Costs Review

Final Report

May 2023

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Executive Summary

i. In early 2022 the Master of the Rolls asked the Civil Justice Council to take a strategic and holistic look at costs, particularly given the ongoing transformation of civil justice into a digital justice system. The CJC approved the setting up of a Costs Working Group at its April meeting and agreed the scope of work would cover the four areas set out below. The Working Group was a large one, reflecting the importance of costs in civil justice in general and the wide range of interests involved. The membership of the Working Group is set out in Annex A to this report.

ii. The exercise was divided into three phases. The first step was the publication of an initial paper setting out the questions to be considered and explaining the context in which they arise. The initial paper was published in June 2022 (Annex C). The second phase was the consultation phase. This included a Costs Conference in July 2022. It was very well attended by stakeholders across the civil justice system. The (extended) deadline for written responses to the consultation was 14 October 2022. The consultation was reopened with a deadline of 15 December 2022 for the sole purpose of considering the implications of the Court of Appeal's judgment in Belsner v CAM Legal.[1] A list of those who responded to the consultation is set out in Annex B. You can read the responses, which contained permission to publish, on the Council's webpage.[2] Following presentation of a draft final report at the Civil Justice Council meeting on 27th January 2023, this final report was approved for publication by the CJC at its April 2023 meeting.

iii. The four areas covered are:

(1) Costs Budgeting;

(2) Guideline Hourly Rates (GHRs);

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

(4) Consequences of the extension of FRC.

iv. The majority of responses focussed on costs budgeting, with a significant number of responses on GHRs, and somewhat fewer, although still a substantial number, on pre-action and digitisation, and on the fourth topic.

v. The striking theme emerging from the holistic nature of the exercise is the diversity of the civil justice system. The needs of litigants in one area, for example in housing, can be very different

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[1] [2022] EWCA Civ 1387

[2] https://www.judiciary.uk/related-offices-and-bodies/advisory-bodies/cjc/current-work/costs/

from those in another area, for example personal injury, and each of these areas is different again from cases in the Business and Property Courts. This diversity applies as much to the impact of digitisation – both positive and in terms of the vulnerabilities of different sorts of litigants – as it does to the economic significance of a given area of civil justice. Making decisions while focussing only on one part of civil justice, even if it is a large part, is risky. Although broad general principles, such as the overriding objective to deal with cases justly and at proportionate case, are applicable to everything; the impact and importance of more specific practices, procedures and even principles, varies significantly between different areas.

vi. All the major recommendations are unanimous. However, some of the more detailed recommendations made in this report are matters supported by a clear majority, but not every member of the group. These are identified as such. On reflection this outcome was perhaps inevitable and arises from a combination of positives: the large size of the Working Group, the diversity of civil justice itself, and the close interest in costs of all those involved in the system.

vii. The first question posed in this exercise was whether costs budgeting was useful? This was a significant question given the persistent criticisms which continue to be levelled at the scheme. However, the response was clear and the Working Group's unanimous recommendation is simple. Costs budgeting has proved itself to be useful. It has brought consideration of the costs of litigation into the heart of the litigation process. That is a significant and valuable shift. It should be retained. Nevertheless, the diversity of civil justice comes into play the moment one suggests that costs budgeting be retained. Characterised as "one size does not fit all" is the clear recommendation that in future the details of the way costs budgeting should work ought to be allowed to vary as between different areas of civil justice. This is a significant break from the past, in which the scheme was presented as a single approach which had to operate in the same way for all cases (with limited exceptions at the upper and lower value level).

viii. In terms of GHRs, the main recommendation is equally simple, that the GHRs produced in the most recent exercise serve a useful function. They should be retained but with adjustment for inflation using the SPPI, with a detailed review in 5 years. That 5-year period should also be used to conduct an in-depth examination of methodology, in time for the detailed review.

ix. There was broad support for the idea that a digital justice system will lead to significant savings in costs. Digitisation should facilitate early effective communication between parties and resolution of the dispute, or at least narrowing of the issues, before court proceedings are commenced. Costs has a role to play to encourage two things: the use of digital pre-action dispute resolution portals,

and compliance with pre-action protocols. Again, the diversity of civil justice plays a role because in areas in which there are or will be digital portals, the way to use costs to encourage their use may be to limit costs recovery; whereas in other sectors, introducing pre-action costs recovery may have advantages. Various recommendations are made in the light of Belsner. The distinction between contentious and non-contentious business is outmoded. The mechanism under s56 of the Solicitors Act 1974 might provide a way forward and the Law Society, which has a right to be consulted, should be approached.

x. The final topic was the wider implications for the rest of the civil justice system of the changes to Fixed Recoverable Costs which are in the process of being implemented for many cases up to £100,000 in value. In practice this impact relates to costs budgeting and is addressed there. Support for a specialist costs capping regime in patent cases was also identified.

xi. Further work of various kinds is identified in the report. It will be a matter for the CJC to consider whether it wishes the Working Group to take that work forward or whether that should be done in other ways. The CJC may also wish to consider how best to coordinate any work arising from this report. There may be a particular need for coordination arising from the recommendations in Part 3, which are directed to a variety of different bodies.

Conclusion

xii. This exercise was intended to be self-contained and limited in time. It was conducted on that basis. This final report has been completed within a year of the start. I would like to thank all the members of the Working Group for the enormous amount of hard work they have put into this, for their insight and for their positive engagement with the issues.

Lord Justice Birss

Chair of the Working Group

1. Costs Budgeting

Summary of Responses

Q1: Is costs budgeting useful?

1.1 Overwhelmingly, and somewhat surprisingly, responses were favourable, but with some significant tweaks recommended. Even the minority who would favour abolition, recognised that exchanging costs information was crucial, and judicially it was recognised that effective case management absent any costs information would be nigh on impossible. A number of respondents, who considered default-off was appropriate for certain types of claim, nonetheless favoured costs updates during the lifetime of the case, for example, due to a material change or due to a critical stage reached such as PTR.

Q2: What if any changes should be made to the existing costs budgeting regime?

1.2 There was a large overlap with Q5 below where suggested recommendations from consultees are set out. Only one respondent felt that, with so many other civil litigation funding changes underway, we should resist changing budgeting as well at present.

Q3: Should costs budgeting be abandoned?

1.3 Only one claimant and two defendant clinical negligence respondents favoured this and advocated that we should replace budgeting with costs estimates.

1.4 Some judges and court users from the Business and Property Courts mentioned a number of cases where it was not desirable (see default positions below) but they still favoured *some* costs information being brought to the attention of the court when making directions.

1.5 Consumer groups (for personal claims) also thought exchanging costs information was important in some form or other and they were less inclined to abandon it.

Q4: If costs budgeting is retained, should it be on a “default on” or “default off” basis?

1.6 We have set out below an indicative list of the range of responses that this consultation question has produced. It is not comprehensive, but once there is a sense of the favoured direction of travel, responses can be reviewed again to stress test acceptability of any proposal.

DEFAULT OFF responses

1.7 There were various suggestions from respondents. Some were suggested by only one or two respondents; others had greater support:

Suggestions from one or two respondents

- Off completely
- Cases valued below £250k
- Cases valued above £500k
- Cases valued up to £500k
- Multi-claimant
- Mid-value commercial cases
- High value child, all protected party claims, and short life expectancy in personal injury/clinical negligence cases
- All county court cases
- Pensions litigation want default-off for trusts cases which comes under a different part of the costs rules but requires costs budgets.

Suggestions with greater support

- Defendant clinical negligence respondents for defendant budgets where QOCS applies
- Defendant personal injury respondents indicated there was limited or no benefit of defendant costs being budgeted in QOCS cases, save for where the possibility of costs recovery is engaged such as the making of a Part 36 offer
- All cases in the Commercial Court and/or Business & Property Courts at above £2.5m or £5m
- All cases of a business and property nature unless the court orders or the parties request it (see further below).

DEFAULT ON responses

1.8 Again, there were suggestions made by only one or two respondents, and suggestions with greater support.

Suggestions from one or two respondents

- Cases over £1m
- Cases over £5m

Suggestions with greater support

- Children's cases in clinical negligence/personal injury
- Most claimant personal injury/clinical negligence respondents prefer to retain budgets for cases with a value of up to £1m or £2m
- Most defendant personal injury respondents suggested retaining the £10m cap and a number of them suggested the cap could be extended beyond £10m
- Most defendant clinical negligence respondents for claimant budgets
- Half of defendant clinical negligence respondents for defendant budgets in QOCS cases
- Business and Property Courts user respondents generally only want budgets retained where there is a special vulnerability/inequality of arms/disproportionate costs.

Q5: 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?

Comments which were not specific to injury cases

- Consider a separate CMC for giving directions from budgeting hearings and try to have budgeting dealt with on papers or remotely
- Use costs judges to deal with budgeting or a third-party provider on the court's behalf
- All budgets should be prepared using GHR or fixed hourly rates
- Adopt Sheffield County Court process as it works well (decoupling of directions from budget hearings)
- For TCC in London to continue as now with early exchange of costs information but for budgeting the limit should be raised to £20m
- Impose penalties for those who do not reasonably agree budgets or where budgets are substantially reduced without good reason /and for those late with Precedent R
- There is a need to manage incurred costs (consider use of a fixed costs matrix) and also scrap comments on incurred costs or make them more useful. NB Business and Property Courts users do not want budgeting for incurred costs
- Consider use of guideline budgets (not bespoke ones) according to complexity/sensitivity

- Budgeting should be a cap rather than fixing estimated costs
- Parties could certify costs will not exceed x% of amount in issue for each phase in lieu of a budget and only proceed to budget if that proportion is exceeded
- Media groups and one other respondent would like the opportunity to revisit budgets more frequently during the life of cases
- Consider extending time to negotiate Precedent R
- One respondent felt courts should hold counsel to account on their fee estimates in a more transparent way similar to solicitors' costs
- Consider the Family Court process with the use of non-binding indications of current and future costs backed by a statement of truth
- Provide clearer guidance on how to prepare budgets
- One respondent favoured less rigid phases so that there can be a greater focus on bottom line totals
- One respondent considered deployment of costs budgeting light by use of a one-page summary only for early directions
- Use a simplified budget for county court cases/incurred costs
- In higher value, more complex non-injury cases there was a concern expressed by some respondents that an early budget for all phases was hard to prepare accurately when there are still many unknowns about the likely issues or overall shape of the case
- Costs management should be by telephone hearings only
- There is a need for a simpler Precedent T process
- The court should always have some costs information at directions hearings even if budgeting is deferred or dispensed with
- If there is a "default-off" provision for budgeting there should be rules requiring parties to exchange their updated costs information at regular points in the claim
- The problem of lack of consistency of judicial approach to approving budgets should be addressed.

