

Costs Roundtable

Eight Club, 20 October 2022



Contributors:

Jeremy Morgan KC (JMKC)
Lord Justice Birss (LJB)
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JMKC:

We really are honoured and delighted to welcome two very distinguished guests. On my left is Lord Justice Birss who is I think Generation X's answer to Rupert Jackson. He is Deputy Head of Civil Justice and he's the Chair of the Civil Justice Council Review into costs which is going on at the moment and which is going to be the main topic of today's discussion. He will give you the view from that side of the fence. From the bar side of the fence we have Alex Hutton KC who I'm delighted to introduce, a specialist costs Counsel from Hailsham Chambers. I'm not

going to waste more time in announcements from me. The topic as I said is the civil justice review and I'll ask Lord Justice Birss to start.

JMKC "Lord Justice Birss ... Generation X's answer to Rupert Jackson."

LJB:

Thank you for that kind introduction and both Jeremy and Alex and I have done this kind of thing in the past and it's a pleasure to be here doing this again in person which is really something. There's a couple of things that I want to say. But I'll just preface where I got to with this. Somebody said to me this morning, just as we were chatting, that costs have been in a state of permanent revolution for a long time – and I think that's a fair comment. I think it is instructive to ask the question, why is that so, and I think the truth is that we haven't sorted it out yet. The

system is not perfect and it's very, very important, it's a hugely important piece of civil justice and we still haven't got a system which we think is as good as it can be. That is why we are in the state of permanent revolution. I'm sorry that it isn't finished, because it would be lovely to sit back and say right costs tick we can forget about costs, we can start focussing on pleadings or something. But that's not where we are. Now the Civil Justice Council's review was something that was kicked off by the Civil Justice Council at the beginning of the year, very much led by Master of the Rolls. I imagine you all know about it and know what it's about but let me just tell you very briefly.

There are four topics that the review is looking at, costs budgeting, guideline hourly rates, the implications of the current work on fixed recoverable costs which I will explain and then pre-action costs and the digital space and the relationship between those things.

I was seriously chuffed to hear Jeremy just slip it in when he was describing the consultation, it is a high-level exercise, we're not trying at all to delve into the micro detail of any of these aspects of costs, that's not what we're trying to do. We're trying to ask and answer some of the very big questions and just take costs budgeting as the best example. Costs budgeting was brought in, as you all know, following the Jackson review. An enormous amount of work was done and it's there as part of our system. I think it's fair to say that the people probably thought that by now it would have calmed down and everyone would be used to it, everyone is used to it but I don't think it's right to say it's calmed down.

LJB "... it is a high-level exercise, we're not trying at all to delve into the micro detail ..."

Almost universally in my own experience and I rather think it's also the Master of the Rolls' experience, but I'm not speaking for him I'll speak for myself, my own experience is that whenever you reveal to lawyers that you're involved in civil procedure they start

moaning about costs budgeting. Now, that's not to say that there are lots and lots of people in our system who seriously support costs budgeting like people think it's the right thing to do. But there is an enormous amount of people who moan about it. I'm not quite comfortable describing myself in this way but as part of the leadership of civil justice, as the Deputy Head of Civil Justice, we have never since Jackson countenanced actually asking well should we keep this? And that's what this is about. It's the right thing to do. We've had it for ten years and we should be grown up enough to be able to have that conversation and ask those questions. Is it the right thing to do? If there are big picture things to change it to make it right, what are they and if we need to get rid of it well then we should get rid of it.

LJB "... whenever you reveal to lawyers that you're involved in civil procedure they start moaning about costs budgeting."

An experience which actually Alex Hutton and I have from a rather more micro bit of costs – the electronic costs bill, the experience of that was that there's a mind game involved a little bit in the reform of any civil procedure. You have to try and bring people with you, you have to work out what the right thing to do is, but there comes a point where you have to say - we're really doing this, you now have to stop moaning because we're doing it, and you have to get used to it. The electronic bill was a classic example. We tried to run a pilot of the electronic bill genuinely to find out how it worked and what people thought and literally nobody used it. And it is a mind game. They didn't use it because they didn't want to. I mean they didn't want to because it's a pest and so we were stuck in this position where we can't introduce it because we haven't tested it, but we can't test it. We just had to go for it and we did and I'm not saying it's perfect at all, I know it's not perfect but that's the kind of problem that we have in civil.

Costs budgeting is a similar thing. It was a clear-eyed decision which I believe absolutely was the right decision in the early

stages of costs budgeting that we had to say to the world that this is happening, we're going to do it, get used to it, we're not taking it away and that was the right thing to do. But now we should be allowed to say actually what do we think, so that's what that's about.

Guideline hourly rates. The big issue with guideline hourly rates is the difficulty of setting them. You can discuss conceptual problems with why we have them but you can see there are reasons why. Ultimately, if you expect judges to do summary assessments you need something for them to work on as a guideline and that's really what it amounts to, but how on earth do you set them? What evidence base do you use? What exercise do you put into force to make it happen? Those have proved over the years to be difficult jobs to do and we need to find a way, if we can, if we're going to keep them. Maybe we should get rid of them, that's a question, that's one of the possibilities is to say we should just get rid of them. Again, tough to do. How do we try and keep them up to date in some way or other?

