This Note has been prepared to assist parties in advance of cost management hearings in the King's Bench Division involving high value personal injury claims. The purpose of the Note is to provide a neutral approach to issues which commonly arise with a view to aiding settlement of issues which commonly arise in the budgeting process.

General approach

1. A costs budget is not reached through the same process as detailed assessment. However, in considering whether a budget is proportionate the court required to have regard to the provisions of CPR 44.3 (5). This provides:

> *Costs incurred are proportionate if they bear a reasonable relationship to –*
> *(a) the sums in issue in the proceedings;*
> *(b) the value of any non-monetary relief in issue in the proceedings;*
> *(c) the complexity of the litigation;*
> *(d) any additional work generated by the conduct of the paying party,*
> *(e) any wider factors involved in the proceedings, such as reputation or public importance; and*
> *(f) any additional work undertaken or expense incurred due to the vulnerability of a party or any witness.*

2. In considering whether costs are reasonable the following factors which are set out at CPR 44.4 (2) are relevant to the amount of a costs budget:

> *(a) the amount or value of any money or property involved;*
> *(b) the particular complexity of the matter or the difficulty or novelty of the questions raised;*
> *(c) the skill, effort, specialised knowledge and responsibility involved;*
> *(d) the place where and the circumstances in which work or any part of it is to be done*.

3. The following three criteria provide the applicable general test as to the recoverability of any given item of cost:

> (i) proved of use and service in the action;
>
> (ii) was relevant to an issue;
>
> (iii) was attributed to the defendant's conduct (i.e. that which gave rise to the cause of action in the first place).

The criteria[1] summarised by the Court of Appeal Hadley v Pryzybylo [2024]EWCA Civ 250 (at [38]) as utility, relevance and attributability.

[1]Deriving from *In Re Gibson's Settlement Trusts* [1981] Ch 179

4. General issues that commonly arise

4.1 Hourly rates of solicitors. When undertaking costs management, it is not the role of court to fix or approve rates (see CPR 3.15(8)). There is, accordingly, no requirement for the court to make any determination of the reasonableness of hourly rates. Nevertheless, in considering whether a proposed budget is reasonable, regard may be had to the reasonableness of the hourly rates claimed (and the availability of other solicitors to do the work competently at lesser rates). Further, in a detailed assessment it is generally recognised that the GHR are a starting point in determining the reasonableness of the rates claimed; thus an allowance of a budget which is based on hourly rates that involve some uplift on the GHR may be appropriate, particularly for more senior fee earners dealing with complex high value claims.

4.2 Reservation of hourly rates to detailed assessment. It is clear and well established that it is not appropriate to costs budget on the basis that hourly rates will be reserved to detailed assessment, see *Yirenkyi v Ministry of Defence* [2018] EWHC 3102 (QB)

4.3 Delegation. When considering the hourly rates claimed, consideration may be given to the involvement of a senior fee earners in work which could reasonably be delegated to a more junior fee earner (at lower hourly rates). Typically, junior grade D fee earners are, for instance, involved in obtaining medical records from medical providers (and the substantial involvement of higher grade fee earners in this task may be unreasonable).

4.4 Counsels' fees. It is not the role of the court to determine how the claimant should be represented, in particular whether by leading or junior counsel or by two counsel. Plainly some cases justify the involvement of two counsel. Experienced junior counsel are however commonly instructed in claims of substantial value. If two counsel are to be instructed, then this may be reflected in the allowance to be made for the involvement of senior fee earners (of instructing solicitors). Further, where two counsel are instructed, the work anticipated may be assumed to be shared, such that the substantial involvement of junior counsel may reasonably be expected to reduce the extent of leading counsel's involvement.

Phases

5. The correct phase?

As the Court of Appeal made clear in *Hadley*, Precedent Form H applies to all civil litigation so it cannot be expected to provide a bespoke fit for everty type of claim. In that case although costs of the attendance of rehabilitative case management meetings where not considered an "obvious fit" under the heading 'Issues and Statements of Case' nevertheless in circumstances where none of other phases were not considered an obvious fit, such costs should be property claimed in this phase.