Comments which were specific to injury cases

- One respondent suggested limiting disclosure of costs information to the front sheet of Precedent H
- Change upper £10m figure now for default off in personal injury/clinical negligence cases as discount rate review could greatly increase claim values
- Reduce recoverable costs for the budgeting process - defendant clinical negligence/personal injury
- There could be a cap for each phase depending on nature/value/complexity of claim (defendant personal injury/clinical negligence)
- Delay budgeting trial preparation and trial phases
- Consider capping instead of budgets for group actions/higher value personal injury and clinical negligence cases
- Consider adding extra phases, for example for rehabilitation and treatment in injury cases

Recommendations

Context

1.9 Addressing the way the costs of civil litigation are handled has been a constant item on the reform agenda for many years. Efforts to simplify the technical complexities, reduce the uncertainties and give effect to desired behavioural and cultural change were never destined to produce significant results overnight. Nevertheless, despite the wide diversity in responses one of the clear outcomes from this consultation, which the working group unanimously supports, can be expressed as follows:

Since costs budgeting was adopted, there is now evidence of real and sustained progress in the discipline and understanding around costs and this has consequently improved case management and the proportionality of costs.

This is an important achievement which is worth reflecting on before turning to make new plans; this is especially so given the strength of feeling which the term "costs budgeting" sometimes engenders and which still pervades many of the consultation responses. This is not a topic about which the majority of respondents feel lukewarm.

The situation prior to implementation of costs budgeting

1.10 The 2009 Preliminary Report for the Review of Civil Litigation Costs noted "Within the CPR judges are given an armoury of powers which collectively enable case to be managed not only by reference to the steps that may be taken in the given proceedings, but also by reference to the level of costs incurred". [3] The report went on to consider the two aspects of the overriding objective in CPR Rule 1.1 which lent themselves directly to costs management, namely the requirement in case management to save expense and deal with matters proportionately.[4] The report then summarised the tools at judges' disposal to give effect to costs management with a special focus on the filing of costs estimates by the parties, such that the judge could case manage by reference to those estimates, although it was recognised that there was no express entitlement to judges in either the Rules or

[3] Page 484 at paragraph 2.1 of the Preliminary Report. Available at https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Guidance/jackson-vol1-low.pdf
[4] Page 485 at paragraph 2.3 of the Preliminary Report

Practice Directions "to limit the recoverable costs to the estimates provided or to set boundaries within which levels of costs may be incurred".[5] The report also noted that scant attention was paid by the courts to costs during the course of case management hearings. Finally, the report observed that whilst estimates should be based on detailed budgets prepared by solicitors, the estimates filed were confined to "a bare statement of the total sum" and that this was ripe for reform.[6] The final report noted "that many litigants ignore the requirement to lodge estimates and that, when they do lodge estimates they seldom use Form H".[7]

Steps since the introduction of costs budgeting

1.11 The lack of focus on costs as described in 2009, is now a thing of the past. The reasons for this are multi-factorial but changes to the CPR, and the requirement to seek relief from sanction for failing to file a proper costs budget on time, following the decision in Mitchell v News Group Newspapers Limited [2013] EWCA Civ 1537 are likely to have been significant contributors.

1.12 In a public lecture delivered by Lord Justice Jackson in 2015, he predicted, "that within ten years cost management will be accepted as an entirely normal discipline and people will wonder what all the fuss was about".[8]

The views of consultees

1.13 As set out in the summary of responses above this consultation shows that only a handful of respondents now consider that costs budgeting should be abolished. There is almost universal recognition that visibility of meaningful costs estimates by opponents and the courts is useful and should be retained. The significance of this change in culture should not be overlooked – it is a major step forward after centuries of litigation where parties were uncertain as to their potential costs liabilities until after their case had concluded.

1.14 A number of respondents have suggested improvements to the current methods of costs management. Some of these possibilities have been aired in previous pilot studies and

[5] Page 488 at paragraph 2.13 of the Preliminary Report
[6] Page 489 at paragraph 2.17 of the Preliminary Report
[7] Page 400 at Paragraph 1.3 of the Final Report. Available at https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Reports/jackson-final-report-140110.pdf
[8] Confronting Costs Management: Harbour lecture 13th May 2015. Available at https://www.judiciary.uk/wp-content/uploads/2015/05/speech-jackson-lj-confronting-costs-management1.pdf

consultations whilst others are entirely new. Inevitably many individual proposals pull in different directions. In order to make progress, the working group considers it is time to suggest a fresh, and more nuanced approach, to budgeting. This would draw on the best of previous efforts and experiences but also be bold enough to jettison aspects which have been persistently troublesome.

Specific Recommendations

(A) Qualified Retention – one size does not fit all

1.15 The working group's fundamental recommendation is as follows:

Costs budgeting should be retained, however coupled with its retention should be acceptance of the hypothesis that "one size does not necessarily fit all". We suggest that it should be possible to permit a more tailored approach to costs management, to suit different work types and/or venues where the litigation is conducted.

This approach would involve further input, and some piloting, from a few court centres, to ensure that any changes had a sound evidential base prior to wholesale implementation. Special attention would be paid to informing court users, in a highly transparent way, of the practice in operation to avoid confusion. The need to avoid forum shopping does not mean that the standard approach for one kind of case necessarily must be identical to the standard approach for a different kind of case.

1.16 While there are some changes which we believe could be implemented in all cases, the following types of work have been tentatively identified as areas in which the appropriate costs management regime may be different from the norm and from one another. They are:

i. Personal Injury and clinical negligence work (covered by QOCS)
ii. Claims progressing in the Business and Property Courts
iii. Other specialist work.

We suggest that an approach based on piloting is the way forward.

(B) QOCS

1.17 There is a clear case for at least considering modification to the usual approach to costs budgeting in the cases in which QOCS applies. That is because QOCS means that in general defendant's costs are less likely to be paid by the claimant as compared to cases in which QOCS does not apply, albeit new rule changes to be implemented from 6 April 2023 will see costs set-off brought back to QOCS cases (reversing Ho v Adelekun and Cartwright v Venduct Engineering). A majority of the working group makes the following recommendation:

In cases where QOCS applies, particularly in clinical negligence cases involving NHSR, the Working Group recommends that full budgets are dispensed with for defendants but the Precedent H front sheet only is supplied to the claimant and the court. This would be subject to the court having the power to direct the defendant to produce a full budget. This proposal should be piloted.

It was considered that if the Precedent H front sheet was supplied that was sufficient, provided that the court retained the ability to call for a full budget if thought appropriate. There was more disagreement whether this approach should be extended to personal injury.

(C) Costs budgeting light

1.18 The group recommends that a tailored approach specific for Part 7 cases in the multi-track valued up to £1M is adopted, with a pilot first. This will mostly relate to cases between £100,000 and £1M (because £100,000 is the new Fixed Recoverable Costs threshold which is being implemented in October 2023 for many but not all civil claims). It is thought that these cases are at greatest risk of incurring disproportionate cost, but are not so high in value that full scale budgeting, as we currently know it, needs to apply. In essence the pilot would test the benefit of a "costs budget light" proposal in terms of saving both court time and the parties money. A question is whether this approach could or should be applied only in the County Court or in the High Court, particularly District Registries. A majority supports the inclusion of PI claims in this approach but that is not unanimous.

1.19 The group recommends that a pilot is undertaken of a Business and Property Courts specific approach to costs budgeting. This again will be a lighter touch approach, for all cases with a value above £1M to which budgeting applies today. For cases under £1M the approach should be the same as the previous paragraph. It is suggested that such claims which are

handled from the Rolls Building would be suitable for such a pilot and potentially one of the regional BPC centres should also be invited to operate the pilot.

1.20 It is recommended that judges who operate specialist lists, such as for Mesothelioma and for Media and Communications claims, and those in charge of specialist proceedings, such as High Court Senior Masters for multi-party litigation are also approached for their views on more bespoke practice arrangements for conducting budgeting, and taking into consideration the specific consultation responses received relating to those practice areas.

Further recommendations

1.21 There are a number of particular aspects of costs budgeting about which we make specific recommendations. The recommendations are supported by a majority within the Working Group. The implementation of these recommendations, in some, or all, of the different areas of civil justice is a matter for further consideration, and as appropriate, inclusion within the pilots.

The Costs and Case Management Conference

1.22 The majority recommends adjustments to facilitate the use of a staged approach to costs and case management – where appropriate. This would allow, but not require, that the costs management and case management tasks would not have to take place simultaneously, but rather can be staged, always underpinned by the costs information exchanged ahead of the first hearing, given that good case management always has regard to the likely cost of a step.

1.23 As a matter of practice currently the first directions hearing in a case is usually a costs and case management conference (CCMC). The practice of listing in this way is said by some to be the cause of significant delays, particularly in the Kings Bench Division. What is suggested is that if a hearing was required for a case management conference alone, for example where directions are highly contentious and could result in very divergent budgetary assumptions, costs management could follow, shortly after the directions had been ordered. As directions hearings do not require such a long time estimate as CCMCs, listing would be quicker, and directions could be given at a much earlier stage in the litigation. This could save some time and costs of budget preparation as assumptions would be clear which could lead to more agreed budgets which would benefit the parties and the court. There is at least one court centre in which this practice has developed and is supported. Nevertheless, it is

important to note that views on this are not uniform. For example, there is no suggestion that in the Business and Property Courts delays are caused by listing CCMCs. There is also firm support from some for the principle that the right way to approach matters is to conduct costs and case management at the same time. An important feature of this proposal is that there will still be an exchange of costs information before the CMC, so that material will be available when the directions are given.

1.24 To the extent a rule change may be required to put this approach on a proper footing, then the approach could be tried under a pilot Practice Direction. Two aspects which require further detailed consideration are clarity about what costs information should be provided before the CMC and whether the court's costs management powers in these circumstances should allow for a degree of retrospective costs management relating to costs incurred after the first CMC. Again, it may be that the right approach in some cases is different from the approach in others.

1.25 Related to this question of a staged approach to costs management is whether the court could direct that the costs budgeting aspect be referred to specialist judges, such as the Costs Judges in SCCO or Regional Costs Judges in the county court. Some believe that the SCCO judges' expertise would be valuably brought to bear in budgeting High Court cases outside the BPCs, particularly the heavier ones. We believe there is nothing in the rules which would prohibit a judge giving a direction to refer any aspect of the management of a case to another suitable judge. This could include a High Court Master referring the costs management of a case, or part of it, to a Costs Judge in the SCCO in an appropriate case.

1.26 Another possible dimension to a pilot of a staged approach could be to have a listing policy issued by the appropriate leadership judge which permits the first case management conference to be listed separately from the first costs management conference, provided the costs information is exchanged in advance.