LJB "The big issue with guideline hourly rates is the difficulty of setting them."

The obvious broad answer to that seems to be especially now that inflation's growing, is can we institute some kind of annual mechanism? Can we say we have an annual mechanism and then we have a regular, every five or ten years, review exercise but what even is that? That's the kind of thing that we're thinking about and where that will go remains to be seen.

Fixed recoverable costs I want to say a word about that. We have, as you know, fixed recoverable costs for cases up to £100,000 in civil justice. It's a done deal, that's happening, the work is ongoing, Mr Justice William Trower will never thank me for when I asked him to do it and he's doing a brilliant job running that committee and they're working very hard in the context of the rule committee to get a system of rules to make this happen. It's Government policy to bring it in, so it will be done. We had our first proper meeting about it in the rule committee meeting which was a couple of

weeks ago in October. They should come back again and we're going to look at it in detail in November.

LJB "[Fixed recoverable costs is] a done deal ..."

The plan is to have it agreed if it can be, in December. Again, the plan if we can is to make sure that the public are told exactly what it will be, subject to ministerial approval as soon as we've made that decision if we have in December with a view to it coming into force in April. That's the plan. And at the moment we're still on track for that. People are working very hard to make that happen. And it is a fixed recoverable costs regime, very much along the lines of the Jackson proposals up to £100,000 in the county court. There are exceptions and everything else but that's essentially what it is. It is not just for PI – it's not for clin neg, because that's a separate regime – but it's not just for PI, it's for all cases subject to some exceptions.

The big CJC review isn't about that, it's about the consequences of that.

One micro and one macro possible consequence. We've had a number of responses now already saying, please don't do it anymore, don't expand fixed recoverable costs above £100,000 at least without X and Y or Z and I can understand why people say that but that's the kind of thing that we might have expected to hear in this review, so that's useful.

There's then a micro consequence in the world of patents which if you know my background is, is where I come from. There's a proposal to have a special kind of costs capping regime for patent cases, so that's a thing which is being looked at.

That's the kind of thing, this implications thing, is dealing with. The other obvious implication goes like this, if some people say that costs budgeting is most useful for cases up to £100,000. If that's true, then we've just abolished those for costs budgeting so that's the kind of obvious potential implication of the changes in fixed recoverable costs. If

someone says, actually it's useful up to £150,000, then you say, is it really worth having a whole scheme just for the £100,000 to £150,000 level?

Pre-action and IT. There's lots of IT reform going on, HMCTS are working their absolute socks off to build and implement an IT system for the County Courts which I really do think will be better when it's done. It will be a great thing. But boy is it a lot of work. Lawyers now have to use the damages system to bring damages claims in the County Court most of the time, but unfortunately you only bring it and then it's defended and then it drops out which is like building a railway from New York to San Francisco and so far we've only got to the Catskills.

LJB "There's lots of IT reform going on"

The other big part of pre-action is the Belsner case which I'm sure you are all aware of. Bluntly, certainly speaking personally, I was rather hoping that the sequencing of the Belsner case would have meant that the judgment came out before the consultation finished, that was kind of my plan anyway.

The consultation finished last week so I'm not quite sure what we're going to do there. At least in my mind is a thought that maybe we need to re-open that bit of the consultation. I don't know, that's not a promise, it's just something that's crossed my mind, but it depends of course on when Belsner actually comes out.

I can tell you we've had 96 responses to the consultation which is fantastic. We've categorised them into the various areas. We're in little groups and we're all beavering away trying to read it all that's the first task.

LJB "... we've had 96 responses to the consultation which is fantastic"

JMKC:

Thanks very much by the way for that introduction to the morning. Before I hand over I want to make one thing clear which is

both from the point of the CJC consultation exercise which is formally closed but also from our way of dealing with things generally, we do welcome input from the floor afterwards. It really is a very much part of the process to have a discussion, so please don't hold back even if you aren't one of the 96 who have sent something in, we would be grateful. Alex, the view from the Bar.

AHKC:

It's quite interesting having the three of us here because there is a link between the three of us in that the electronic bill which came in some years ago, started with Jeremy who was Chair of the committee appointed by Rupert Jackson to look into bringing in the electronic bill. He then retired and went off to Italy or semi-retired and handed over to me. I then struggled with it for a number of years, tried to get it in and there was huge opposition to the concept that you should have this bill which is effectively a spreadsheet. It was only when Lord Justice Birss, Colin, got involved that it actually happened and came in and was implemented. You have almost a ten year history there, which finally got it in. It does show that it is quite difficult to implement major change that changes people's day to day life like the electronic bill has. I have to say, every time I stood up to talk about the electronic bill before it came in, I felt like I was in the medieval era and in the stocks with people throwing rotten tomatoes at me. Since it's come in, I've had very few people complain. Generally people realise, actually this works and actually possibly it's better. Of course there are problems and issues and we should be alive to seeing how we can iron those out, but it is progress and sometimes as I was talking to Colin before we started, sometimes people, particularly lawyers perhaps, are very resistant to the idea of change, then change is forced upon them against their will and they think actually why did we ever do it the old way and it's much better now.