6. Issue and Statements of Case

In many cases this phase will have been largely completed by the time of the first CCMC. It is however commonly the case that the schedule of loss requires extensive further work at this stage. It is not the job of the court to determine who should draft a schedule but when considering the allowance to be made in the budget for the work to be done regard may be had to the anticipated costs of counsel (normally those of junior counsel). Indeed, in complex schedules where calculations may be required of pension loss or loss of earnings (which require consideration of contingencies such as, for instance, promotion) the relative familiarity of counsel in dealing with such issues may mean that the work is reasonably done by counsel.

7. Disclosure

7.1 The consideration of the nature of and extent of the documents that may be caught by disclosure, and the extent to which such documents require careful consideration is highly case-sensitive.

7.2 It is recognised that on-going case manager assessments may require careful consideration and the issue as to whether this work and the extent to which this work can delegated is also case sensitive. A distinction is however to be made between obtaining updated records and assessment (generally Grade D work) and reviewing them, which often justifies a higher grade of fee earner.

7.3 In most cases solicitors can be expected to keep a *running* electronic bundle of documents which can be bookmarked and added to as and when new documentation is made available. This is so even in document heavy cases (perhaps particularly so in such cases). This bundle can then be edited (and the index annotated) so that it forms the basis of any trial bundle.

7.4 The assembling and pagination of bundles are generally to be regarded as administrative or secretarial tasks the costs of which are taken into account within the hourly rate of the fee earners involved; it is not generally separately chargeable (cf work done on preparing an index and deciding what documents should be included in a bundle) (see 3E PD.4) .

8. Witness statements

In general, there is an expectation that the first draft of a witness statement can be undertaken by lower grade fee earners including Grade C solicitors and legal executives (and those with similar experience). This is particularly so since witness statements should, in general, be drafted in the witness' own words. Whether and the extent to which a higher level senior fee earners may reasonably be involved in taking the witness statement and/or checking the contents of the statement is case sensitive and may depend on the complexity and value of the case.

9. Experts

9.1 Assumptions

The court, in general, assumes that in all cases where parties have instructed different experts there will be, and will remain up to an including trial, a dispute between the experts. If and to the extent that there is no substantial or material dispute between the experts following service of reports or joint statements this may, in general, constitute a good reason for departing from the budget at detailed assessment (or by agreement); this is not however a matter for costs management.

9.2 Fees of experts

The court may have regard to its own experience with the regard to the rates of experts. It is the function of the court to determine a reasonable and proportionate budget and it does not follow that simply because an expert has asserted that their fees will be a certain amount the court should set a budget which reflects the amount requested. It is however recognised that in general the fees charged by experts who are instructed by the NHSR or insurers may be less than are paid by claimants (by reason of the greater negotiating power of such organisations).

9.3 Consultations/conference with experts

In some, if not many, cases these can be conducted by videolink without the need for experts to incur travel expenses or to spend time travelling. Whether allowance should be made for attendance of an expert in person is however case sensitive. It is recognised that where, for instance, liability is in issue in a clinical negligence claim, close scrutiny may be required of scans/x-rays justifying in person attendance and that there may be other instances where in person conferences or consultations with experts may be reasonably be anticipated.

10. Costs of PTR

In general in the KB a PTR is not considered necessary and often costs of 2/3 hours are allowed to deal with issues relating to listing and associated matters together with a listing fee where appropriate.

11. Trial preparation

11.1 Preparation of trial bundles

See comments above in section 6.

11.2 Pre-trial conference/consultation

Whether a pre-trial conference is in principle reasonable is case sensitive and may depend on the extent to which allowance is made elsewhere for conferences and consultations.

11.3 Brief fees

In determining brief fees at detailed assessment the court is generally required to envisage hypothetical counsel capable of conducting the particular case effectively but unable or unwilling to insist on the particular high fee sometimes demanded by counsel of pre-eminent reputation, *Simpsons Motor Sales (London) Ltd v Hendon Corporation (No. 2)* [1965] 1 WLR 112 (per Pennycuick J).