Further work

1.27 In due course the Working Group is ready and willing to provide recommendations around topics which were less controversial amongst consultees. The main ones are:

i. Revisions to timescales for exchanging Budget Discussion reports to allow longer for meaningful negotiation, which in turn it is hoped would remove the need for so many budgeting hearings

ii. Recommendations for the process for budget variation to be simplified, as the current Precedent T process appears to find favour with nobody
iii. Consideration to whether introducing penalties for those who default on aspects of the budget timetable leading to wasted court resource, would be an effective way forward without introducing the prospect of more satellite litigation
iv. The approach, in the budgeting process, to hourly rates and to pre-action/incurred costs.

2. Guideline Hourly Rates

Summary of Responses

Role of GHRs

2.1 The majority of respondents took the view that GHRs had a useful role:

- As a starting point for summary assessment;
- As a starting point for detailed assessment; and
- In indicating to the market generally the rates that would be considered reasonable by the courts.

2.2 One respondent (Commercial Court judges) considered that the use of GHRs sends a helpful message to court users that expenditure must be proportionate.

2.3 The majority of respondents made clear that if they are to serve their purpose, GHRs must reflect commercial reality/the market (assuming a functioning market).

2.4 There were mixed opinions over the circumstances in which GHRs may be departed from, with a few respondents suggesting that hourly rates should be fixed in a similar way to Fixed Recoverable Costs. One respondent considered that they should only be exceeded where a clear and compelling justification is given, while a number of others thought there should be more flexibility and that Judges should be able to depart from them in appropriate cases. A couple of respondents thought that it would be useful to have more clarification around the circumstances in which the court might disapply GHRs.

2.5 One respondent thought that it would be useful to formalise the use of GHRs in detailed assessments.

Frequency and manner of assessment

2.6 Almost all respondents thought that GHRs should be frequently updated so as to ensure they could serve their commercial purpose and remain of practical use.

2.7 Views were mixed as to the frequency of the updating exercise, with most respondents suggesting either an annual exercise, or an exercise to be completed every other year. Many

respondents thought that GHRs should be index linked (SPPI and SPPI Legal Services were suggested). A couple of respondents considered that it would be worth having a periodic review by the CJC, one saying perhaps every 5 to 10 years and the other saying every 3 years.

2.8 A handful of respondents thought that GHRs could be established by an annual survey (perhaps undertaken by the Law Society?) as to what regular users of legal services in fact pay (market rates). A few respondents thought that GHRs should be based on expense of time calculations (that is, the cost of doing the work with an uplift for profit), but were less clear about how the data necessary for that could be obtained. One respondent suggested using the hourly rates submitted in filed budgets, and another suggested obtaining data submitted to the SRA for bulk renewal of practising certificates.

Should GHRs be abandoned?

2.9 There was no real appetite amongst respondents to abandon GHRs, which it was thought would lead to uncertainty, create difficulties for judges when assessing costs and leave the consumer exposed. Possible alternative regimes were mooted by a few respondents, but the overall view was that alternatives were unlikely to be as simple or effective in providing the necessary guidance.

2.10 One respondent expressed the view that GHRs reward time spent and discourage investment in technology. He thought that the Courts should be encouraging use of modern technology to keep costs down and another said that exclusive focus on GHRs stifles innovations in charging. In this context we are aware that there is appetite in some sectors of the market to move away from the billable hours model altogether, towards alternative models, such a fixed fee model.

What, if any, changes should be made?

2.11 One respondent expressed the view that GHRs should not be used for complex commercial litigation where clients have chosen to instruct firms at rates which are well above GHRs (although it is worth noting that this was not the view taken by the Commercial Court judges). Looking at a similar issue, a number of other respondents thought that a new band should be introduced for high value work and that hourly rates for heavy commercial cases

are too low. It was suggested that this could be applied to international law firms and that it would assist in ensuring the competitive nature of the English legal market.

2.12 Respondents with experience of applying GHRs outside London considered that the hourly rates set there are considerably lower than the rates commonly seen in schedules of costs and that they unfairly discriminate in favour of London, driving work away from locations outside London. The strong view was expressed by these respondents that GHRs for London and elsewhere should not be different, particularly since the pandemic has changed working practices. It was suggested that there could be a separate band for BPC work regardless of location, similar to London 1 – i.e., a new National Band 1.

2.13 A number of respondents suggested that the bands should reflect the complexity of the work, rather than the location in which the work was done.

2.14 One respondent thought that GHRs should be rounded up or down to the nearest £10 on the basis that they are intended as broad approximations only.

2.15 There was some criticism of the 2021 exercise to identify GHRs. One respondent thought that the new rates do not achieve their intended purpose, another that they are not reflective of how law firms in fact bill their clients.

2.16 A handful of respondents thought that the approach taken by the CJC to the identification of rates on the last occasion was overly complicated and/or that the data collection process was flawed. One or two thought that there remains a need for a full evidence-based review and that the sample taken on the last occasion was too small.

2.17 One respondent thought that rules requiring that clients give properly informed consent about GHRs should be brought in.

2.18 One respondent thought that the figures currently in use are just as "right" as any other figures would be.

2.19 A few respondents suggested that GHRs should be reintroduced for counsel (the original guidelines suggested brief fees for short interlocutory hearings).

Recommendations

2.20 We recommend that the system of GHRs should be retained. There is no real appetite amongst respondents for GHRs to be abolished and there are many advantages to retaining them. The lack of appetite for abolition suggests that the current system is fit for purpose, subject always to ensuring that GHRs are kept up to date and that a careful eye is kept on

the market (and/or sectors of the market) for any wholesale changes in billing structure. While there are criticisms of the changes made to GHRs in 2021, our clear sense from the responses as a whole is that there does not seem to be a ground swell of dissatisfaction with them.

2.21 Our overarching recommendation in the circumstances is that we should retain the rates identified at that time, subject to appropriate annual index linked increases, together with some minor tweaks to address (i) the fact that the highest band is widely considered to be too low and unrepresentative of the fees charged for top flight commercial work (both in London and elsewhere); (ii) the anomaly of counsels' fees being excluded from the existing system; and (iii) the applicable test for departing from the GHRs. The current rates were the result of an evidence-based review and so can be justified on a principled basis, even if some respondents to the consultation would have preferred a different approach to the gathering of evidence. There will need to be a retrospective uplift (by reference to the appropriate index) to reflect the fact that some time has now passed since the evidence was collected for the 2021 changes to GHRs – it is anticipated that on any given assessment this may result in the application of more than one GHR (one prior to, and one after, the uplift date).

2.22 We recommend that we should proceed on this basis for the next (say) five years, with a view to carrying out a Detailed Review at the end of that time. At the time of the Detailed Review we will be in a better position to consider (i) the impact of the index linking; (ii) the impact on the market of remote working, savings in office costs and the increased costs of IT; (iii) the potential geographical changes that may need to be made, including whether to smooth out differences in the existing bands between the rate for London and those applicable elsewhere – although there is strength of feeling amongst some respondents that a smoothing of rates should be carried out as soon as possible, we think it is too early to take such a step.

2.23 Taking the above approach buys some time in which to consider the methodology to be adopted to the future assessment of hourly rates. It is important to emphasise that the majority of respondents to the consultation considered the justification for GHRs to be that they are intended to reflect market rates. However, there has always been a tension at the heart of the thinking on GHRs between the exercise of identifying market rates with any degree of certainty and the alternative approach of simply setting a rate that represents what the courts are prepared to permit. The former is an ostensibly attractive approach but,

although the view of some was that this could be achieved by a simple survey, others believed this would require substantial resources and widespread analysis of the market. The latter appears more arbitrary and less representative but has the benefit of being (potentially) more readily achievable.

2.24 Bearing in mind this tension, but always acknowledging the overriding views of the majority of respondents that GHRs should be a function of market rates, we recommend setting up a Working Group (probably Judge led and reporting, in the first instance to the MR) to consider the methodology to be used when carrying out the Detailed Review and the resources required. By setting up a Working Group now, we hope to ensure that by the time of the Detailed Review, a satisfactory methodology will have been identified which may then be put into practice. In the past, the options have been (i) an expense of time approach and (ii) the collection of evidence as to the GHRs allowed on assessment by the Court. Each of these approaches is time consuming if sufficient representative evidence is to be collected and each is open to criticism for different reasons. The Working Group will need to consider whether there are more innovative ways in which appropriate and useful evidence can be gathered, together with grappling with the tension we have already identified. One important issue for consideration will be the question of whether the approach to GHRs should be more flexible (particularly if there is a movement away from trying to replicate market rates), and, if so, whether greater flexibility is likely to bring with it increased argument in court and thus increased expenditure by the parties – this latter point ties in with our third recommendation under paragraph 2.28.4 below.

2.25 We recommend that, thereafter, Detailed Reviews should take place every 5 years. Ideally a methodology could be adopted (based on recommendations from the Working Group) which could be used for every Detailed Review, thereby providing certainty and consistency.

2.26 We recommend that index linking should be on an annual basis (conducted on the 1 January each year)[9] as this removes the need to carry out any form of detailed (and thus time consuming) review on a more regular basis whilst at the same time ensuring that GHRs continue to reflect (in so far as possible) the position in the market (as we have said, a critical concern for many respondents to the consultation). It will be necessary to identify a

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[9]We consider that index linking on an annual basis is preferable to index linking on a two-yearly basis as it is less likely to result in confusion and mistakes over the correct figure to be used for GHRs.

sensible and fair way for the index linked uplifts to be applied to costs – our present view is that rates should be applied by reference to the date on which the costs were incurred.

2.27 We recommend that the general SPPI be used. This index is a measure of inflation for the UK services sector. It is constructed from quarterly surveys measuring the price received for selected services. The general SPPI index will be used by the MOJ in relation to the upcoming implementation of the extension of fixed recoverable costs. We understand that significant work has been undertaken by the MOJ and specialist academics to agree the most appropriate index. It was noted in the CJC's final report on GHRs in 2021 that:

[t]he question of indices for annual updates is extremely controversial. It is understood that the Government has considered such matters in connection with its reviews of FRCs and IPEC capped costs. These reviews should be available publicly before the time of any annual update of GHRs. We therefore recommend that the CJC's decision on annual update of GHRs should be guided by the outcome of these reviews.[10]

There is obviously sense in applying a consistent approach. Using the Legal Services SPPI is not recommended as we consider that it could create an incentive for practitioners to increase fees. In the CJC's final report on GHRs in 2021, Professor Rickman said of the Legal Services SPPI: "[w]hile this may seem to be a natural candidate for uprating GHRs, there is a potential difficulty because it effectively compensates law firms for cost increases that may largely be in their control".[11]

Recommendations in the short term

2.28 In the short term (i.e., before the first Detailed Review), we recommend four changes to the existing structure of GHRs:

2.28.1 that measures are taken to create a new band for complex, high value, commercial work, whether in London or elsewhere. A substantial number of respondents to the consultation considered this to be necessary and we agree. An appropriate rate will need to be identified which sits above the existing rates. We anticipate that this is something that the proposed

[10] See para 10.5 at https://www.judiciary.uk/wp-content/uploads/2022/07/Civil-Justice-Council-final-report-on-guideline-hourly-rates.pdf

[11] See para 3.23 at https://www.judiciary.uk/wp-content/uploads/2022/07/Civil-Justice-Council-final-report-on-guideline-hourly-rates.pdf

Working Group could consider as a priority. In the first instance it will need to decide, what, if any, evidence it needs to collect in order to arrive at appropriate figures for the new band.

