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# The CJC Review of Costs - FOIL considers the final report

Coming closely behind the draft FRC rules published by the CPRC earlier this month, the CJC has now published its Final Report on its strategic review of costs. Whilst the timescale has been short compared with the Fixed Recoverable Costs project, the CJC review has been underway since early 2022, with a initial report published in June 2022, a consultation phase running until October 2022, and a reopening of the consultation at the end of 2022 to call for responses on the decision in *Belsner v CAM Legal*.

The review has focused on four areas:

- Costs budgeting
- Guideline Hourly Rates
- Costs under Pre-action Protocols/Portals and the digital justice system
- Consequences of the extension of FRC.

FOIL has been involved in the review process throughout. Nicola Critchley, FOIL President, member of the FOIL Costs SFT, and CJC member, was part of the working group. FOIL conducted extensive consultations with the SFTs, a FOIL member event was held in September 2022 and the FOIL Costs SFT met continually over the consultation period to refine the FOIL response.

It should be remembered that the report makes recommendations, not final decisions. It will be for the MR, the CJC and the MOJ to now consider the proposals put forward and decide upon next steps. The review has been extensive and thorough and the seniority of the working group will carry much weight, but with the introduction of FRC coming in the autumn and the CJC's report on Pre-Action Proposals expected soon, this report is just part of a very extensive programme of potential reform, with recommended pilots and further work by the CJC part of the picture. It is likely to be some time before firm proposals for long-term reform of the costs regime are on the table.

## Costs budgeting

Costs budgeting was perhaps the most controversial issue included within the review. Whilst the consultation amongst FOIL members resulted in a range of views on the value of the process, reflecting different types of litigation and varying experiences, in general there was wide support for the principles and aims of budgeting. Comments from other stakeholders and the judiciary during the consultation period had raised the possibility that the CJC might recommend that costs budgeting be abandoned or severely reduced in scale but in fact there were surprisingly high levels of support in the responses, leading the CJC to make the welcome recommendation that costs budgeting is valuable and should be retained.

### *A more nuanced approach*

FOIL's focus in its response was on reform of the process, arguing for an interlocking package of reforms to make it more straightforward and less expensive. Other stakeholders were also keen to see changes and, faced with proposals that often pulled in different directions, the CJC supports a more nuanced approach to budgeting, to introduce a more tailored regime to suit different work types. In short: *"one size does not necessarily fit all"*.

Personal injury and clinical negligence, and claims in the Business and Property Courts are areas where the CJC believes that different rules on budgeting could apply, with pilots proposed.

In claims where QOCS applies, it is recommended that full budgets for defendants be dispensed with, with Precedent H considered sufficient but with the court retaining the ability to call for a full budget if appropriate.

A new "costs budget light" approach is proposed for claims worth between £100k and £1m, on the basis that these are claims at risk of disproportionate costs but not so high in value that full-scale budgeting is required. A majority of working party members supported the inclusion of personal injury claims in this new 'light' regime but that view was not unanimous. Alongside 'costs budgeting light', a specific light touch approach is recommended for those Business and Property Court claims worth over £1m to which budgeting already applies.

FOIL has concerns that the proposal will create a sharp divide between claims below and above £1m, with a significant risk of gaming and forum shopping. If budgeting is reduced to just a front sheet, it may introduce the worst of all worlds, with defendants paying for the preparation of a claimant budget but seeing only a fraction of the current costs information. Whilst there are concerns at present about the cost of budgeting, a regime that is too light risks removing the current levers which can control costs. Judges without data on rates and hours per phase will find it harder to control the budget and the lack of data will hamper the further extension of FRC to claims worth up to £250k.

### *Costs budgeting after directions*

A majority of the CJC working group recommends a staged approach to case and costs management where appropriate, allowing costs and case management to be decoupled. Under the proposals a CMC would be listed first, with some costs information to be exchanged beforehand to inform the directions. Costs budgeting would then follow. Whilst there is not universal support for this approach, and it would be subject to pilots, FOIL believes the proposals have merit. The change would allow more negotiation and agreement between the parties on costs, on a much firmer footing once directions have been given. FOIL believes post-CMC budgeting could be largely paper

based, reducing costs and allowing costs budgeting to be handled more effectively within the judicial time available.

#### *Budgeting in mesothelioma claims*

The CJC recommends that judges operating specialist lists, such as for mesothelioma, and those in charge of specialist proceedings, such as High Court Senior Masters for multiparty litigation, are approached for their views on more bespoke arrangements for conducting budgeting, taking into account the consultation responses received.