In general, there are two elements to the determination of a brief fee: the work counsel will put in on the brief. This is generally regarded as the main element and is generally understood to include time spent preparing a skeleton argument, the opening speech, any examination in chief, cross examination (but also closing submissions , the first day of trial, and the checking of the judgment are also generally included); and, secondly, the fact that counsel has been booked for the trial and so will have a gap in their diary if the case settles (which may be difficult to fill at short notice). If counsel is expected to be heavily involved in the earlier phases of a case then this will inevitably have an effect upon the level of a reasonable brief fee because it will impact upon the amount of work required in preparing for trial.

See generally in respect of the rates of leading counsel, and other related matters concerning brief fees, *Hankin v Barrington & Ors* [2021] EWHC B1 (Costs).

12. Trial

12.1 Experts' attendance at trial.

At a CCMC the Court may not be in a position to say whether and for how long it would be reasonable for the experts to attend trial. In some cases permission to allow experts to give oral evidence will be determined at a later date; in other cases it may be appropriate to order at the CCMC that the parties have permission to call their experts to give oral evidence to the extent that there remains a substantial and material dispute between the experts (following joint statements). In either case the budgets can be expected to provide for attendance at trial on the assumption that attendance is reasonable.

Some experts might be expected to attend only for one day of trial or indeed only for part of the day (typically neuroradiologists when providing an interpretation of an MRI for instance). In cases where it is unclear whether attendance will be reasonably required for more than one day the parties can be expected to agree a budget attendance on the basis of an assumption (typically of one day or two days' attendance) without there being any implicit finding or agreement that it would be reasonable for the expert to attend for this period. The allowance for experts can be adjusted in due course should it be the case that two days' attendance of a particular expert has been assumed was not reasonable and/or proportionate and, similarly, if the expert were reasonably required to attend for longer than budgeted. The assumption made (whatever it is) however can and generally should be recorded in the order.

12.2 Solicitors attendance at trial.

12.2.1 **Level of fee earner.** Issues might arise as to the seniority of the fee earner attending trial if a solicitor's attendance is reasonably required. But even in high value cases it may not be reasonable for a senior solicitor to attend throughout a trial.

12.2.2 **Estimating times for solicitor's attendance at trial and associated work**. Ordinarily the court sits for five hours, from 10:30 until 1:00 pm and then from 2:00 pm to 4:30pm. There may, in addition, be a reasonable allowance for the solicitors' time at meetings before and after court and for time travelling to and from court; there may also be additional work in

ensuring the notes made in the course of hearing are made available to counsel in the course of the trial. It is however generally reasonable to take as a starting point 7/8 hours work for a solicitor's attendance (when the solicitor is not acting as advocate).

13. ADR/Settlement

13.1 Joint Settlement Meetings (JSM) It is not generally an objection to an allowance being made for a JSM that one or other party thinks such a meeting is unlikely to be required (unless it is clear that one will not be required or appropriate). It can be budgeted for on the assumption that one will take place. If a JSM is not required, then that is likely to be a good reason to depart downwards from a budget allowance. Again, the order can be expected to state whether attendance at a JSM (or mediation, exceptionally) is assumed.

13.2 This is an important phase which in high value claims in particular may require a significant amount of work. But in considering the budget to be made it is necessary to take into account the extent to which counsel and solicitors will be familiar with the issues arising from their earlier involvement in the case.

14. Costs of Costs Management hearings

The parties are reminded that the provisions set out in CPR 44.2 apply, see ***Reid v Wye Valley NHS Trust*** [2023] EWHC 2843 (KB)

15. Form of Order

14.1 In general where incurred costs are not agreed the order should provide that incurred costs are subject to detailed assessment if not agreed.

14.2 Suggested form of order:

> *On the basis that incurred costs are not agreed and are subject to detailed assessment if not agreed, the parties costs budgets are approved/agreed in the following sums:*
>
> *(1) Claimant agreed [as to the following phases: ….] otherwise approved/approved – [£]*
> *(2) Defendant agreed [as to the following phases: ….] otherwise approved /approved – [£]*
>
> *Revised as appropriate Precedent H front sheets are to be filed and served within 7 days.*
>
> *The assumption on which the costs budgets are agreed or approved by the court are:*
>
> *(1) The following experts [ ] will attend trial for [ ] days; etc*

SJB March 24