2.28.2 that a retrospective uplift to the 2021 figures is applied having regard to the SPPI.

2.28.3 that counsel's fees should also be capable of being assessed by reference to a guideline hourly rate. Whilst we appreciate that this will pose numerous challenges, nonetheless, there is currently a real perception that counsel's fees are not being adequately addressed and that there is no real justification for treating them differently from solicitors' fees. We believe this change would be consistent with the aim of providing certainty for parties over their liability to pay opposing parties' costs. We are under no illusions as to the difficulties that may be involved in this exercise (and the importance of ensuring that any solution does not increase the risk of inflated and disproportionate sums) but we do not think those difficulties militate against trying to address this issue as soon as possible. It is clearly something that the proposed Working Group will need to consider in detail (again potentially by reference to evidence), but we are firmly of the view that the direction of travel should be in favour of including counsel fees within GHRs as soon as possible.

2.28.4 that the test to be applied when considering a departure from the GHR should be clearly stated. A number of respondents felt that the circumstances in which the court will be prepared to depart from GHRs were lacking in clarity, and we agree. Nevertheless, there were highly divergent views about what the test for departure should be. Some of the group suggest that GHRs should only be departed from where there is "a clear and compelling justification and it is in the interests of justice to do so". An alternative articulation was that departure from GHRs should be considered where a case falls outside the notionally average case (average complexity), i.e., a case of above average complexity or length, and where departure is "just and proportionate". At the other end of the spectrum, others suggest the right approach is to provide that any departure from a GHR should be accepted whenever it is reasonable to do so.

3. Pre-action and digitisation

Summary of Responses

3.1 The consultation for this part of the review was re-opened after the Court of Appeal decision in Belsner.[12] Twelve of the initial responses to the consultation expressed a view on pre-action and digitisation. The further consultation produced 15 responses.

Initial responses

What are the implications for costs associated with civil justice of the digitisation of dispute resolution?

3.2 There was broad agreement that digitisation should facilitate early effective communication between parties and so lead to an increase in early settlement of claims or narrowing of issues which are to be litigated. Consequently, digitisation ought to lead to a significant saving of costs. A need to improve APIs was highlighted. This will facilitate interaction between (a) solicitors' in-house systems and digital portals and (b) digital portals and the court.

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

3.3 The general view was that pre-action processes help to settle claims and to narrow issues.

Is there a need to reform the processes of assessing costs when a claim settles before issue, including both solicitor client costs, and party and party costs?

3.4 There was strong support in principle for a change to allow courts to deal with costs incurred in the pre-action arena. It was accepted that such a change should not be universal. Two competing factors were identified: claimants should not be discouraged from participating in pre-action protocol exchanges by fear of adverse costs orders, at the same time a party which incurs costs within pre-action exchanges ought to be able to seek an order that those costs be paid.

[12] https://www.judiciary.uk/judgments/belsner-v-cam-legal-services/

3.5 Respondents also identified the need to police compliance with pre-action protocol processes. At present the court can only deal with non-compliance if proceedings are issued.

What purposes does the current distinction between contentious business and non-contentious business serve? Should it be retained?

3.6 No respondent identified any utility in the distinction, set out in the Solicitors Act 1974, between contentious and non-contentious business.

Post Belsner

3.7 Respondents were given a free hand to respond to Belsner as they saw fit. No consultation questions were posed.

3.8 It was widely accepted that consumers of legal services ought to have equal protection in respect of solicitor own client costs whether they engage solicitors in contentious or non-contentious business.

3.9 There was an almost universal acceptance that the distinction between contentious and non-contentious business was outmoded. It was also widely understood, given pressures on legislative time, that reform of the 1974 Act (which would in any event not be straightforward) is not regarded as a government priority.

3.10 Several respondents were concerned that there could be unintended consequences (and ensuing satellite litigation) if there was too much haste in tackling the issues raised by Belsner. The need to engage with the profession and to approach change in a co-ordinated way was emphasised.

3.11 One respondent noted that it would be helpful to revisit relevant provisions in the Solicitors Act 1974 (itself a consolidating Act) and CPR 46.9 (*'Basis of detailed assessment of solicitor and client costs'*). The respondent noted with approval the comments of HHJ Gosnell in Richard Slade and Co Plc v Erlam [2022] EWHC 325 (QB), at para 25: "[t]he Solicitors Act 1974 does not appear to have undergone the sort of transformation which is common when consumer rights are brought into the equation". The respondent argued that there was a need for such a transformation, not least from a consumer rights and access to justice perspective, and to consider the level of protection in other jurisdictions.

3.12 A number of respondents suggested that a general order might be made under section 56 of the 1974 Act to deal with the remuneration of solicitors engaged in non-contentious work.

3.13 A small number of respondents felt that the distinction between contentious and non-contentious business was semantic and has produced no real issues to date.

Recommendations

3.14 The objective of engaging in pre-action processes (whether in the digital or analogue world) is to settle claims without the need to resort to litigation or, where settlement is not possible, to narrow the issues between parties. Parties should be encouraged to engage in these processes in the fullest and most effective way possible. In our view, costs reform in this arena must further these aims.

3.15 This desirable objective can be fulfilled in different ways which may operate in tension with one another. Costs is a perfect case in point. In some areas there are problems with engagement and compliance with pre-action protocols. Costs recovery for pre-action work may encourage parties to engage in pre-action dispute resolution, by reducing the temptation to proceed straight to issuing proceedings so as to maximise a litigant's entitlement to costs. Some existing pre-action protocols and pre-action digital portals contain costs recovery rules of various kinds depending on the stage at which a dispute is settled.[13] On the other hand, the risk of adverse costs makes the pre-action arena more like court litigation. That feature applied in some areas is likely to discourage users, such as small and medium-sized enterprises, from embarking on pre-action resolution at all. The solution to this dilemma will necessarily vary depending on the type of litigation. Costs sanctions are also a possible technique to encourage compliance within the protocol, albeit that it is also important that the risk of an adverse costs order should not deter a claimant from exploring if they have a claim, or a defendant from seeking proportionate evidence that there is a claim.

3.16 Facilitating costs recovery pre-action, where appropriate, could be given practical effect by making it possible to bring costs liability disputes for claims that are settled at the pre-action stage, or allowing the court to deal with costs incurred pre "issue" as it deals with costs post "issue". We believe housing is an example in which this may be a useful approach. However, as already explained, while this may be beneficial in the right field, it does make the pre-

[13] The Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents and Low Value Personal Injury (Employers Liability and Public Liability) Claims; the Pre-action Protocol for Personal Injury Claims Below the Small Claims Limit in Road Traffic Accidents; the Pre-action Protocol for Resolution of Travel Package Claims; and the Pre- Action Protocol for Housing Conditions Claims (England).

action arena more like court litigation. In other areas this may discourage users from embarking on pre-action resolution at all, which runs counter to the need to encourage maximum use of modern dispute resolution portals. In that context, compliance with the procedures in a digital portal should be a simple matter because this happens naturally as long as the portal itself is well-designed. This is one of the major potential benefits of digitising in this area. In these areas the distinction between court litigation and pre-action dispute resolution needs to be maintained particularly when the apparent involvement of the court itself can be off-putting. Of course even in the digital area, it would be unrealistic to assume that the human problem of non-compliance will disappear altogether and so if significant problems with compliance and engagement persist, then some post-issue costs sanctions may need to be considered.

3.17 These various considerations illustrate that the pre-action context of civil justice is another example in which "one size does not fit all". The right way to address the problems in housing cases may well not be the best way to address dispute resolution for SMEs, and neither may be the appropriate approach to personal injury cases. Modern digital portals have enormous potential to make pre-action exchanges and dispute resolution more accessible, and pre-action processes easier to comply with. Well-designed digital portals may also facilitate engagement by persons with legal problems who have little or no intention of taking formal legal action. However, while the ways to address them may differ depending on the context, the basic dilemmas as to how to promote engagement and compliance, and reduce the need for court action apply as much in the digital context as they do on paper.

Solicitors Act 1974

3.18 The Solicitors Act 1974 is (in parts) clearly out of step with the reality of present-day litigation practice. The outmoded definitions of contentious and non-contentious business will become more pronounced as we move to a digitised dispute resolution system where parties will engage within the system well before "issuing" proceedings.

3.19 The outmoded statutory definitions are not simply a matter of words. Whether business is contentious or non-contentious governs the form of retainers available to legal practitioners. Compliance with the DBA and CFA legislation needs to be considered alongside any reforms to the definitions. Regulation in the area (s.58 Courts and Legal Services Act 1990 and the regulations made thereunder) is an important part of providing and ensuring consumer

protections. It will be necessary to maintain the existing protections harmoniously with any changes to the definition of contentious/non-contentious business.

3.20 We proceed on the basis that changes to the 1974 Act are unlikely to be regarded as a legislative priority and are likely to require wide consultation. Against that background we recommend the following steps should be taken.

New digital pre-action portals

3.21 The new OPRC has been set up with the jurisdiction to make suitable provisions, including costs provisions, relating to digital pre-action portals. We recommend that for new portals in which the emphasis is on drawing a distinction between pre-action dispute resolution and court proceedings, there should be very limited costs recovery pre-action, if any.[14] Any provisions concerning costs recovered pre-action will need to balance the encouragement of compliance with the need not to discourage pre-action resolution of the dispute. This recommendation relates to recovery pre-action, it is not concerned with the recoverability of costs incurred pre-action once court proceedings have commenced.

Existing pre-action protocols

3.22 In relation to existing pre-action protocols which provide for recovery of costs that settle at the pre-action stage, and subject to vires, it may be possible for the CPRC to make a rule change so that certain types of dispute or claims are deemed to be "issued" at the point that a relevant pre-action protocol is commenced.

3.23 The change would amount to a fundamental shift, not least in making that pre-action arena much more like court litigation and so we would recommend that it be the subject of a pilot scheme. Whilst a matter for the CPRC, we suggest that the Pre-Action Protocol for Housing Conditions Claims (England) would be a sensible starting point. Housing disrepair claims often require the preparation of an expert (surveyor's) report and will often therefore require some outlay. We note that paragraph 11 of that PAP already provides that "*If the tenant's claim is settled without litigation on terms which justify bringing it, the landlord will pay the tenant's reasonable costs*." At present, that obligation is unenforceable absent an agreement to pay costs.