In relation to the subjects that Colin has covered in relation to the consultation, on the question of costs budgeting I happen to be, personally, a bit of a fan of costs

budgeting. I know that it may be a pain in the backside, and it may be because I've been around for a while, I don't do the bog standard kind of day by day costs budgeting hearings in the County Court and the lower reaches of the High Court.

For the cases that I get involved in, for instance group litigation, costs budgeting is fantastic, it has worked really well. It gives certainty as to what the ultimate price will be. For the claimants that's crucial because they need ATE insurance, they need third party funding, they need to know what the outlay may be. It gives certainty in that everyone knows where they stand.

AHKC "For the cases that I get involved in, for instance group litigation, costs budgeting is fantastic ..."

A couple of examples - Volkswagen emissions claims for instance has recently settled. As a result of having the process budgeted it was very easy to settle the costs and there were no great arguments over it because it was set down.

I would put in a submission to Lord Justice Birss about this, that the idea that you can do budgeting - certainly in a big case - at the same time as doing the directions is a problem. I'll give an example. I was involved in the Mau Mau litigation in relation to over a hundred thousand people claiming for injuries sustained in British Colonial Kenya in the 1950s. It was almost impossible to do the budgeting at the same time as the directions because the judge would decide on the directions which weren't the ones that everyone expected, and the budgets just weren't geared towards it and then you'd be trying to reconfigure figures in front of a judge and that really didn't work. In a big case a gap between the directions hearing, the case management hearing and the budgeting hearing would really be very helpful but I think it would be a great pity if we got rid of budgeting. I think it has brought in some really useful changes.

In relation to guideline hourly rates, they are an odd concept. I entirely accept and agree that you have to have guideline hourly rates

but you can't just leave it to judges who often don't know what they're doing, although costs judges might. Your standard High Court Judge probably isn't that au fait with costs. The difficulty is that they used to be based on the idea of how much it cost to do the work and Jeremy will remember and I remember in my early years of practice, before the Woolf reforms, you actually had to do an expense of time calculation - what does it cost to do the work? Then you would add on the percentage for profit, the care and conduct on top of that, and that was the basis of calculating an hourly rate. Now that basis has been long since eroded. When they brought in composite rates, Woolf said just one rate rather than an A+B, a single composite rate. That link got lost and it has become increasingly difficult to produce evidence of what the expense of time is, no-one wants to do it. The Foskett Committee back in 2014 tried to do it in order to uprate the guideline hourly rates but the Master of the Rolls rejected it on the basis that there was simply not enough of an evidence base on which to implement those rates. The recent review of guideline hourly rates under Mr Justice Stewart, who is one of those High Court judges who is very au fait with costs, abandoned that concept and simply said what are costs judges allowing? The basis that hourly rates are allowed on now is what costs judges, district judges, County Court judges and High Court judges are allowing across the country. Now that may be a reflection of reality. It was well evidenced because [Professor Paul Fenn and Neil Rickman] who are geeks in this field, have done a number of studies and so there was evidence of what was being allowed across the country and that was a solid evidence base. But it started from the proposition of what costs judges are allowing. Now that's somewhat circular - what is that figure? Well, that's because the costs judge allows it. But why does the costs judge allow it? Because they do. That's it. And that's problematic. I'm not saying there's an easy solution to that.

AHKC "In relation to guideline hourly rates, they are an odd concept."

In relation to 2021 rates, it is worth bearing in mind that there has been a significant change in the London rates in the sense that it used to be geographical - where are you doing the work? They've now got rid of that in relation to what they call heavy commercial work. Wherever it's done whether it's actually in the City or it's in Canary Wharf or it's in the West End or wherever, if it's heavy commercial work you get the London 1 rate.

Now that is helpful in terms of guidance as to what we're going to do.

The top rate now is £512. It used to be £409 in relation to the 2010 guideline rates which hadn't been upgraded since. Interestingly, that was the subject of a decision by Lord Justice Males in a case called [Samsung Electronics v LG Display](#) earlier this year where in an appeal in relation to a heavy commercial case, which couldn't be said to be exceptionally heavy, the sort of work that you would expect to be done in the City, the successful appellant claimed vastly over the £512 for the Grade A for London 1 rate. Lord Justice Males wasn't having any of it. He said this is to do with heavy commercial work so if you want to get more than that, you're going to have to justify something exceptional.

Interestingly it's arguable that by bringing in this new rate, the actual allowances by costs judges might come down. Previously costs judges were going well over the old guideline rate whereas these days, this is the guideline rate for heavy commercial work. Therefore, you're going to have to work hard to show that you should get more. We know that for the people who are doing this kind of work, £512 for a Grade A is well below what's being charged, they are often [charging] £1,000 an hour for instance. The reality is that you can't expect anything like £1,000 an hour and of course you weren't getting that before, but possibly you will get less now as a result.

