemnity spend is made of up of three elements:

1. Damages and interest
2. Opponent's costs
3. Own costs

Costs budgeting provides clarity as to the previously unknown opponent's costs which is to be welcomed but does not adequately control costs, both incurred and estimated.

Part 1 – Costs budgeting

1.1 Is costs budgeting useful?

Yes, in fact costs budgeting is essential to enable and assist:

1. Parties to understand their potential costs exposure; our experience is that claimant solicitors are often reluctant to otherwise provide details of costs incurred or estimates of future costs.
2. the overall process of Costs Management has been shown to aid dispute resolution by way of co-ordination with the ADR process to ensure that parties engage in ADR at an early stage before vast sums of costs are incurred
3. clients in assessing the actions to be taken towards settlement
4. costs information is key when considering/assessing Part 36 offers by reference to costs consequences; that the process of reserving for costs is now more accurate because of the information provided; and
5. in the provision of a greater degree of transparency and certainty for the purpose of setting reserves.

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

The applicability of the costs budgeting regime will change upon the anticipated extension of fixed recoverable costs (FRCs) to all cases with a value up to £100,000. The impact will mean that costs management is targeted to claims where it will have a greater impact and more application generally.

1. Exceptions

Whilst, in general terms, costs management applies to all Part 7 Multi track cases, there are exceptions. With the majority of the profession and judiciary comfortable with the ethos surrounding costs management, there should be no general exceptions, rather left to determination by the judiciary set against the salient facts of any one claim.

The following existing exceptions should not continue: : -

i. Petitions under Companies Acts and Insolvency Acts for instance can still have significant costs liabilities but technically sit outside of the costs management regime as they are not issued under Part 7.
ii. The same benefits that apply in general commercial litigation will apply to parties here. This is also true for Inheritance Act claims which can become very contentious and thus involve significant costs.
iii. There is currently a financial limit exclusion for claims with a value exceeding £10 million. There is no empirical data to state that claims worth more than the current ceiling imposed are conducted at proportionate cost, indeed the opposite is often the case, as is evident from detailed assessment hearings to assess what sum reflects reasonable remuneration, a costly process when conducted without the benefit of earlier costs management.
iv. Claims involving minors and other protected parties are nuanced simply by the procedure, not complexity, which is quantifiable in terms of additional costs this is easily managed by members of the judiciary.

2. Timing

Costs budgeting assists in promoting the early settlement of cases by focusing minds on the expenditure to be incurred on general litigation costs. It requires tight control to avoid frontloading of costs.

There is no reason why a party engaging in litigation cannot from the outset project the likely costs of its claim on a stage-by-stage approach, akin to the FRC's.

Through staged costs management, parties are afforded certainty from which to promote settlement and avoid recourse to the courts; again, reflective of the approach contained within the proposed extension to the FRC's. This requires tight control to avoid frontloading of costs.

Suggested timing of the claimant to reflect both incurred and anticipated costs:

a) Pre-action
b) Claim Form to defence
c) CCMC and Directions
d) PTR
e) Trial

3. Venue

Costs management should be a separate process from the directions at the CCMC.

Costs management prior to the directions process is reflective of the procedures to be adopted in accordance with the Pre-Action Protocols. Following the commencement of proceedings, costs management will reflect the stages agreed or approved through the directions process. Whether pre commencement of proceedings or post, there is a method upon which to base costs management with a degree of certainty as to what costs are required to be incurred to achieve resolution via trial or ADR.

Akin to the detailed assessment process, specialist costs judges are best placed to deal with costs management e.g. The Senior Court Costs Office. It is essential to the success of costs budgeting that it is a well-resourced service with appropriate experts. With delays due to Covid and other pressures on the court service, it is our experience that in some cases there is insufficient time at the CCMC to properly deal with costs budgeting.

A regional approach by specialist costs centres to effectively manage costs both pre and post the commencement of proceedings, would provide parties with an arena to challenge and afford certainty in the event of a compromise in the claim.

Through effective costs management by dedicated personnel throughout the entire claims process, transparency is constant.

1.3 Should costs budgeting be abandoned?

No.

The process of costs management is a largely effective tool for aiding settlement of cases and limiting the requirement for detailed assessment. All processes require modification over time and making the recommended changes to the costs management process will increase its applicability and use in the arena of litigation.

However, our experience and that of our client in some forms of litigation, notably clinical negligence, is that costs budgeting has led to increased costs and that the baseline level of costs claimed has increased. Others want the process to begin sooner so that costs are controlled from day one as opposed to post litigation, with the introduction of costs management to the pre-litigation space.