[14] This relates to recovery pre-action, it is not concerned with costs recovery for pre-action work once court action has commenced.

3.24 In our view there are three points which should be considered: (a) issue fees (b) Civil Restraint Orders (CROs) and (c) limitation. We see no need for an issue fee to be paid until a Claim Form is issued. We think that CRO provisions should apply to deemed issue and in our view limitation should run until a Claim Form is issued.

3.25 Clearly the CPRC could only make such a rule if there was vires. The statutory basis for the OPRC vires relating to pre-action matters is different from that applicable to the CPRC. However, whether the CPRC has vires to make a provision of this kind does not weaken the case for change, the issue is just about the mechanism. If legislation were needed to facilitate a rule change of this kind then we support that.

CPR Rule 46.14

3.26 We recommend consideration should be given to whether CPR Rule 46.14 could be amended. Currently under the rule the court can only deal with the quantification of costs where there is an agreement that one side will pay costs. There is no power under the rule to deal with the incidence of costs. We recommend, if possible that the rule be changed to allow the court, in some or all cases or case types, to decide questions about the incidence of costs between the parties ("*inter partes*") costs in a case in which the parties have settled the rest of their dispute but not the costs.

3.27 CPRC should also consider the process by which the court should deal with costs orders under the recommendation about r46.14. In particular, should there be a summary, low-cost procedure or a fixed costs regime?

Orders under Section 56 of the 1974 Solicitors Act

3.28 The Law Society should be invited to consider if a general order made under section 56 of the 1974 Act might usefully provide an improved, helpful and workable scheme to deal with "non-contentious" costs.

3.29 The Law Society has a right to be consulted in respect of any order proposed by the section 56 committee. Consulting on the principle of a new general order would therefore seem sensible.

3.30 Such an order would (as set out in section 56) prescribe the general principles to be applied when determining the remuneration of solicitors in respect of non-contentious business.

The Solicitors Act 1974

3.31 An appropriate body (the CJC or the Law Commission) should be invited to report on the need to revise the Solicitors Act 1974 given the intended digitisation of dispute resolution.

The CJC's review of Pre-Action Protocols

3.32 Our recommendations 1, 2 and 3 overlap with the recommendations of the Pre-Action Protocol Working Group at section 6 of its report. Specifically, we each advocate the creation of a process to allow the courts, in appropriate cases, to determine "pre-issue" costs and a simplification of process. The differences between us are about the selection of appropriate cases and piloting.

4. Consequences of the extension of Fixed Recoverable Costs

Summary of Responses

4.1 The responses on this issue tended to fall into three distinct groups: (i) opposition to FRC generally, including to the extension of FRC which is already under way; (ii) support for the principle of fixing costs in advance and the benefits that flow from that; and (iii) support for the proposal on capped costs (of £500k) for the patents Shorter Trials Scheme (STS).

4.2 The CJC agreed at the outset that the Working Group would focus on four areas, one of which was the consequences of the extension of FRC. In doing so the Working Group has been clear that the implementation of the changes made in accepting the recommendations to extend fixed recoverable costs, made in Lord Justice Jackson 2017 FRC report for certain cases up to £100,000 in value, are already underway. It is therefore worth re-emphasising that, whilst legitimate questions have been raised in the consultation responses with regard to the former report, it is not the purpose of this Working Group to either examine or re-examine that work. Nor is it part of the Working Group's remit to cut across the work being done relating to costs in clinical negligence cases.

4.3 The Working Group has always been clear that it is tasked with considering the wider implications of the changes to FRC for the rest of the civil justice system. It is committed to ensuring a more holistic view is adopted. While some respondents oppose extended FRC, largely on the basis of the assumed costs, there are proponents too. One business representative[15] commented: "Costs associated with resolving a dispute can often outweigh the value in dispute, which is why small businesses are often disincentivised to use the court system. Fixed recoverable costs allow businesses to assess and anticipate the financial risks associated with court action, and are therefore extremely useful to businesses when considering raising or defending a claim." In any event, whether for or against in principle,

[15] Federation of Small Businesses

there was a general consensus that (i) FRC should be set at the right level and (ii) the levels of FRC should be subject to regular review and uprating in line with inflation.

4.4 The Working Group notes that full account needs to be taken of the implications for the party who will have to pay their lawyer's costs, including clarity about what those costs will be and whether that party may have to pay more than is recovered either (i) in damages, or (ii) from the other side. The potential for this highlights the relationship is between recoverable costs and claimant compensation, and has a particular significance in areas of routine civil litigation like personal injury. The likelihood of this occurring could increase from the extension of FRC (depending on the levels of FRC), as well as potential changes to GHR and costs budgeting.

Costs cap in the Shorter Trial Scheme for patent cases

4.5 A number of respondents supported the idea of introducing a costs cap of £500,000 into the Shorter Trials Scheme[16] for patent cases.

4.6 To quote one respondent:[17]

> *…the UK has a strong reputation for the handling of legally and technically complex patent disputes … The judgments of the Patents Court in London are respected across the world … the Intellectual Property Enterprise Court (IPEC) has similarly gained a strong reputation for dispensing justice in IP disputes at an affordable level for small and medium sized enterprises.*
>
> *In relation to costs, the two courts represent extremes of client experience. Whilst IPEC … caps recoverable costs at £50,000,[18] the Patents Court … offers an open-ended jurisdiction in which the costs of a case which proceeds to a full trial are almost always over £1m for each party, and now frequently reach figures in excess of £5m.*
>
> …
>
> *We believe that there is similar pent-up demand in the middle tier of potential litigants – which might be tempted by the prospect of a ceiling of liability in the event of defeat, those*

[16] The STS is a scheme which has been running in the Business and Property Courts (BPCs) for a number of years. Under the scheme any case within the BPCs can be commenced in the STS. The case is then subject to tight case management and a trial, essentially fixed for no more than a year from issue, in no more than 4 days. All costs are assessed summarily. There is no costs budgeting and no detailed assessment.

[17] *Gowling WLG (UK) LLP*

[18] £60,000 for cases issued after 1st October 2022

for whom the £50,000 is too low but for whom the prospect of potential liability for fees running to £millions is simply too much of a risk to take in terms of the long-term viability of their businesses. There is significant anecdotal evidence, and some empirical evidence, of companies with potential patent infringement actions under consideration defined by their own legal costs, over which they have a degree of control and a limit of no more than £500,000 to the other side.

4.7 Essentially the same points are made by the other respondents from the specialist intellectual property area. The proposal they support is to commence a pilot as part of the Shorter Trials Scheme (STS) in which the recoverable costs are capped at £500,000 in patent cases. In addition to the associations representing the relevant specialist bar (IPBA) and the solicitors (IPLA) as well as a number of individual law firms, a notable supporter of the proposal is IP Federation, which represents United Kingdom industry. Their view is that the proposal would improve access to justice for mid-tier patent disputes.

4.8 The IPLA suggest that the scheme could be brought in as a simple cap on total recoverable costs on top of the existing STS rules with changes and additions to the rules kept to a minimum. The IPLA is willing to assist with work on preparation of a draft Practice Direction.

4.9 Some respondents raise the question whether the scheme should be made available for all intellectual property disputes (not just patents) or even all BPC cases. However, as matters stand the evidence base for a proposal going wider than patents is not strong.

4.10 A single respondent was concerned that the proposal might risk increasing the costs for smaller litigants. However, that is not the view of any of the other respondents. The IPBA noted there was unanimous support for the principle of the proposal at an open public meeting in September 2022, with near unanimity for the level of the cap at £500,000. It may also be noted that nothing in the proposal would affect the existing IPEC system, in which litigants can be protected by a costs cap which is now at £60,000.

4.11 Two respondents indicated that they were not in favour of extending the proposal to particular areas outside patents (e.g. clinical negligence). The group JUSTICE raised the question of costs capping in the context of judicial review, indicating their support for further consideration, piloting and evaluation of the costs proposals in judicial review made in the Final Report of the Jackson Review.

4.12 In terms of timing, a number of respondents proposed that the pilot scheme should be introduced as soon as practicable. The IPBA indicated that time was particularly ripe for the

introduction of this pilot given that the proposal has been discussed and supported among in the specialists for some time following the UK's departure from the EU, but was delayed by the pandemic. A number of groups cited the imminent commencement of the European Unified Patent Court (IPC) as grounds for urgency.

4.13 We believe that if such a scheme can be made to work in this specialist area, it could have significant positive implications overall.

Recommendations

4.14 The recommendations concerning costs pre-action and the Solicitors Act 1974 are above.

4.15 The CJC supports the proposal for a £500,000 costs cap in patent cases in the STS. The CPRC is invited to work with the IP Court Users Committee and other stakeholders to introduce a suitable pilot scheme.

Table of abbreviations and acronyms

Abbreviation or acronym	Meaning
API(s)	Application programming interface
BPC(s)	Business and Property Courts
CMC	Case management conference
CCMC	Costs and case management conference
CFA	Conditional fee arrangement
CJC	Civil Justice Council
CPR	Civil Procedure Rules
CPRC	Civil Procedure Rule Committee
CRO(s)	Civil Restraint Order(s)
DBA	Damages based agreement
FRC	Fixed recoverable costs
GHR(s)	Guideline Hourly Rate(s)
HMCTS	His Majesty’s Courts and Tribunals Service
IP	Intellectual property
IPBA	Intellectual Property Bar Association
IPLA	Intellectual Property Lawyers Association
IPC	European Unified Parent Court
IPEC	Intellectual Property Enterprise Court
IPLA	Intellectual Property Lawyers’ Association
MOJ	Ministry of Justice
NHSR	National Health Service Resolution

Abbreviation or acronym	Meaning
OPRC	Online Procedure Rule Committee
PAP(s)	Pre-action protocol(s)
PI	Personal injury
PTR	Pre-trial review
QOCS	Qualified one-way costs shifting
SCCO	Senior Courts Costs Office
SME(s)	Small and medium-sized enterprise(s)
SPPI	Service providers price index
STS	Shorter Trial Scheme
TCC	Technology and Construction Court

Annexes:

(A) Membership

Steering Group

Lord Justice Colin Birss (Deputy Head of Civil Justice & CJC)

Mrs Justice Joanna Smith (High Court Judge)

His Honour Judge Nigel Bird (Designated Civil Judge)

Master Amanda Stevens (King's Bench Master)

District Judge Judy Gibson (District Judge & CJC)

Wider working group

Senior Costs Judge Andrew Gordon-Saker (Senior Costs Judge)

District Judge Simon Middleton (Regional Costs Judge)

Master Francesca Kaye (Chancery Master)

Nicholas Bacon KC (Costs Barrister)

Nicola Critchley (Defendant solicitor & CJC)

Brett Dixon (Claimant solicitor)

Laurence Shaw (CILEX)