In relation to fixed recoverable costs I think one has to recognise that although lawyers hate fixed recoverable costs, particularly claimant lawyers obviously, there was a

problem that had to be addressed in the sense that the costs that were being claimed in lower value cases including cases up to £100,000 were often vastly more than the damages they were getting. It was always difficult to explain to a client, your claim is for £100,000 but it's going to cost you £300,000 in order to win that claim. That really is a hard sell in terms of a logical bystander.

The difficulty with fixed recoverable costs and I know Colin is alive to this, is they tend to get stuck at the levels that they're implemented at in the first place. They are often lower than people were getting before because one of the purposes of fixed recoverable costs is to reduce costs. They're already lower and then they never go up and now we are in an era where there's 10% inflation a year, possibly more coming. There is real upset in the profession when these rates don't get upgraded by some kind of index and the same is true of course of guideline hourly rates. They need to be upgraded somehow.

AHKC "The difficulty with fixed recoverable costs ... is they tend to get stuck at the levels that they're implemented at in the first place."

I do clinical negligence work where the care rates are uprated each year on the basis of the annual earnings survey for carers and there is 'ASHE 6115' which gives you a figure for how much carer rates are going up each year. There is no such a thing for lawyers. Whether it's the consumer prices index or retail prices index, it needs some kind of index to keep pace with reality.

Ultimately in relation to fixed recoverable costs it is of course about justice. On the basis that you get the same figure for whatever case you're running, ultimately the test is whether lawyers are still willing to do the work. You cannot put [costs] lower than lawyers can do the work for, because then you will harm access to justice and people just simply won't bring claims of less than £100,000.

I'm sure those who were implementing this have that in mind but that's the ultimate test. Firstly, does it benefit the client in terms of bringing down the costs and making certainty in relation to costs but secondly, are the rates so low that they drive [lawyers] out of the market and therefore clients won't get access to justice.

LJB:

Can I speak to you on one of the things that Alex said which I think is interesting and worth illuminating. Guideline hourly rates and the decision of Lord Justice Males. As no doubt Alex also knows, I agreed with Lord Justice Males in the second case. It is worth bearing in mind that there's a crucial difference which I tried to explain in that judgment with the way guideline hourly rates are now, from the way they used to be, which is that those guidelines now state that they apply to all cases.

They didn't used to, there used to be a get out clause effectively and there isn't now. It's as simple as that. If you think that's wrong and you think we should change it, then say so. So that's a really important little detail on that point.

Can I just mention indexing? I'm just going to float this thought because I'm not shy. I can see a difference between indexing guideline hourly rates and indexing fixed recoverable costs. I'll explain why. Guideline hourly rates are not tied to the value of the dispute, certainly not directly, and given that they're not I can see a logic to saying that they should be indexed in some suitable way. How on earth you do that that's a whole different question, but I see the logic of saying that there's a case for indexing in some way or somehow.

LJB "Guideline hourly rates are not tied to the value of the dispute..."

But fixed recoverable costs are tied to the value initially so since the value initially is as much subject to inflation as the costs, it's not obvious to me that it's as simple as saying that you should index fixed recoverable costs when they're tied to the value at issue. To

illustrate the point in a simplistic way, if you said that the fixed recoverable costs will be subject to the rate of inflation which is currently 10%, in ten years' time they would overtop £100,000. You would end up in a situation where the fixed recoverable costs for a £100,000 claim will be more than £100,000 which is the opposite of what we're trying to achieve. I'm just trying to illustrate the point that it's more complicated to say that they should be indexed, than it is in the context of guideline hourly rates which are not linked to value.

LJB "... fixed recoverable costs are tied to the value initially..."

AHKC:

Absolutely, that must be right. As I understand it, they are going to have a fixed element and then a percentage of the damages and the fixed element presumably could be indexed.

LJB:

It could be, but it's still a fixed element relative to the fact that the case is worth £100,000.

AHKC:

Yes.

LJB:

It's not a percentage, but it's not an accident that it's less than £100,000. I see your point, but I don't think it's a complete answer.

JMKC:

Anyway. Any thoughts from the floor please, some thoughts from the floor?

Contribution from the floor:

On fixed recoverable costs is there any thought about the procedural requirements of litigation because, for example, disclosure can be difficult and complicated and witness statements can be long and thorough and some judges are terribly pedantic. It's these

accoutrements which often generate excessive legal costs. Is there a thought that District Judges and County Court Judges are going to be encouraged to be more pragmatic in order to get practical justice?

“Is there a thought that District Judges and County Court Judges are going to be encouraged to be more pragmatic in order to get practical justice?”

LJB:

Are we going to issue an edict as to the way judges should manage cases? No. I don't think that would be appropriate, but I don't see why parties can't say that this is subject to this regime judge and please have that in mind. I don't think that's an unreasonable point to make.

Where we go in the detail of a given case is impossible to say, but just picking up on that thought.

One of the things about costs budgeting which has always puzzled me is that it is an industry based on a bespoke suit for every customer.