Costs management is a suitable control to claims beyond the applicability of further extending the FRC's which would not otherwise fit into a simplified procedural fixed costs matrix.

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

Costs management, albeit in an altered format as referenced above, must remain as a "default on" setting.

Making the process of costs management a "default off" process is a backwards step in affording visibility and certainty to parties generally and can only give rise to:

i. Uncontrolled levels of costs being incurred;
ii. Greater propensity for disputes via detailed assessment; and
iii. Negation of settlements.

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 management should be conducted by well-resourced and dedicated members of the judiciary, such as costs judges within the SCCO or on a regional basis. Through active costs management by dedicated members of the judiciary solely charged with the task, consistency can be achieved and potentially mitigate the need for detailed assessment in its entirety. Albeit potentially disparate to the claims process, correctly managed resolution of the entire claim may well become far swifter.

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1. Hourly rates

The 2021 review of the guideline hourly rates has afforded a greater degree of certainty to enable parties and the judiciary to ascertain what sums reflect reasonable remuneration, added to which the GHR's are subject to review by way of the SPPI every two years, maintaining the GHR's as fit for

purpose generally. Any change to the GHRs should be evidence-based, particularly in the light of the change in working practices and arrangements post-Covid.

Through consistent costs management by specialist costs judiciary, hourly rates should be part and parcel of the adjudication process for determining whether a sum is reasonable and proportionate within the costs management process. Costs management void of consideration of an appropriate hourly rate would negate an evidenced approach to determining what is reasonable and proportionate.

2. Incurred costs

The lack of control and transparency currently in existence owing to costs management introduction at such a late stage within the claims process simply fuels an environment with no control in terms of expenditure. To avoid uncertainty and promote greater visibility, incurred costs should either be: -

a) Tracked via a more staged approach to costs management from the outset of a claim; or

b) Subject to the provision of more detail in the Precedent H to assist in projecting forward reasonable costs.

3. Costs management process

Absent the introduction of costs management from the outset of the claims process, to mitigate uncertainty and reduce costs associated with the process, having the costs management hearing four weeks post the approval of directions, will mitigate costs enormously i.e., instead of a combined directions and costs management hearing, separate the direction from the costs management as parties are afforded certainty as to the steps required to be budgeted to conclusion of a claim.

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Part 2 – Guideline Hourly Rates

2.1 What is or should be the purpose of 'GHR's

The GHR's are accepted as the starting point from which to determine whether the sums in issue are both reasonable and proportionate.

As a starting point, in determining whether a sum is reasonable and proportionate, an hourly rate claimed can be increased **or decreased** dependent on the salient facts of the claim.

GHR's do play a part to afford certainty to the parties from which to present offers in settlement.

Whether, if there is a place for GHRs, their use may be restricted to certain areas of civil litigation – and if so, which areas; and

There can be 'one-size' fits all, in the arena of litigation.

The GHRS's act as a barometer from which to assess the reasonableness of the sums in issue set against the salient facts of a claim. Any variation to the GHR should be considered on a case by case basis rather than by reference to particular types of litigation which are suggested to be inherently more complex than others. It is for example the usual practice for an enhanced rate to always be sought in clinical negligence claims. While in some instances such cases are more complex, that is not always the case and in many cases the complexity is dealt with by more frequent use of counsel such that enhanced hourly rates are not always justified.

Whether, if there is a place for GHRs, the question of geography and banding needs to be considered.

Arguably, hybrid working makes location redundant in term of where the work is carried out.

Location remains an important issue when considering the choice by a client to instruct a legal representative. The concept of choice cannot be ignored; however, choice cannot exceed the parameters of what sum is reasonable for a paying party to pay, hence the dictum within the decision of *Wraith v. Sheffield Forgemasters Ltd, Truscott v. Truscott [1998] 1 WLR 132 (CA), remains of relevance. The issue in the light of changing working practices is not just whether it is reasonable for a party to choose a legal representative whose office is in a particular location, but whether the legal representative is*

based at that location, whether the litigant in fact attended the legal representative in that location and what the reasonable costs of conducting litigation in that area now are.

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

No – the rate should remain a starting point for determining what sum is both reasonable and proportionate. As a "starting point", this provides the ability for an hourly rate in dispute to be the subject of an increase **or decrease** to that as claimed. Any departure from the GHR should be on a case-by-case basis and evidence- based.