Jack Ridgway (Association of Costs Lawyers)

Elisabeth Davies (Consumer Interest & CJC)

Paul Seddon (Legal Aid Practitioners Group)

Andrew Higgins (Academic & CJC)

Robert Wright (Ministry of Justice) (observer)

CJC Secretariat

Sam Allan

Leigh Shelmerdine

Amy Shaw

(B) List of those who responded to the consultation

1. A barrister
2. A large law firm
3. A large law firm
4. A large law firm
5. Alan Johnson, Hogan Lovells
6. Alan Tunkel, 3 Stone Chambers
7. Amanda Groves, Ealing Law Centre
8. Costs Judge Jason Rowley
9. Costs Judge/Master Simon Brown
10. Dominic Hughes, 3 New Square
11. HHJ Alan Saggerson
12. HHJ Christopher Lethem
13. HHJ David Hodge KC
14. HHJ Emma Kelly
15. HHJ Graham Robinson
16. HHJ Philip Glen
17. Ilesh Chandarana, Nexa Law Ltd
18. Imran Benson, Hailsham Chambers
19. Julie Skinner, Nottingham Law Centre
20. Mr Justice Timothy Fancourt
21. Sarah Bingham, Slater & Gordon
22. Action against Medical Accidents (AvMA)
23. Acumension Limited
24. Association of British Insurers
25. Association of Costs Lawyers
26. Association of HM District Judges
27. Association of Medical Reporting Organisations
28. Association of Personal Injury Lawyers
29. Bar Council
30. Bevan Brittan LLP
31. Birmingham Law Society
32. Browne Jacobson LLP
33. Capsticks LLP
34. Chancery Division
35. Chartered Institute of Legal Executives
36. Checkmylegalfees.com
37. City of London Law Society Litigation Committee
38. Civil Court Users Association
39. Clifford Chance LLP
40. Clyde & Co
41. CMS
42. Cost Law Services
43. Counsel of Circuit Judges
44. DAC Beachcroft LLP
45. Direct Line Group
46. DisputesEfiling.com Limited
47. DLA PIPER
48. DWF Law LLP
49. Federation of Small Businesses
50. Fletchers Group - Fletchers Solicitors
51. FOIL, the Forum of Insurance Lawyers
52. GowlingWLG (UK) LLP
53. Guardian News & Media
54. Herbert Smith Freehills LLP
55. Hill Dickinson LLP
56. Hogan Lovells International LLP
57. Horwich Farrelly
58. Housing Law Practitioners' Association
59. Intellectual Property Bar Association
60. Intellectual Property Lawyers' Association
61. IP Federation
62. Irwin Mitchell LLP

63. Islington Law Centre
64. JUSTICE
65. Kain Knight Costs Lawyers
66. Kennedys Law
67. Keoghs LLP
68. Kingsley Napley LLP
69. Law Centres Network
70. Legal Aid Practitioners Group (LAPG)
71. Legal and Risk Services
72. Leigh Day
73. London Solicitors Litigation Association
74. Lyons Davidson Solicitors
75. Marks & Clerk Law LLP
76. Medical Protection Society (MPS)
77. Motor Accident Solicitors Society (MASS)
78. News Media Association
79. NFU Mutual
80. NHS Resolution
81. Pensions Litigation Court Users Committee
82. PMC LLP
83. Senior Courts Costs Office
84. Springfield Advice & Law Centre
85. TECBAR
86. Technology and Construction Court
87. The Association of Consumer Support Organisations
88. The Commercial Court Judges
89. The County Court at Central London
90. The Expert Witness Institute
91. The Forum of Complex Injury Solicitors
92. The Law Society of England and Wales
93. Thompsons Solicitors
94. Underwoods Solicitors
95. Weightmans LLP
96. Zurich Insurance

Further responses in light of Belsner

1. Benjamin Williams, 4 New Square
2. Action against Medical Accidents (AvMA)
3. Association of Costs Lawyers
4. Association of HM District Judges
5. Association of Personal Injury Lawyers
6. Chartered Institute of Legal Executives
7. DAC Beachcroft LLP
8. DisputesEfiling.com Limited
9. DWF Law LLP
10. FOIL, the Forum of Insurance Lawyers
11. Lyons Davidson Solicitors
12. Professional Negligence Lawyers Association
13. Senior Courts Costs Office
14. The Association of Consumer Support Organisations
15. Zurich UK

(C) Initial Paper

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Costs Working Group

Consultation Paper – June 2022

1. In early 2022 the Master of the Rolls asked the Civil Justice Council ('CJC') to take a strategic and holistic look at costs, particularly given the ongoing transformation of civil justice into a digital justice system. The CJC approved the setting up of a Costs Working Group at its April meeting and agreed the scope of work would cover the four areas set out below. The membership of the Working Group is set out in Annex A.
2. The exercise will be divided into three phases. The first step is the publication of this initial paper, setting out the questions to be considered and explaining the context in which they arise. The second phase is the consultation phase. Responses and reactions are invited to the questions raised in this paper, with a deadline of 12:00pm on Friday 30 September 2022. Responses to the consultation should be submitted online by file upload at https://www.surveymonkey.co.uk/r/CJC-costs.[1] Also, in this phase, there will be a CJC Costs Conference on Wednesday 13 July 2022. The costs conference will provide an opportunity for a public debate about the issues raised. It is planned to take place in person. During September 2022 there will be a series of online webinars and other smaller events are planned too. Once the consultation closes, the final phase will begin. The Working Group will produce its final report with recommendations.

The four areas

3. The CJC agreed that the Working Group would focus on four areas:

    1) Costs Budgeting;
    2) Guideline Hourly Rates;
    3) Costs under pre-action protocols/portals and the digital justice system;
    4) Consequences of the extension of FRC.

4. The Working Group's remit is to take a strategic approach, recognising that access to justice for all plays a vital part of the rule of law in a democratic society and that affordability is fundamental to such access. The Working Group understands the importance of detail. However, it is not part of the group's remit to conduct an examination of the fine-grained aspects of any of the areas under consideration. The costs review is intended to be holistic in nature (albeit focusing firmly on the specific areas identified above), acknowledging that while

[1] A copy of the consultation questions is available for download at https://www.judiciary.uk/related-offices-and-bodies/advisory-bodies/cjc/working-parties/costs/

each of these topics is important in itself, their interaction with one another and the wider context of civil justice as a whole, is crucial. That wider context has many dimensions but three in particular are worth highlighting at the outset.

5. The first is digitisation. This has the potential to transform civil justice and reduce its cost and complexity for many court users. Its impact is only beginning to be felt. The costs system in civil justice must be fit for purpose in a Digital Justice System. That will include costs incurred in proceedings before the court, and also costs incurred before court proceedings begin.
6. The second dimension is vulnerability. The needs of vulnerable court users must always be taken into account. That is particularly so when changes are being proposed. Furthermore, unintended consequences should be avoided.
7. The third dimension is the economic significance of the civil justice system. A functioning civil justice system is the bedrock of the economy. Everyone, including individuals, small and medium sized enterprises, and larger organisations, is entitled to a clear and enforceable legal framework in which to conduct their affairs. Organisations need such a framework to be able to plan and invest for the future, secure in the knowledge that breaches of their rights can be remedied, and that their obligations can be enforced, if necessary. Accessible courts promote respect for rights and proportionate dispute resolution, even without the need for parties to go to court. Lengthy delays and excessive cost needlessly magnify the stresses caused by involvement in court proceedings, with knock on effects for society and the economy. If disputes cannot be resolved within reasonable time and in a proportionate manner, then the rule of law itself is undermined.
8. The remainder of this document will address each of the four topics, summarising the background and the questions which this report poses. One aspect of the approach taken by the Working Group to the preparation of the questions is worth highlighting at this stage. For each of the four topics, the Working Group has identified some wide overarching questions. The purpose of this is to ensure that Respondents do not feel inhibited in expressing their views by the presence of too many granular questions. However, immediately following the groups of questions, the Working Group has included a number of paragraphs designed to identify the types of issues that Respondents may wish to consider when responding to the overarching questions. It is hoped that this will help to focus responses, but it is not the intention of the Working Group to be prescriptive. If Respondents identify additional issues which they consider to fall within the scope of the overarching questions and the remit of the Working Group, they are encouraged to raise them and to explain their rationale.

Costs Budgeting

The introduction of costs management rules

9. Costs budgeting rules were introduced in the Civil Procedure Rules (‘CPR’) in 2013, following recommendations made by the Review of Civil Litigation Costs: Final Report (“Jackson Report”) in 2010. Prior to the introduction of the rules, parties were required to file and exchange estimates of costs on Form H (now Precedent H) both at the time that the parties filed their directions questionnaires and when they filed their listing questionnaires. The Jackson Report

found that many litigants were ignoring the requirement to lodge estimates at all and that, when they did, Form H was seldom used.

10. The initial idea for costs management was influenced by developments in Australian litigation. The Jackson Report highlighted a study published in 2009 by the Access to Justice Taskforce of the Attorney-General's Department of the Australian Government entitled "A Strategic framework for Access to Justice in the Federal Civil Justice System". That study argued that a lack of information about costs restricts the ability of people to make decisions about dispute resolution and that greater transparency about costs would improve access to justice. The authors proposed that, in the Federal Court, lawyers should be required to provide their clients with a litigation budget and to provide copies of that budget both to the court and to opposing parties.
11. To test its proposed reforms based on the Australian model, the preliminary version of the Jackson Report set up a voluntary pilot exercise in the Birmingham Mercantile Court and the Technology and Construction Court. This was followed by a mandatory pilot in defamation cases in London and Manchester. The latter required the parties to lodge budgets, or revised budgets, as a case proceeded, setting out the assumptions on which they were based. The court approved or disapproved the budgets or revised budgets and sought to manage the costs of the litigation as well as the case itself in a manner proportionate to the value of the claim and the reputational issues at stake.
12. The pilots received generally positive feedback from the lawyers and judges involved, with similar views expressed at a number of conferences and seminars attended by Jackson LJ prior to the publication of his Report.
13. However, a working group consisting of representatives of third-party funders voiced concerns that the skills of judges, solicitors or barristers in relation to costs budgeting were deficient. Provided these problems could be fixed with adequate training, the working group favoured clear rules allowing the court to control the parties' costs budgets and the costs of the proceedings generally.
14. Further criticisms were voiced by Circuit Judges and the Bar Council, who considered costs management to be a time-consuming exercise which was already adequately provided for. They also questioned the skills of judges to deal with costs management. The Bar Council, in particular, raised a concern that defendants with weak cases could seek to press the Court to limit the costs that might be incurred by claimants to a level beneath that which claimants might reasonably need to incur to establish their cases.
15. Against that background, the Jackson Report recommended rules for costs management primarily for two reasons. First, the Report considered that case management and costs management go hand in hand; it does not make sense for the court to manage a case without regard to the costs which it is ordering the parties to incur. Second, the Report expressed the view that costs management, if done properly, can save substantially more costs than it generates. Accordingly, the Report recommended an outline structure for costs management whereby:

    i. The parties would prepare and exchange litigation budgets or (as the case proceeds) amended budgets.

ii. The court would state the extent to which those budgets are approved.
iii. So far as possible, the court would manage the case so that it proceeds within the approved budgets.
iv. At the end of the litigation, the recoverable costs of the winning party would be assessed in accordance with the approved budget.