FOIL has previously raised the issue with the senior judiciary, arguing that whilst recognising that mesothelioma claims have special features, including the need for claims to be dealt with quickly where there is a living claimant, there is a strong argument for budgeting in post-mortem cases. Following communications with Senior Costs Judge Gordon-Saker in 2019, Master Fontaine responded to FOIL, indicating that adopting budgeting in post-mortem claims would require more judicial resources than are available currently. It is to be hoped that, freed from the requirement to adopt a standard approach, that the consultation will result in the adoption of some form of streamlined budgeting in these claims.

#### *Further proposed work by the CJC*

The CJC proposes that further work be undertaken on reform of the budgeting process to consider revising timescales to allow for more meaningful negotiation; to simplify budget variation; to consider whether penalties for default in the budgeting process would be useful; and to consider how budgeting approaches hourly rates and incurred costs.

#### **Guideline Hourly Rates**

FOIL has lobbied extensively on the methodology used to set GHR, raising serious concerns at the process undertaken in the 2021 review of the rates. FOIL was critical of the use of hourly rates agreed or awarded in setting the new rates, a process which failed to reflect changes in working practices and created a circular effect, with the rates which receiving parties have been able to obtain becoming the basis for what they should be awarded in the future. FOIL also criticised the data on which the current rates were based as too heavily focused on higher value litigation, rendering the new rates unsuitable for most average litigation.

#### *Current GHR to be retained for the next five years*

The CJC recommends that GHR should be retained, with the current rates subject to annual index linked increases for a period of around five years (with a retrospective uplift to reflect inflation since the 2021 review). The CJC recommends that the annual index linking should be on the basis of SPPI – the inflation measure for the UK services sector. In its consultation response FOIL argued against annual increases, believing they would cause delay and gaming, and instead supported Sir Rupert Jackson's recommendation for increases every three to four years. FOIL is supportive of the use of SPPI as an inflation measure, arguing that it is more closely aligned with the inflation experienced by businesses than the RPI or the CPI which are consumer focused, and better able to reflect genuine market forces than the SPPI for legal services.

#### *Detailed Review*

It is regrettable that the CJC has not taken the opportunity to recommend a more robust, evidence-based method of reviewing the rates at this stage, but a Detailed Review is recommended at the end of the five year period to consider the impact of the index linking; the impact of the changes to working practices; and the potential geographical changes that may be required to potentially

*“smooth out differences in the existing bands between the rates for London and those applicable elsewhere”*. Further Detailed Reviews are recommended every five years thereafter.

FOIL welcomes the recommendation that a working group should be set up now to consider the methodology to be adopted for future reviews. In the past the options have been an expense of time approach, or the collection of evidence of GHRs allowed on assessment by the courts (with FOIL strongly favouring the former). The working group will *“grapple with the tension”* between those approaches and consider whether there are other *“innovative ways”* in which evidence can be gathered to inform the review. As an alternative, FOIL’s proposals to replace GHR with Fixed Hourly Rates have been widely circulated to the MOJ, CPRC and the CJC. FOIL will continue to lobby for a better system than that adopted in recent years.

#### *Changes recommended before the Detailed Review*

A new band for high value commercial work is recommended, to sit above the existing rates. Whilst the higher band was supported by a number of respondents to the consultation, the recommendation, on the basis that current hourly rates for heavy commercial cases are too low, sits awkwardly with the general CJC view that the latest review of GHR was *“principled”* and *“evidence-based”*.

It is recommended that counsels’ fees be brought within the GHR framework, to provide more certainty for parties on their potential liabilities, a proposal which FOIL supports. It is recognised that this will be a difficult exercise and that it is important to ensure it does not increase the risk of inflation or disproportionate costs. The proposal would require further work by the CJC, with change recommended as soon as possible.

The test for departing from GHR is also raised as an issue which needs attention, but there were very divergent views within the working group on what the test should be. This is a key issue for FOIL: current GHR do not reflect average claims, but if they were set at an appropriate level FOIL argues there should be less judicial discretion to depart from them. Straightforward claims should be awarded rates below GHR, with above-GHR rates limited to claims genuinely more complex and challenging. At present it is too easy to argue for rates above GHR on the basis of expertise or complexity, especially in niche areas of litigation such as disease.

#### **Pre-action and digitalisation**

Respondents to the consultation were generally agreed that digitalisation should facilitate early communication between parties, with a view to achieving early settlement, or at least the narrowing of issues. The CJC recommends that costs reform should encourage the parties to engage in pre-issue processes.

