RESPONSE TO CIVIL JUSTICE COUNCIL COSTS WORKING GROUP CONSULTATION PAPER - JUNE 2022

Part 1 – Costs Budgeting

1.1 Is costs budgeting useful?

Costs budgeting has some use, and it does act as a discipline on parties, and lessens the need for detailed assessment.

However, it achieves nothing that could not be achieved much more effectively by the extension of Fixed Recoverable Costs to all civil work.

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

It should be extended to civil claims above £10 million. Excluding such cases makes no sense at all; it is the equivalent of having a full budget for constructing a shed, but no budget at all for building a house.

The extension of Fixed Recoverable Costs in April 2023 to virtually all Civil claims valued at £100,000 or less will dramatically reduce the number of cases where budgeting applies.

Lord Justice Jackson's original proposal, in his speech before his Report was published, was that Fixed Recoverable Costs should be extended to virtually all civil claims valued at £250,000 or less, and in the Business and Property Courts claims up to that value will be subject to a costs capping pilot.

I would scrap now costs budgeting on all cases valued at £250,000 or less on the basis that the Fixed Recoverable Costs regime up to £100,000 gives the court sufficient guidance in relation to claims up to £250,000.

In other words the Fixed Recoverable Costs figures, meticulously worked out, can act as a guide for parties and the courts in claims up to £250,000.

This also deals with the issue of incurred costs, in the sense that the Fixed Recoverable Costs scheme covers all stages, including pre-issue, and therefore, is much more valuable than a court budgeting the matter halfway through.

This would obviously greatly reduce the pressure on the courts, and the time and costs to lawyers and their clients.

The time and costs of budgeting is disproportionate in lower-value cases, as it does not take significantly less time to prepare a costs budget for a claim worth £200,000, as compared with one worth, say, £1 million.

This change can be progressive, in that if Fixed Recoverable Costs are extended to claims up to £250,000, which is expected to happen in due course, then costs budgeting could be scrapped for any claim valued at £500,000 or less.

1.3 Should costs budgeting be abandoned?

Not at the moment, but we should work toward its elimination by the spread of Fixed Recoverable Costs to all civil litigation in due course.

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

It should be on default-off basis, that is the parties and the court would need to show justification for costs budgeting in any given case.

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?

I believe that I have dealt with these points above.

There is a central flaw in the concept of budgeting, in the sense that it is a budget **to be paid by someone else.**

Consequently there is a perverse incentive to make the budget as high as possible, so in a sense it becomes the reverse of a budget.

Part 2 – Guideline Hourly Rates

2.1 What is or should be the purpose of GHRs?

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

2.3 What would be the wider impact of abandoning GHRs?

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

2.5 Are there alternatives to the current GHR methodology?

Guideline Hourly Rates

- What is or should be their purpose?
- Do or should they have a broader role than their current role as a starting point in costs assessments?
- What would be the wider impact of abandoning Guideline Hourly Rates?
- Should Guideline Hourly Rates be adjusted over time and if so how?
- Are there alternatives to the current methodology?

At the Costs Conference the point was made that Guideline Hourly Rates have only been around for about 20 years and that the Solicitors Act 1974 had to be amended to allow charging by the hour as a legitimate basis for billing a client, and that there was very little research available and almost no logical basis for the actual rates.

When I started work in 1974, there was no billing by the hour. Indeed at the Crown Court you negotiated the fee with the court clerk at the end of the case, and walked away with a government order- equivalent of a cheque – or in some cases cash! I remember walking away with a stash of cash in the company of my client who had just been acquitted of robbery; I was relieved when we went our separate ways and I returned to the office.

There is a tension between Fixed Recoverable Costs where, with the minor exception of a 12.5% London Weighting Allowance, seniority and status of the lawyer and location are irrelevant, and Guideline Hourly Rates, where they are the *only* variables.