16. Adequate training for solicitors, barristers and judges was also recommended.
17. An important feature of the Jackson Report was the recognition that the general culture around costs needed to change. As the report pointed out: "Costs are an important facet of every contested action. In a large number of cases they are the single most important issue, sometimes towering above all else. I have regretfully come to the conclusion that it is simply unacceptable for judges or practitioners to regard "costs" as an alien discipline, which need only be understood by costs judges, costs draftsmen and solicitors who specialise in that kind of thing."

Changes after implementation

18. The rules were first implemented in April 2013. In April 2016 amendments were made which added to the list of cases excluded from the rules unless the court otherwise orders. In April 2017 further amendments were made to ameliorate some aspects of the decision of the Court of Appeal in *SARPD Oil International Ltd v Addax Energy SA* [2016] EWCA Civ 120, expressly allowing comments to be made about incurred costs to be taken into account in subsequent assessment proceedings. In July 2020 amendments were made to incorporate the old Practice Direction 3E into the rules and a new rule was added (r.3.15A). Rule 3.15A restates the procedure to be followed on applications to vary a costs budget.

This review

19. With the 10-year anniversary of the introduction of costs budgeting approaching, now is an opportune time to review the impact and effectiveness of the rules.
20. The implementation of costs budgeting has not been without its critics. Some call for its immediate abolition, arguing that (i) the resource cost is not worth the return; (ii) it causes severe delays; and (iii) in some areas it has actually driven up costs because budgets now err on the high side and once a high budget is set it will be spent.
21. On the other hand, supporters argue that costs budgeting is critical to access to justice and that it allows individual claimants to manage downside cost risk. Furthermore, supporters point out that costs budgeting focuses attention at an early stage on the costs of litigation and that whilst there may be specific issues with the costs budgeting process, the overarching exercise of costs management is, in many cases, the only sensible means by which parties can be encouraged to think about the costs of litigation from the outset and the court can intervene to control escalating costs.
22. Judges' views on the subject differ. Those in favour of reform suggest that they often feel they are not equipped to conduct the costs budgeting exercise properly (whether by reason of lack of training, experience or information). Further they consider there to be a disparity between budgets approved in London, which are thought to be more generous, and those approved

elsewhere. Judges in favour of the current rules point out that for courts outside London, costs budgeting is the key (and often only) tool to prevent disproportionate costs in cases at the lower end of the multi-track.

23. Given the substantial body of experience amassed over the best part of a decade and the broad range of opinions on the efficacy of costs budgeting, this consultation paper is designed to provide an opportunity for all interested parties to express their views on (i) whether costs budgeting should continue in its current form; (ii) whether it should be restricted in scope and if so how; (iii) whether it should be abolished altogether; and (iv) if costs budgeting is to be restricted or abolished, how an early focus on costs could nevertheless be maintained. Parties are also invited to identify and provide any specific data or other evidence which they believe would assist the Working Group in making its recommendations.
24. QUESTIONS are in Annex B, Part 1.
25. One of the questions posed on this topic and various of the issues that Respondents may wish to consider use the expressions “default on” and “default off”. These are shorthand for rules which provide that a measure, such as costs budgeting, is to take place unless the courts directs otherwise (default on) or conversely does not take place unless and until the court makes a positive direction to do it (default off). The costs management rules at present are default on for proceedings worth less than £10 million, subject to various exceptions. They are default off for cases over £10 million.

Guideline Hourly Rates (‘GHRs’)

Background

26. GHRs have been a feature of the summary assessment of inter partes costs in civil litigation since the introduction of the CPR. The current Guide to the Summary Assessment of Costs 2021 Edition[2] summarises the purpose of GHRs at paragraph 28:

> *‘The guideline figures are intended to provide a starting point for those faced with summary assessment. They may also be a helpful starting point on detailed assessment’.*

27. Lord Dyson MR in 2014 expressed the purpose of GHRs in this way:

> *‘GHRs are guideline rates. The intention of the rates is to provide a simplified scheme and the guidelines are intended to be broad approximations of actual rates in the market.’*[3]

28. Initially issued by the (then) Supreme Courts Costs Office, responsibility for review and setting of the GHRs passed to the Master of the Rolls in 2007. Since then, there have been several reviews. In 2011 by the Advisory Committee on Civil Costs and then in 2014 and 2021 by

[2] Available at https://www.judiciary.uk/wp-content/uploads/2021/08/Guide-to-the-Summary-Assessment-of-Costs-2021-Final1.pdf

[3] Stewart J’s interim report citing the 2014 views of Lord Dyson MR available at https://www.judiciary.uk/wp-content/uploads/2021/01/20210108-GHR-Report-for-consultation-FINAL.pdf

working groups led by Foskett J and Stewart J respectively. By that stage responsibility for reviews had passed to the Civil Justice Council when Jackson LJ's recommendation to set up a Costs Council was not implemented.

29. It is notable that the committee recommendations have not always been accepted by the Masters of the Rolls at the time, such as in 2011 and 2014. As a result, GHRs remained unchanged for many years.
30. The most recent review was conducted by a committee led by Stewart J with a final report in 2021.

The Context of this review

31. The current Master of the Rolls accepted the recommendations of the Stewart Committee[4] including that any updates to the proposed GHRs (if adopted) should be guided by the outcome of the reviews of FRCs and IPEC capped costs. He committed to a review of GHRs in two years.
32. The Working Group is also aware that other areas of the civil jurisdiction, such as the Ogden tables in personal injury litigation, use government indices for review purposes.
33. The task of this Working Group is not a review of the GHRs themselves. Rather it is to consider two broad questions. First, what is the purpose and effect of GHRs in the current interlocking landscape; and second, if there is a place for GHRs in the future, what is the right approach to reviewing GHRs over time.
34. The first topic will take into account all aspects of the current landscape of civil justice, including changes such as the use of technology, including any impact of remote hearings and remote working, and the extension of fixed recoverable costs to cases valued at up to £100,000 and IPEC capped costs.
35. The second topic will seek to identify a feasible mechanism for reviewing GHRs. This will involve considering what the right approach should be and how often the GHRs should be subject to review. Part of the context for this will be the disparity between the herculean nature of the task and the limited resources faced by the Foskett and Stewart Committees. Stewart J summarised the work as an: 'attempt to guide the GHR ship through the narrow strait between the Scylla of comprehensive but unachievable evidence and the Charybdis of arbitrariness'.
36. QUESTIONS are in Annex B, Part 2.

Costs under pre-action costs/portals and the digital justice system

37. Pre-action protocols ('PAPs') embody the principle that litigation should be a last resort. Even if the processes they set out do not result in a full settlement, they should at least lead to a clarification of the dispute and a narrowing of issues. Both outcomes mean that the court only has to resolve those disputes the parties cannot otherwise resolve. Costs consequences and other sanctions may be imposed by the court after proceedings are issued if a party fails to engage fully in pre-action processes. Dishonesty in these processes will be treated in the same way as dishonesty after proceedings have commenced. Overall, it is now clear that pre-action

[4] Available at https://www.judiciary.uk/publications/master-of-the-rolls-accepts-recommended-changes-to-guideline-hourly-rates/

protocols are an integral and highly important part of litigation architecture. The relationship between pre- and post-issue processes means that we need to think holistically about how all the costs associated with the resolution of the dispute are dealt with.

38. Access to justice is not only concerned with access to the courts but includes access to pre-action processes. The point was recognised by the Supreme Court in *Bott v Ryanair* [2022] UKSC 8 in deciding that a solicitor had an equitable lien for their costs over the compensation payments due to claimants in respect of delayed flights, even if there was no dispute between the parties about the entitlement to compensation. The recognition of a lien in these circumstances helped promote access to justice and serves to emphasise the need to examine costs in the pre-action space.
39. The importance of full engagement in the pre-action area will be just as great, if not greater in the future with a digital justice system. Encouraging early resolution or, where that is not possible the narrowing of issues, will be a central part of that. The digital justice system will ultimately use a consistent data architecture to integrate the pre-action arena explicitly and directly with the court process. Such an integrated system may, for example, use the opportunity presented by digital technology to seamlessly guide a litigant from initial advice, into a portal governed by a relevant protocol, and then ultimately, if necessary, into the relevant court or tribunal process. Appropriate data gathered at each stage being transferred throughout by API, or similar technology. Such a system will of course need to maintain sufficient flexibility to allow claims and defences to evolve as information is exchanged, even if currently repetitive requirements are removed.
40. In future this integrated process will be governed by rules created by an Online Procedure Rule Committee ('OPRC') to be established by powers set out in the Judicial Review and Courts Act 2022. This legislation expressly caters for the need for governance of the pre-action processes as well as those in online courts. Therefore, it is right for the CJC to examine the governance of pre-action costs at this stage.
41. The CJC has recently published an interim report on pre-action protocols. It suggests (at paras.3.13 to 3.16) a new summary costs procedure which would allow the court to determine the amount and incidence of costs on paper when a dispute settles at the pre-action stage.
42. The position of unrepresented parties pre-action also falls to be considered. It may raise different issues from the position of unrepresented litigants before the court.

"Solicitor own client costs" and *"party and party costs"*

43. Part of the landscape involves the distinction between "party and party" costs and "solicitor and own client" costs. The latter are the costs due from a client to their solicitor while "party and party costs" are costs to be paid by one party to another.
44. The assessment of solicitor and own client costs is governed by section 70 of the Solicitors Act 1974 ("the Solicitors Act") and by CPR 46.9. These provisions are due to be considered by the Court of Appeal in an appeal against the decision in *CAM Legal Services Limited v Belsner* [2020] EWHC 2755 (QB). In that case, an RTA personal injury claim had settled before issue. The injured party entered into a conditional fee agreement (CFA) with a 100% success fee with her solicitor. The costs payable to the solicitor by the claimant were potentially greater than the

damages recovered, so that the injured party could be left not only with no damages but with a debt to her solicitors. The matter was adjourned by the Court of Appeal and is due to return to the court later this year.