We basically go to some fancy tailor and say, make me a bespoke suit for every single case. I just wonder whether there's a halfway house? You can imagine saying I'll have ten totals and I will have three models for the percentage share of the total costs across a case. A disclosure heavy case, an expert heavy case and a pre-action heavy case. If you look at most cases they probably fall quite closely in the way they distribute. Now they won't be the same I know. Every case will be different but that's true of our feet. Our feet are all different from each other but we don't go to Clarks and complain about the fact that you can only get a size 7 or a size 7½ or if you're lucky a size 8. I just wonder whether there is something to be done there to try and reduce the cost of costs budgeting by saying that you don't have to micro bespoke a final suit, you just have to work out which model this case fits into. Once I've decided that the grand total is a £150,000 worth of costs, I don't have to worry about

whether it's £145,000 or £155,000 I only have to pick that number.

LJB “I just wonder whether there is something to be done there to try and reduce the cost of costs budgeting by saying that you don't have to micro bespoke a final suit, you just have to work out which model this case fits into.”

Contribution from the floor:

If fixed recoverable costs may lead to not having budgeting, can we also remove the CMC and go back to automatic directions? In the work that I do a lot of, we're agreeing directions, we might be arguing over little bits of the budgeting, but we then have a problem with Court resources, so that we are not getting CMCs for 10-12 months etc. If you restore automatic directions, you take a big chunk of costs out, because CMCs are very expensive.

“... can we also remove the CMC and go back to automatic directions?”

One of the problems of budgeting at the moment is that I find it difficult to persuade my opponent sometimes even though we're agreed on the directions effectively, that we can press on because they don't want me to run up or incur costs that the Court can't have a say in.

I just don't think you can just bring in fixed costs. I do think you need to look at procedure that goes with it to give us a fair chance of being able to give access to justice and not end up trying to do a cut price job for the client which doesn't always work.

AHKC:

The trouble with automatic directions, is that they don't take account of the nature of the case. There may be an argument in a clinical negligence case as to whether you need four experts or five experts. That's got to be resolved somehow, it's not going to be answered by automatic directions. You've got to be able to litigate those issues.

JMKC:

Going back to the point that Alex made earlier which was probably a high level or a more expensive type of case - the trouble is if you try to have directions and costs budgeting hearing at the same time you get into difficulty because Jackson's idea was that you framed the directions and the work to be done by reference to the budget which is proportionate to the case. If that were the case you'd start off with your cost management hearing and then you'd do the material case management.

AHKC:

But what happens if the judge doesn't agree and says I don't think it should be dealt with like that, I think it should be dealt with by these directions? You've then got to reconfigure all your budgets for that template.

JMKC:

That sort of model doesn't really work unless you have this massive hearing where everything is discussed at the same time?

AHKC:

Yes, which can be chaotic in a big case.

Contribution from the floor:

Some County Courts have started to have a CMC and then allow the parties to have a month before the costs have to be dealt with. Often that means that costs budgeting doesn't come back to the judge because the parties have knocked heads together knowing what the directions are going to be and have come to an agreement on the costs.

I was troubled somewhat by the fixed costs regime coming in for £100K. If you introduce any fixed costs regime, often the issues involved in a £200K case or a £100K case are not that different. You might need to have similar experts involved, you might need to have similar issues dealt with. There is a risk of things not being done properly. Where there are fixed costs already, those

cases are often an absolute shambles before they get to trial when they finally have someone look at them who says, why hasn't this been done? The incentive on the people who are doing these very low value cases is really to do the bare minimum, because they are going to get the same costs back regardless of what they do.

"Where there are fixed costs already, those cases are often an absolute shambles before they get to trial when they finally have someone look at them who says, why hasn't this been done?"

At the moment cases up to £100K tend to be done quite well in comparison. They are generally well organised because you have people who are going to get paid roughly for the work they're doing.

LJB:

We all know it's right that a case worth about a £100,000 can have the same issues in it as a case of about £200,000. I understand that, but I think what is often lost sight of is a case worth £100,000 is only about £100,000. To say that it is the same as a £200,000 case leads you in the direction where you spend the costs as if it's a £200,000 case which wipes out what the case is about and it is crazy to do that. Fixed recoverable costs up to £100,000, that's coming, that's Government policy, they had the consultation, they did that. I'm not here to defend it or argue against it.

LJB "... a case worth £100,000 is only about £100,000. To say that it is the same as a £200,000 case leads you in the direction where you spend the costs as if it's a £200,000 case ..."

There are disputes in our society of that value which need to be resolved and ought to be resolved in court. What shouldn't happen is that they shouldn't be resolved at all because the cost of dealing with them is prohibitive. I feel quite passionately that we've got to do something about that end of civil justice because at the moment it doesn't work properly. And that's what worries me.

JMKC:

Any thoughts around Colin Birss' idea of weighting cases within a fixed recoverable costs regime?

LJB:

What I was thinking was, instead of saying I'm going to build a budget for every case, you go in and say here is a rack of budgets. And the exercise is to pick one, only to pick one and then you only have to make two decisions. What's the total in the end and is that proportionate? You can do that. And then what's the percentage share-out from a set of totals? You know there's a relatively small number of percentage share-outs where you can say well we're a bit more disclosure heavy so we should have that one and then that's your budget. Why get navel-gazing about the detail?

LJB "What's the total in the end and is that proportionate? ... And then what's the percentage share-out from a set of totals?"