Few people thought they should be abandoned, and everyone recognized that there needs to be a mechanism for uprating them in a period of higher inflation.

Failure to uprate fixed recoverable costs was cited as a reason why many people opposed their extension.

Guideline Hourly Rates, although essentially a tool for between the parties' assessments, do give solicitors a starting point for setting the charge to their client, with many adopting a Guideline Hourly Rate plus 50% formula to reflect the old adage about expecting to recover two thirds of costs from the other side if successful.

A key issue is whether location should be of any relevance in a world of hybrid working, remote and hybrid court hearings, Microsoft Teams, Zoom and WhatsApp etc.

Why should an opponent pay for London offices and London salaries? Surely that is a classic solicitor and own client expense.

CIVIL COSTS CONSULTATION: BUDGETING AND GUIDELINE HOURLY RATES

The Civil Justice Council is consulting on a wholesale revision of the civil costs regime; the Consultation Paper is *here* and the consultation ends at 12 noon on Friday 30 September 2022.

In the last piece I looked at pre-action costs and the interplay with fixed recoverable costs due to be extended in April 2023.

Here I look at the connected issues of Costs Budgeting and Guideline Hourly Rates, and in each case the Consultation Paper asks whether they should be abolished altogether.

Payment by the hour obviously rewards the inefficient and less talented lawyers and incentivises lawyers not to settle. High rates for city centre firms arguably reward a poor business choice of expensive locations.

A modern, efficient firm making use of technology and lower overheads risks being punished, a key feature in the flight compensation case of

Bott & Co Solicitors Ltd v Ryanair DAC [2022] UKSC 8 (16 March 2022)

where I advised *Bott & Co*, the successful law firm in the Supreme Court.

The lawyer who resolves a matter satisfactorily and quickly with little work deserves a higher, not lower, fee than the one who takes years and goes to trial.

Contingency fees achieve that in that the fee is the same, but clearly the less work done, the greater the profitability to the law firm.

In fact, it is some of the lowest paid Legal Aid work, such as housing, which needs an expensive city or town centre location to be near the clients. Commercial work does not.

The old idea of benchmarking should be revisited, that is where a particular fixed fee is regarded as reasonable for a particular piece of work, and that fixed fee would take into account the "*seven pillars of wisdom"* in CPR 44.4(3).

Essentially the Guideline Hourly Rates are a combination of

(i) seniority of lawyer; and

(ii) location of lawyer.

Seniority

Insofar as there are to be hourly rates - I would scrap them all and have fixed recoverable costs for everything- then there is logic in higher rates for more senior lawyers where the case warrants it.

Location

Why should location now be of any relevance whatsoever?

London offices have been shut for nearly a year; work has gone on from where the lawyers live, that is Hemel Hempstead or Reading or Kent or wherever.

Now lawyers and everyone else should be free to have offices wherever they want, but how can there be any justification now for a paying party to pay for very expensive London rents and salaries?

To put this in context, for a Grade A lawyer the Central London proposed recoverable rate is more than double that for National Band 2, which is where many of those lawyers live, and for the past year, where they have worked.

Do the paying clients care which location the lawyer is in? Of course not.

Remote working has been brought into sharp focus by COVID, but it existed before then.

Suppose a Central London firm has at any one time half of its staff working from home, and so has half the rent, half the rates, half the fuel bills etc., although of course not half the salary bill.

Should the hybrid situation not be reflected in a lower hourly rate? This is really only a refinement of the principle set out in

Wraith v. Sheffield Forgemasters Ltd, Truscott v. Truscott [1998] 1 WLR 132 (CA).

Most of the staff of Underwoods Solicitors work in Wellington in the Western Cape of the Republic of South Africa. That is where our secretarial work is done, our phones answered, and much of our routine legal work is done. It is where I am now.

Our overheads are lower; our operation is more efficient as we have qualified typists doing the typing, rather than two-fingered lawyers claiming lawyers' hourly rates for typing badly.