45. The *Belsner* case highlights the relevance of the classification of costs as "contentious" and "non-contentious". The distinction may be important in claims that settle prior to issue. Different requirements are imposed if an agreement with a solicitor relates to "contentious business" rather than "non-contentious business." In *Belsner* one of the issues is whether the Solicitors Act definition of "contentious business" (business done "*in or for the purposes of proceedings begun before a court*") applies to pre-action work only once proceedings are commenced. So, if a dispute settles before a claim is issued, work done in respect of it may arguably be "non-contentious". This approach may seem to be at odds with the practical reality that pre-action protocols are already integrated into the civil justice system.
46. The amount of party and party costs incurred in a claim that settles pre-issue might be disputed, in which case such costs can be assessed by the court. If the principle of whether one party must pay any costs at all to the other is disputed, proceedings may need to be issued to determine that dispute. CPR 46.14 deals with these costs-only proceedings. Sometimes costs are catered for in a pre-action protocol. CPR 45.9 to 49.15 apply to costs-only proceedings and allow represented parties in certain RTA claims to claim fixed costs. Some pre-action protocols (for example the low value RTA pre-action protocol) make express provision for the payment of fixed costs by a defendant at various stages without the need for any court-based assessment.
47. QUESTIONS are in Annex B, Part 3.

Consequences of the extension of Fixed Recoverable Costs ('FRC')

48. In 2021 the Government accepted the recommendations to extend fixed recoverable costs made in Jackson LJ's 2017 FRC report for certain cases up to £100,000 in value. The implementation of these changes is underway. A sub-committee of the Civil Procedure Rules Committee is working on it. It is not the purpose of this Working Group to examine that work. Nor is it part of the Working Group's remit to cut across the work being done relating to costs in clinical negligence cases. Rather the Working Group is tasked with considering the wider implications of the changes to FRC for the rest of the civil justice system. This will clearly involve topics (1) to (3) but the potential issues arising may have wider implications too. For example, there may be other areas in which some form of fixed costs or cost capping scheme may be worthy of consideration. A possible example could be certain kinds of high value specialist litigation. An idea mooted recently has been to set up an extended form of costs capping arrangement, similar to the one operated in the Intellectual Property Enterprise Court but set at a higher level, for patent cases in the Shorter Trials Scheme. With that in mind, responses from the intellectual property sector (and any other specialist sector where similar changes would be of value) are invited. Another example could be the control of incurred costs as discussed in Chapter 6 of the Jackson 2017 report.
49. QUESTIONS are in Annex B, Part 4.

Consultation responses – guidance

50. When responding to this consultation, the Working Group would be grateful if Respondents could identify their areas of expertise/interest in the topic/levels of experience. Respondents are encouraged to respond to the overarching questions (or only some of the overarching questions) in any way they see fit, including by focusing only on one or two topics in respect of which they have particular expertise, or indeed only on specific questions or issues arising within individual topics.
51. The Working Group has not imposed limits on the volume of material which Respondents can provide when responding to the consultation. However, one condition, which must be adhered to, is that any response which amounts to more than 20 pages of text must be accompanied by an executive summary of no more than 2 pages in length.
52. Respondents should have in mind the point emphasised above that the Working Group's remit is strategic in nature. The report to be generated at the end of this process is intended to set the direction of travel for costs and address important general issues. This work will not descend into detailed rule making or a close revision of detailed provisions.

Conclusion

53. In this initial report, the Working Group only seeks to pose questions and put them in context. It invites answers, supported wherever possible by evidence and data. As part of the consultation phase the Working Group will also consider what data may be available to illuminate the answers to these questions and will take steps to seek it out. Any suggestions as to material that the Working Group should be taking into account would be welcome.
54. Throughout its work the Working Group will have regard to the three dimensions identified at the start - digitisation, the needs of vulnerable court users and the economic significance of the civil justice system as a whole. Respondents are invited also to bear these in mind in providing their responses.

TABLE OF ACRONYMS

Acronym	Meaning
API	application programming interface
CFA	conditional fee arrangement
CJC	Civil Justice Council
CPR	Civil Procedure Rules
DBA	Damages Based Agreement
FRC	Fixed Recoverable Costs
GHR	Guideline Hourly Rates
IPEC	Intellectual Property Enterprise Court
OPRC	Online Procedure Rule Committee
RTA	road traffic accident

ANNEX A – MEMBERSHIP

Steering Group
Lord Justice Colin Birss (Deputy Head of Civil Justice)
Mrs Justice Joanna Smith (High Court Judge)
His Honour Judge Nigel Bird (Designated Civil Judge)
Master Amanda Stevens (Queen's Bench Master)
District Judge Judy Gibson (CJC)

Wider working group
Senior Costs Judge Andrew Gordon-Saker (Senior Costs Judge)
District Judge Simon Middleton (Regional Costs Judge)
Master Francesca Kaye (Chancery Master)
Nicholas Bacon QC (Costs Barrister)
Nicola Critchley (Defendant solicitor & CJC)
Brett Dixon (Claimant solicitor)
Laurence Shaw (CILEX)
Jack Ridgway (Association of Costs Lawyers)
Elisabeth Davies (Consumer Interest & CJC)
Paul Seddon (Legal Aid Practitioners Group)
Andrew Higgins (Academic & CJC)
Robert Wright (Ministry of Justice)

CJC Secretariat
Sam Allan
Leigh Shelmerdine
Amy Shaw

ANNEX B – THE QUESTIONS

Part 1 – Costs Budgeting

1.1 Is costs budgeting useful?
1.2 What if any changes should be made to the existing costs budgeting regime?
1.3 Should costs budgeting be abandoned?
1.4 If costs budgeting is retained, should it be on a "default on" or "default off" basis?
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?

It is anticipated that the answers to Questions 1.1-1.3 are likely to overlap. However, in answering these questions, Respondents may wish to consider:
Whether costs budgeting is more useful in some circumstances than in others and, if so, what those circumstances are and why. If costs budgeting is not considered useful, why? What (high level) changes should be made? If Respondents consider that costs budgeting is not always applied consistently (whether as between judges or courts) it would be helpful if Respondents could identify what they think are the reasons for the disparity and provide evidence to support their views. Evidence indicating whether costs budgeting has reduced the number of cases going to Detailed Assessment might be provided.
Respondents may also wish to identify their views (and explain their reasons) on whether costs budgeting (i) should be abandoned; (ii) is vital, at least in certain cases (and, if so, those cases should be identified); (iii) promotes access to justice for smaller parties litigating against better funded opponents; (iv) wastes significant time and costs in managing the budgets of parties whose costs will never be paid; and (v) causes the expenditure of costs which are disproportionate. Respondents may wish to consider whether there are any alternative rules that should be put in place of costs budgeting (for example to safeguard access to justice and to ensure the early consideration of costs by the parties together with the scope for intervention by the court to control costs).
If Respondents consider that costs budgeting should be abandoned, they may wish to consider and provide views on how the court will nevertheless ensure that cases are conducted justly and at proportionate cost in accordance with the overriding objective, what the potential impact might be on vulnerable parties and whether parties should still be required to exchange (and file) their own estimates of their costs to trial and if so when. Respondents may wish to provide their views on whether an alternative procedure or rule should be introduced to ensure the conduct of proceedings at proportionate cost.
In answering Question 1.4, Respondents may wish to consider whether the current arrangement, in which costs budgeting is default on for cases under £10 million (subject to exceptions), should be retained or whether it should only be applied to cases at the case management discretion of the court and upon the making of a court order to that effect ("default off"). Where the court makes such an order do Respondents have views on whether the rules should provide that a decision to order cost budgeting must carry out a costs/benefit analysis, taking into account the costs and complexity of the case? Are there any further criteria that ought to be applied aside from the overriding objective? If Respondents consider that the right general approach should be default off, they may wish also to consider whether there are any types of case (identified by subject matter or value) in which the default on rule should nevertheless be retained, and if so, why.

In answering Question 1.5, Respondents may wish to consider how incurred costs should be dealt with in the context of a costs management exercise and whether hourly rates should be considered in the context of such an exercise. They may also wish to express their views on who should carry out costs management, whether it should be dealt with by specialist costs judges and whether more training is required if the present system is to be retained. One practical problem with costs budgeting that has been reported is the lack of consistency overall and, in particular, the differing approaches to the question of what comes first – identifying the work that needs to be done, or setting the budget with the work then being agreed within that budget? Respondents may wish to consider the solution to this problem.

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?

In answering Question 2.1, Respondents may wish to consider whether summary assessment could be carried out without GHRs or whether their use should be restricted to a starting point for summary assessments and not as a 'starting point' for detailed assessment. Three other potential issues are (i) the impact of the new value limit for FRC of £100,000 (if any); (ii) 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 (iii) whether, if there is a place for GHRs, the question of geography and banding needs to be considered.

In answering Question 2.2 Respondents may wish to address whether GHRs have a role in consumer and small business protection in the purchasing of legal services, in the protection of litigants in person, and/or in enabling regulated providers of legal services to comply with their regulatory obligations such as to provide regular costs estimates and transparent pricing for their clients. For any of these roles (or any other role), if GHRs were to be abandoned, Respondents may wish to address whether consumers would have the means to gauge the reasonableness of solicitor and own client costs estimates and how regulatory obligations would be complied with.

In answering Question 2.3 Respondents may wish to consider any possible wider effects on, for example, Family proceedings or proceedings in the Court of Protection (or anywhere else) together with any potential effects (adverse or otherwise) that may be felt in the provision of litigation funding or costs insurance protection.

In addressing Question 2.4, Respondents may wish to address what proportionate ways of adjusting GHRs are available for the future. Might adjustment involve data as to rates allowed on detailed and summary assessments of costs? If so, what data should be captured, by whom, from whom and how should that be achieved reliably and proportionately? Should indices be used, perhaps with suitable adjustment, e.g. SPPI (services producer price inflation) legal or CPI (consumer prices index)? If not, why not?

In answering 2.5 Respondents may wish to give examples of alternative GHR models and/or methodology.

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?

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

In answering Question 3.1, Respondents may wish to consider what impact digital dispute resolution has on costs and what effect the current digital systems have. Is there an impact on the cost for unrepresented litigants? How should those costs be dealt with? Mindful of the cost of repetition, should the development of the digital system prioritise an API, or similar method of sharing information? What may be the cost advantages/disadvantages of such an API for professional users, the court system, the judiciary and litigants in person?

In answering question 3.2 Respondents may wish to consider how costs incurred before a case is issued should be governed. They also may wish to address whether more pre-action protocols (and other dispute resolution services) ought to include self-contained rules on party and party costs and if so, what these rules should be.

In answering Question 3.3, Respondents may wish to consider what reforms are required, whether they apply to all types of claim and whether they ought to apply only to costs owed to providers of legal services.

In answering Question 3.4, Respondents may wish to address whether there are areas in which the distinction between contentious and non-contentious business serves a useful purpose and what the implications would be of removing that distinction.

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?

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.

In raising these questions, the Working Group is NOT inviting comment on the extension of FRC (which has already been consulted upon), rather it is interested in receiving the views of Respondents on the consequences of the extension of the FRC.