JMKC:

Any reactions to that because I think it's a fascinating idea?

Contribution from the floor:

I really like that idea because so much of budgeting is about the number of witnesses, the number of experts, how many likely documents you'll have to review at the disclosure phase so I like the idea of having different models you can apply to different cases. I think that could work. My concern is that it does maintain some element of proportionality to the litigation process. My concern is that I'm not always sure that judges who are case managing cases are the best people to necessarily take a view as to what is and is not reasonable when it comes to setting a budget.

The vast majority of our judiciary is comprised of former members of the bar who haven't done disclosure exercises, haven't routinely done the witness

statement process. They look at the significant chunk of costs and go that's far too high, chop it down without really giving consideration as to what's involved in the process at the solicitor level. I wonder whether having some sort of neutral evaluator of a costs budget who has experience in case management from the solicitor's perspective would be a better way of imposing that on the judges who have plenty to do as it is. They won't necessarily have a view as to what comprises the usual costs bill.

"I wonder whether having some sort of neutral evaluator of a costs budget who has experience in case management from the solicitor's perspective would be a better way of imposing that on the judges who have plenty to do as it is."

LJB:

You're right about the senior judiciary, most of it comes from the Bar, but actually District Judges don't. They're mostly solicitors. I get the point you're making; I do. But I don't think it's quite as simple as it might seem. One thought which has certainly been floated is that we should say costs budgeting should be done by Costs Judges. The problem with that is there aren't enough of them. So if we want to go down that road and I'm not saying it's a crazy road to go down, then we would have to find a way of having many, many fewer costs budget cases. Maybe that's where the consultation idea of default on or default off, so you don't have to do costs budgeting in a case unless someone wants you to and then you persuade a judge to make an order to do it and there's the Costs Judges who do costs budgeting comes in. What do you think?

There is a prospective aspect to what we call costs budgeting at the moment. People's behaviour will change and will adjust depending on what has been set in the budget and that's what it's meant to do. Maybe there should be more rigidity by saying that once you've set your shoe size, that's the way you do it.

AHKC:

Talking about Belsner and informed consent from the client for shortfalls from recovery from the other side which the client has to bear. This has been a big issue in the low value pre-action protocol cases etc which Belsner arises from. You've got to consider if you have that off-the-peg four choices rather than a bespoke system, who is going to pay the shortfall? Is the lawyer going to write it off or is the client going to have to bear the shortfall because if the case turns out to be more complicated than the off the peg budget that you've chosen, there's nothing you can do about it. Who's going to pay the shortfall?

AHKC "... if you have that off-the-peg four choices rather than a bespoke system, who is going to pay the shortfall?"

That raises interesting questions, but I think it has to be addressed because certainly within the low value stuff, there have been costs that have been charged to the client, in relation to success fees for instance. That has caused a costs industry to grow up challenging these things.

Checkmylegalfees.com have a whole business model based on that and that's what their work is.

Contribution from the floor:

Just very quickly, in the mists of time the Birmingham Mercantile Court pilot scheme on budgeting where the budgeting exercises took five minutes. It covered things like - you don't need a leader, it's not a four day case, it's a two day case and one could see tens of thousands of pounds being swiped off and no spreadsheets or anything. It was a joy to behold, it was very, very good and it just disappeared.

LJB:

I know the exercise of course. I wasn't there but it does remind me of the job I used to do in the judiciary, in this thing that's now called the IPEC, initially called the Enterprise

Court. Mostly it is big ticket work, but there is a lower level element of work and as a Judge sitting in those cases you can do so much good by knowing what you're talking about.

You've got the experience to know how those cases go and you can say you don't need 20 experts, you don't need to bring in 20 consumers who are confused. There's a really interesting issue in all of this. What dawned on me doing those cases is that judges attending events like this and shouting at lawyers telling them that they're spending too much money and doing too much stuff, doesn't get you anywhere. One of the reasons it doesn't get you anywhere is that you've got a case and your job as a lawyer is to win the case for your client. That's what you're trying to do. The client comes to you and says I've got 20 witnesses to prove this point. It's not at all easy for a professional person in that context to say, well 20 is too many, you should have three. It's not easy at all, there's a potential prof neg risk if you start doing that kind of thing and we should be realistic about that. The person who can cut it from 20 to three is the Judge.

LJB "... judges attending events like this and shouting at lawyers telling them that they're spending too much money and doing too much stuff, doesn't get you anywhere."

We can't always expect the parties to cut their cloth in that way because it's not the structure of the way our litigation systems operates. I'm not trying to make excuses for people who are making silly points in Court, but there is something more going on there. If the Court has a role as the intermediary and the neutral in the middle to say - I know you say you want 20 and I don't have to say it out loud because your client behind you wants 20, but I'm only going to give you four because you don't need more than four. I think that sort of very robust case management, if you're a confident Judge who knows the area you're in, you can do it.

One of the difficulties of course is, is that we're all so pressed for time and obviously

the idea that people can focus on the detail as much as you'd like to is hard.