We should get extra for our innovative approach, not less.

We have people studying in Wellington to qualify as Chartered Legal Executives, and no doubt, in due course, solicitors of England and Wales.

What will the Guideline Hourly Rates be for such people?

Will an entirely unqualified person in England and Wales be able to recover more for their work than a fully qualified solicitor who happens to be based in South Africa?

What about me personally?

Am I suddenly worth less because I am sitting in an office in Wellington in the Western Cape rather than in Hemel Hempstead?

What hourly rates do I charge for my colleagues sitting with me here in the office in South Africa?

If I am working on a file and I travel from Hemel Hempstead to the Western Cape via Qatar, as I have just done, do I charge different rates depending on where I happen to be?

Do I have a break when the plane is flying over Central Africa on the basis that I would get really low hourly rates there?

Logically, is there now not an argument for punishing firms who maintain expensive offices in City of London when COVID-19 has demonstrated that this is entirely unnecessary?

You have the regulators in their usual way saying that in matters such as conveyancing, clients should look to instruct solicitors hundreds of miles away if the clients live in the south of England, so as to save money because fees are lower elsewhere.

The end game of that is to instruct English qualified lawyers in South Africa or India or wherever.

Of course, to my clients the value is exactly the same, and they are happy to pay the same fee wherever I am.

This piece has been entirely researched, written, and typed in the Western Cape. Would it be more valuable if it had all been done in Hemel Hempstead?

Will we shortly see a Costs Master sharply cutting the hourly rate for 100 hours of document review in Central London, on the basis that it could have been done at a third of the price in South Africa by lawyers qualified in England and Wales? If not, why not?

Unsurprisingly, Underwoods Solicitors and the five firms we carry out work for in South Africa have the fixed costs work done here – no issue of Guideline Hourly Rates – and keep the open costs work in England and Wales.

That is madness. Guideline Hourly Rates by reference to location is the equivalent of taking into account the increased costs of quill pens and carrier pigeons.

I mentioned above remote working, but 19 people in an office here in Wellington does not feel like remote working; it is just economic common sense – saving on the cost of delivering the service – just as it makes economic sense to have clothes made in cheaper jurisdictions.

Why should the legal profession be any different?

In an open costs Guideline Hourly Rates case, that business acumen would be punished, not rewarded.

Perhaps the most important question is the one that is not asked in the Consultation Paper:

Is there any justification at all for charging by the hour?

Time present and time past
Are both perhaps present in time future
And time future contained in time past.

If all time is eternally present
All time is unredeemable.

Four Quartets: Burnt Norton by T.S. Eliot

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?

Digitisation always leads to an increase in costs, as effectively the work has to be done twice, that is taking the information and then uploading it.

There are also significant extra costs in terms of maintaining the relevant software etc.

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?

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

I can deal with these together.

A key issue concerns assessing costs before court proceedings begin, and a recognition that in an age of portals, protocols and digital justice, whatever that means, there is not such an obvious point where the Rubicon is crossed, and proceedings are issued.

For example, in the existing portal system for personal injury work, do proceedings begin when:

i. The Claim Notification Form is lodged on the portal; or

ii. when Stage 3 is engaged, and a court fee paid; or

iii. only when the matter drops out of the process and substantive Part 7 proceedings are issued?

Pre-issue work is non-contentious, but becomes retrospectively contentious once proceedings are issued, which is why in a matter settled pre-issue there needs to be a contractual provision for costs, e.g.:

"*The defendant will pay the claimant's reasonable costs to be assessed if not agreed."*

What is, or is not, contentious, or a dispute, was considered recently by the Supreme Court in

Bott & Co Solicitors Ltd v Ryanair DAC [2022] UKSC 8 (16 March 2022)

and remains to be ruled upon by the Court of Appeal in the seemingly endless saga of

Belsner v Cam Legal Services Ltd [2020] EWHC 2755 (QB)

In the absence of an entitlement to costs pre-issue, there is an incentive to issue, which goes against current Government and Judicial thinking, partly, or even mainly, because of the shortage of judges and resources.