#### *Recovery of costs pre-issue*

The CJC’s focus is on the costs position pre-issue, with some pre-action protocols and the Claims Portal regime already including rules for costs recovery. Whilst allowing costs recovery pre-issue discourages premature proceedings, it is recognised that it also makes the pre-issue stage more like litigation, which can discourage some users, for example, small and medium sized businesses, from trying to resolve their disputes at all. The CJC raises the possibility of reform to allow costs liability disputes to be brought before the court for claims which settle pre-issue, or by allowing the court to deal with costs pre-issue as it deals with costs post-issue. Housing is raised as an area of litigation where this may be beneficial: it is recognised that this is an area where the same rules will not be appropriate for all type of claim.

The CJC recommends that within portals where there is a distinction between pre-action dispute resolution and court proceedings, there should be very little costs recovery pre-action, if any.

In relation to existing pre-action protocols which already include some provision for the recovery of costs pre-issue, subject to vires, it may be possible to introduce a rule which deemed such a claim “issued” at the point when the pre-action protocol is started. It is recognised that this would be a fundamental shift and a pilot is recommended, with housing disrepair claims recommended as a sensible starting point. The PAP for Housing Condition Claims already provides that if the claim is settled on terms which justified bringing it the landlord will pay the tenant’s reasonable costs, but the provision is unenforceable and frequently ignored. Under the proposals limitation issues would be unaffected and a court fee would remain payable only when proceedings were formally issued.

The CJC goes on to recommend that a change to r.46.14 be considered:

*“to allow the court, in some or all cases or case types, to decide questions about the incidence of costs between the parties (inter parties) costs in a case in which the parties have settled the rest of their dispute but not the costs.”*

The extent of the CJC’s thinking on this point is not clear. The CJC review of the Pre-Action Protocols currently underway is considering very significant changes to the pre-action stages, to require much greater engagement between the parties, to settle wherever possible and narrow the issues where the claim cannot be resolved. Although the focus in this report is on housing disrepair claims, the wording of this section, and the inclusion of the issue in the CJC Pre-Action Protocol Interim Report, raises the possibility that the CJC is considering a wider regime to allow the courts to award costs pre-issue, where there is no agreement on costs and no proceedings. This would significantly change the nature of dispute resolution, and the CJC recognises that litigation may be required to effect this type of reform.

#### *Contentious and non-contentious work*

Against a background of digitalisation, the Solicitors Act 1974 is seen as out of step with current litigation practice, with the definitions of contentious and non-contentious work now outdated. The MR in the appeal of *Belsner v CAM Legal*, in finding that the statutory consumer protections applicable to county court contentious work in Section 74(3) of the Solicitors Act 1974 did not apply to portal claims as no proceedings had been issued, described the current distinction between contentious and non-contentious work as “*illogical*”.

The CJC recommends that the Law Society should be invited to consider if a general order under Section 56 of the 1974 Act could provide a workable scheme to deal with non-contentious costs. The section allows a committee including senior judiciary and the President of the Law Society to put in place general principles to govern remuneration for non-contentious work. The CJC also recommends that an appropriate body (the CJC or the Law Commission) be invited to report on the need to revise the Act taking into account the digitalisation of civil litigation.

Whilst FOIL agrees that the distinction between contentious and non-contentious work is outdated, it is important that any new definitions provide certainty, with a clear step required to tip non-contentious costs into the contentious arena. It is also important that the concepts of contentious costs and recoverability are not muddled together: a move to define some costs pre-action as contentious must make it clear that the general rules on recoverability would remain unchanged.

## Consequences of the extension of Fixed Recoverable Costs

The CJC makes it clear that the report is not seeking to address the work already underway to introduce extended FRC. The only recommendation in this area concerns a costs cap in patent cases. In its response to the CJC, FOIL argued for the reversal of the decision in *Doyle v M&D Foundations & Building Services*, to prevent the inadvertent contracting out of FRC; and for FRC to be extended to Part 8 costs-only claims. It is regrettable that neither the newly published draft rules for FRC nor this report addresses those issues. (With regard to *Doyle*, the decision will be reversed for claims under the new rules but will remain in place for claims in the existing FRC regime). FOIL continues to lobby on both issues.

FOIL will continue to monitor developments arising from the report. If you have issues you would like to raise with the FOIL Costs SFT please contact Shirley Denyer on [info@foil.org.uk](mailto:info@foil.org.uk).

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