AHKC:

It reminds me of doing work for the Government which I've done a fair bit of in my time. You are instructed by the Government, you tell them, I think you're going to lose this point and they say we need an order to show the Minister, we need a Court decision on it so get the Court to say it and then fine, we'll live with it. There is an element of that sometimes in litigation - if the Judge says it, that's a fact, that's it.

LJB:

I'm a big fan of supporting Judges to be as robust as is right in their case management decisions.

LJB "I'm a big fan of supporting Judges to be as robust as is right in their case management decisions."

JMKC:

I would just like to invite Liz Harris from Victoria in Australia to give us an antipodean perspective on the discussion we're having here. I'm sure you have had similar discussions in your part of the world.

Contribution from the floor (Liz Harris):

Thanks Jeremy, it's been really interesting listening to this for a number of reasons. In Victoria, and in fact in most jurisdictions in Australia, we are still embedded in the old scales of costs. Having said that in our lower level matters, which is now matters up to £100,000/\$200,000, we have had fixed costs regimes for decades, with an ability for a judicial officer to allow increases by reference to the complexity of matters and some criteria. I'm interested to hear the comments about the possibility of actually having criteria which would result in a loading of additional costs. I've been involved in the development of some schemes along those lines, particularly in the personal injury area, but I think the big difference in Victoria is that we're about to

abandon scales of costs and introduce guideline hourly rates and costs budgeting.

I'm a great supporter. I think the big difference for us is that there has been an emphasis on the requirement of lawyers to give estimates to their clients at the outset and update those estimates on what their costs are going to be and what the differential is going to be between the actual costs and party/party recovery. That's been in place since at least 2004. Those requirements were strengthened in 2015. I can't say that lawyers are still particularly good with that, I'm involved with the equivalent of the SRA and still the bulk of consumer complaints relate to costs, but I think solicitors are much better than they were. The barristers are still terrible, but the whole idea behind it is to create an informed client. When it is litigation where you are talking about £100,000, when a client realises that the differential between their actual costs and their recovered costs is going to be £50,000, you know it's then a discussion with the client. Can we run the matter this way, should we be running the matter this way? You need to take this into account in settlement negotiations and the like, because it's going to be a spurious win for you if half of the win is taken up in that differential in costs. And it certainly has changed those discussions and I suppose from my perspective in the end the client is the most important party in this equation. Enabling them to have some understanding about what the parameters of any negotiations and settlements will really mean to them is important. That really underlines the reason that the decision has been made to undertake costs budgeting because with scales of costs, it was almost impossible at the outset to give anyone a sense about what the costs recovery was going to be.

JMKC:

That's very interesting. Here it has become rather a technical exercise with firms just building a business on failure to give proper advice in very low value cases where the advice was quite hard to get anyway. In bigger cases where there can be massive

sums involved, the whole question is would you really sue for a £100,000 if your costs are going to be X. It's critical. Thank you, Liz that's a very interesting description.

Contribution from the floor:

It's a two-part question I suppose on the guideline hourly rates and assessment. With the new 2021 guideline hourly rates as Alex rightly said, not really reflecting the market reality of what to charge for the London 1 firms, my first question is with, with the restrictive interpretation now following Samsung, is it right that rates are so different to market reality, that's part one. Part two, apologies to barristers, but barristers often also charge £1,000 an hour for example, and their costs on assessment, are often just [allowed]. And it doesn't seem to me that this difference is right.

LJB:

I completely agree with you. The thing that used to drive me absolutely insane as a judge was on summary assessment where junior barristers mostly, because they haven't figured it out yet, will go hammer and tongs on their opposing solicitor's bill using the N260 which has all the hourly rates and then they get to counsel's fees and they say - oh of course I haven't got anything to say. I mean it's just ridiculous.

The problem though is the opacity of the bill in the sense of the information about counsel. I don't mean that as a criticism, it's just a fact that the way it works makes it quite opaque. As all of you will know, buried in the rules about costs budgeting there is a provision that says that you should put in or at least you can put in an hourly rate for barristers in your costs budget. I'm not going to hide it, I think we should put in the requirement in the N260 that you put in an hourly rate or at least a time for barristers because it will allow you to compare that number to something. Otherwise, it's very, very difficult. I can't think at the moment of a better way and I think we need to do something about it. I'm very open seriously if someone can come up with a better idea. We either say that you have to have a time or

you have to have an hourly rate, otherwise the number is just not traceable.

LJB "I'm not going to hide it, I think we should put in the requirement in the N260 that you put in an hourly rate or at least a time for barristers ..."

AHKC:

I think in relation to counsel the difficulty is that the authorities suggest that counsel's brief fee should be assessed in some way other than hourly rates. It has to be questioned in this day and age, that there is a concept that because the brief involves preparing for a hearing and thinking about it, that somehow you have to have a different system with barristers. I think that's a fair question as to whether that should remain.

In relation to the guideline hourly rates, the difficulty as I've said is what does the guideline represent? It just represents what costs judges allow. Why do they allow that figure? We don't know. Once you've divorced it from what it actually costs to do the work, how do you set that figure? The reality is that it's a circular process. I'm not saying there's an easy answer because it's not easy to get to the cost of actually doing the work, but if you do so, why set it at five hundred rather than a thousand I suppose because a thousand just gives you too large a sum. There's no particular logic or science to that it seems to me.