That is a different issue from the desirability of certainty in relation to costs where matters are resolved through a quasi-Judicial pre-issue portal process.

Both the existing personal injury pre-action process, and the general civil litigation fixed recoverable costs scheme from April 2023, provide an entitlement to fixed costs where the matter is settled pre-issue.

However, there is a fundamental difference between personal injury work and other civil litigation, in that Qualified One-Way Costs Shifting means that an unsuccessful personal injury claimant generally does not pay the successful defendant's costs.

In general civil litigation they do. Creating that liability pre-issue means that a putative claimant who does not go ahead with the claim is liable for the un-sued defendant's costs.

Let us take an example.

It is April 2023. Charlie Claimant writes the email from hell to Denise Defendant claiming £100,000 and saying that it is a Band 4 case with maximum fixed recoverable costs.

Denise Defendant politely tells Charlie Claimant to go away and no further action is taken.

Under the new system the putative claimant has to pay the un-sued defendant £16,000 (see page 106 of Lord Justice Jackson's Supplemental Report: Fixed Recoverable Costs).

That will come as a shock to some of the more aggressive litigators and their clients, and it throws up many issues.

When does liability crystalize?

In issued proceedings it would be on defeat, or on Notice of Discontinuance. Is there to be a form of pre-action strike out, so that if no action is taken for three months or whatever, then the inactive claimant becomes liable for costs?

Can a claimant keep it jogging along – at no extra costs as they are fixed – for the six-year limitation period?

What about a Litigant in Person who writes an email with it never occurring to them that they are thus engaging in a cost bearing litigation process?

Where does the system draw a line between, at one end, a mild Letter of Complaint, and at the other a full-blown Letter before Action?

The risk is that a digital process will be seen as a form of litigation and have the consequences of deterring parties from engaging and thus have exactly the opposite of the intended effect.

Small businesses in particular are concerned about this.

At the Civil Justice Council meeting there was a general view that there should be pre-issue costs liability, but no consensus on where to draw the line.

Whatever happens, it is hard now to justify the distinction between contentious and non-contentious business, and surely it is time that these terms were scrapped.

Likewise, the indemnity principle, which in any event has no application in fixed recoverable costs cases – see

Butt v Nizami [2006] EWHC 159 (QB)

The related matters of costs under pre-action protocols and portals and the digital justice system on the one hand, and fixed recoverable costs for pre-issue work whether the matter becomes issued or not, are of great importance if the desire is to have matters settled pre-issue.

At present there are more questions than answers.

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?

Costs budgeting is not required, obviously, in cases subject to Fixed Recoverable Costs, and Guideline Hourly Rates have no application in relation to such cases either.

The existing Fixed Recoverable Costs scheme, and the very substantial extension in April 2023 both deal with pre-issue costs.

Consequently Fixed Recoverable Costs eliminate the need to consider any of the issues raised in Parts 1-3 above, which is a very significant benefit of Fixed Recoverable Costs.

Fixed Recoverable Costs should be extended to all civil litigation without exception.

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.

As stated above, Fixed Recoverable Costs should be extended to all areas of civil litigation.

Fixed costs are preferable to capped costs, in that capped costs still create uncertainty, and allow scope for argument about the level of costs within the cap, and still leaves open the possibility of assessment of costs, and the attendant delay and expense.

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.

As stated above, fixed costs are preferable to capped costs, but capped costs are better than no costs control at all.

One obvious area, currently heavily abused, is Solicitors Act 1974 challenges, where there are open, generally indemnity costs, even on the most trivial of claims.

Fixed costs should be introduced here as a matter of urgency, and generally I see no reason why Part 8 applications should be excluded from the Fixed Costs Regime.