2.3 What would be the wider impact of abandoning GHRs?

A lack of certainty, fueling unnecessary litigation to determine what sums represents reasonable remuneration.

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

GHRs should be amended over time. The change in working practices (hybrid working, less office space, IT costs, virtual meetings and hearings) in the legal sector arising from Covid necessitates an early re-evaluation of the current GHRs. Inflation should also be considered when amending rates to reflect inflation. The question remains what index rate of inflation should apply to GHRs?

CPI – the consumer price index
RPI – the retail price index
SPPI – service providers price index

The concern is whether the current proposed two-year review reflects a true picture when apply a mean rate of a period. Arguably, a review every five years considering the average rate of inflation would promote a fairer outcome for all parties.

2.5 Are there alternatives to the current GHR methodology?

1. Expansion of the fixed costs regime
2. All parties bear their own costs

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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?

The digitisation of dispute resolution, in the long term, should result in a more cost effective and efficient method of resolving disputes. In any event, in recognising the economic significance that the legal system possesses, the processing of claims and the system generally must keep pace with the technological advances in the world around it.

Initially there will be significant investment required by firms to ensure they have the appropriate infrastructure and technology in place.

Whilst the Covid 19 pandemic reduced some ancillary costs in terms of the enforced move from personal attendance at some court hearings to online, the overheads of the firms in terms of administration expenses have increased. Staff had to upskill, improve digital literacy and often this happened without any formal training programmes in place because of the speed with which things changed. This has not been helped by the number of different platforms used and any redesigned system should be consistent throughout all courts.

Increased license fees for software and programmes are inevitable and costs surrounding further increased data security may be significant as the risk increases.

An API may only reduce cost to firms if they have the current technological infrastructure already in place otherwise this may increase costs for firms putting in place that infrastructure.

Redesign of processes and working relationships with clients also come at a cost. Unrepresented litigants cannot be expected to bear an increased cost to be able to access justice. For that reason, and in the interests of a digital system being universally accessible, it should be centrally administered and funded. Facilities should be considered to enable unrepresented litigants to have secure access to computer equipment.

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

Portals have successfully controlled costs in low value personal injury litigation but only because the process is limited and prescriptive. Pre-action protocols outside of the portal processes have standardised behaviour but not reduced costs. Represented claimants incur significant costs in front-loaded work and this reduces the effectiveness of the costs budgeting process and increases the cost of litigation generally.

Pre action protocols for Motor/ EL and PL cases currently contain provision for costs payable by the defendant once a matter has started in the Portal. Most other protocols currently contain no such provision, any costs entitlement for a matter settling pre-issue is dependent upon there being a contractual agreement to pay costs within any term of settlement. Protocols should be revised to clarify the costs liability where the matter settles pre-issue or is discontinued pre-issue. There should also be stricter penalties for non-compliance.

The costs protections afforded to solicitors pre- action have only recently been clarified with the recognition of the lien pre-proceedings.

In terms of portals improving access to justice for unrepresented litigants, data suggests that most claims brought on the Official Injury Claim Portal in the first six months of implementation were brought by claimants with the benefit of legal representation. Introducing more portals may not have the immediate desired impact in terms of accessibility.

Whilst introducing compulsory alternative dispute resolution prior to proceedings may be effective in some cases, the parties must be able to be on an equal footing and the cost must be kept down in order to save further adding to the cost of cases that do not settle.

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 CJC's interim report on pre-action protocols suggests a summary costs procedure should be introduced, independent of CPR Part 8, for claims that settle pre-proceedings. We agree that a clearly defined mechanism should exist in the CPR. However, introducing a procedure that sits outside of the normal procedures may add a level of complexity to pre-proceedings settlement procedures.

The current solicitor and own client costs assessment procedure is lengthy and cumbersome and should be replaced by a simpler process, not least in personal injury cases involving deductions from damages where the amounts at stake are small.

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

No.

The existing definitions influence how potential litigation is handled and funded for both claimants and defendants. Claimant retainers may be different where a matter falls under the present definition of non-contentious and insurance companies are able to handle claims because of pre-proceedings work not being a reserved legal activity.

Those definitions, however, are not suited to a seamless system with a single designed litigation procedure from letter of claim/CNF through to trial.

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?

No response offered

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.

In addition to the intended extension into civil claims where damages do not exceed £100,000.00, claims against medical professionals and the police should not be excluded by virtue of a perceived difference between private and public bodies.

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.

No response offered