AHKC "In relation to the guideline hourly rates, the difficulty as I've said is what does the guideline represent? It just represents what costs judges allow."

Contribution from the floor:

In the [Athena Capital v The Holy See](#) case in the Court of Appeal very recently, counsel's fees were hammered because the payment on account was £100,000 where both counsel were on over £200,000. Counsel's fees were emphatically slashed.

AHKC:

Counsel always feel resentful about judges slashing their fees because often senior judiciary are ex-barristers and they know that those judges five years before were getting brief fees at least that size. They now say that they are outrageous.

Contribution from the floor:

Yes – on counsel's fees. I do quite a lot of Privy Counsel work and I know it's slightly different because it's appellate work, but under the [Judicial Committee of the Privy Council] rules they have hourly rates for solicitors which are still based on the old hourly rates.

Then for each stage of the litigation they have a sort of cap on counsel's combined fees (seniors and juniors) and you've got to have very good reasons to go above them.

AHKC:

The Supreme Court has guideline figures for counsel in terms of fees. There are guideline brief fees which counsel and the Supreme Court always ignore. In reality I think the costs judge and the registrar who assess these things usually allow more than that but in principle if they are guidelines for the Supreme Court they are guidelines for any case in the Supreme Court, which are of course much lower than you'd get in the Court of Appeal or you know where it's just a settlement meeting.

Contribution from the floor:

Could I just say as a barrister that it must be at least fifteen years since my clerk discussed a brief fee in terms other than how many hours are you going to do? It seems to me perfectly reasonable that costs should be dealt with on that basis.

"... as a barrister ... it must be at least fifteen years since my clerk discussed a brief fee in terms other than how many hours are you going to do?"

Could I also make another point that there's a fundamental weakness in our system which drives costs and probably can't be the subject for a costs review?

In that time I don't think I've seen a single case in which counsel have been instructed to advise on evidence at any stage. I think the omission of advice on evidence causes a great deal of costs to be incurred and because the costs budgeting comes quite early, at the costs budgeting stage you have to assume we're going to do X, Y and Z without having thought about whether you really need to.

"I don't think I've seen a single case in which counsel have been instructed to advise on evidence at any stage."

JMKC:

Liz, you wanted to make another point ...

Contribution from the floor (Liz Harris):

I was just going to make a comment about the guideline hourly rates. It comes back to the fundamental question about what is the philosophy behind awards of costs. Is it to provide an indemnity to a successful party? If not then you know where are you looking to get the disparity between actual and recoverable costs from because if it is to provide close to an indemnity then you have to start to look at market rates and that has to be the starting point. The flip side of that is that I review costs in class actions and I get appointed by the Court to look at the costs of claimants. My concern is and again that I have to look at market rates because I can't be setting a rate and allowing a rate that is significantly below what a firm with qualifications and experience in class actions would charge. I would say having been doing this for ten years, that the rates have increased dramatically over that time and because it's a small market, those firms know that they can charge those high rates. So there's that balancing act there as well too.

AHKC:

A number of the submissions to Mr Justice Stewart's committee on guideline rates were – it should be market rates. Everyone can see what's happening in the market but of course the difficulty with that is that it's self serving isn't it? Keep charging more because you know that whatever you charge you'll get. So that doesn't work either.

In relation to that kind of litigation, the courts are well aware that clients are willing to bear shortfalls in big commercial litigation and therefore you don't need a full indemnity in order to get access to justice. But you might need it lower down.

AHKC "... the courts are well aware that clients are willing to bear shortfalls in big commercial litigation and therefore you don't need a full indemnity in order to get access to justice. But you might need it lower down."

END

ADDENDUM: Since the Roundtable took place, we have had the decision of the Court of Appeal in [Belsner v Cam Legal Services Ltd.](#)

Chaired by:

Lord Justice Birss	Judicial Office
Alexander Hutton KC	Hailsham Chambers
Jeremy Morgan KC	Practico

Guests:

Molly Ahmed	Armstrong Teasdale
Imran Benson	Hailsham Chambers
Anya Cross	Addleshaw Goddard
Nicholas Davidson KC	Hailsham Chambers
Henry Fox	Osborne Clarke
Katherine Harper	Goodwin Law
Liz Harris	Ovid Consulting
Mark Harvey	Hugh James
Victoria James	Clifford Chance
Enfys Jenkins	Simons Muirhead Burton
Jennifer McDowell	Jones Day
Mollie MacGinty	Clifford Chance
Maura McIntosh	Herbert Smith Freehills
Kevan Neil	Herbert Smith Freehills
Louise Nicholson	Baker McKenzie
David Phillips	Simons Muirhead Burton
Dominic Regan	DR Training
Amy Shaw	Judicial Office
Jamie Streete	Clifford Chance
Alicia Tew	Hailsham Chambers
Craig Thompson	TLT
Alex Vakil	RPC

Hosted by Practico:

Deborah Burke
James Coleman
Andy Ellis
Francesca Ellis
James Heawood
Aimee Lawman



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