Gniomhaireacht Bainistiochta an Chisteain Naisiunta
National Treasury Management Agency

An Ghnfomhaireacht um Eilimh ar an Stat
State Claims Agency

State Claims Agency Opening Statement on Legal Costs to Meeting of the Joint Oireachtas Committee on Justice and Equality

18 December 2019

1. Introduction: Work of SCA Legal Costs Unit

Dear Chairperson and Committee Members,

Thank you for inviting me to talk about the issue of legal costs from the perspective of the State Claims Agency {SCA). I will begin with the role of the SCA Legal Costs Unit and I will then make a couple of specific comments on third-party legal costs in personal injury cases.

2. Work of SCA Legal Costs Unit

The Legal Costs Unit (LCU) was established within the SCA in 2013 to deal with third-party costs arising from certain Tribunals of Inquiry (the Mahon, Moriarty, Morris and Smithwick Tribunals). Its remit has been extended to include third-party legal costs of the State and certain State authorities. This means that the LCU deals with third-party legal costs in relation to these State author ities, whether they arise in the course of the SCA's own claims management work or in respect of other legal costs incurred by the State authority concerned.

The LCU carefully examines the legal costs submitted by plaintiffs' legal representatives. We then negotiate to cut the State's bill for legal costs by as much as possible If we can't reach an agreement that is acceptable to us, we refer the case to a Legal Costs Adjudicator , subject to a right of appeal to the High Court.

The LCU has been successful in achieving very significant savings for the State. I have attached a summary of our results in 2017 and 2018 and the position up to end-November 2019 as an Appendix to this Statement.

3. Legal Services Market

While we are aware of the significant level of public dissatisfaction with legal costs, our view is that large section s of the legal services market work effectively and are generally non-controversial in terms of solicitors' or barristers' remuneration. These include areas such as probate , conveyan cing, company law, including acquisitions and mergers, and commercial disputes. The introduction of the Legal Services Regulation Act 2015 and the lawyer/client terms and conditions agreement mandated under Section 150 is likely to enhance relationships and competitive fee structures in these areas.

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The common denominator driving the smooth working of these areas of law is pure economic market forces. In short, consumers have never been more empowered and equipped to shop around and do so in respect of certain categories of legal costs expenditure where there is a direct contractual liability to meet the cost of the service rendered.

But it would be a mistake to say that the entire market for legal services is functioning as competitively as it should. Personal injury litigation is the great outlier in this regard due in large part to the widespread take up of *no win no fee* retainers. It cannot be disputed that such terms facilitate access to justice for those who would not otherwise have the means. In basic terms, the injured party may not have the financial resources to fund litigation but has a good case which the solicitor is keen to take. However, ultimately, the costs are paid by a third-party insurer or indemnifier and there is no incentive on the plaintiff to shop around or to seek value as to fees charged. The problem with this, which was remarked upon in the Legal Costs Working Group Report published in 2005 ("the Haran Group"), is that *"the person paying the piper is not entitled to call the tune"*. Of course, this model only works where the defendant or potential indemnifier for damages and costs has sufficient resources and there is a good prospect of success.

One particular issue worth noting is that excessively high legal costs in personal injury litigation were flagged during an earlier pressure point in the mid-1980sresulting in certain measures to alleviate the problem. One such measure, namely Section 5 of the Courts Act 1988, was enacted to end the practice of briefing two senior counsel and one junior counsel in personal injury cases. The Bar Council (as it was then known) held a meeting of members which resolved that not more than one senior counsel and one junior shall seek to recover brief fees on a taxation of party and party costs in personal injuries actions . An undertaking in these terms was provided to the Minister for Industry and Commerce and the relevant statutory provisions were left in abeyance. The undertaking has since been withdrawn unilaterally by the Bar of Ireland on the grounds that it is anti-competitive. The impact by way of increased numbers of counsel brief fees has been limited to a small number of catastrophic injury claims to date, however the Taxing Master , in a written ruling delivered in one such case, opined that claims for two senior counsel and one junior counsel are likely to become more frequent as the precedent for such representation becomes more established.

4. The Legal Services Regulation Act 2015 (Part 10) and Superior Court Costs Rules 2019 (SI 584/2019)

The legal costs provisions introduced under the Legal Services Regulation Act 2015 are to be welcomed and have the potential to reduce litigation costs. For example, modification of the costs follow the event rule (Section 169) will enable the court to carve out costs orders that do justice as between the parties. New court rules contained in SI 584 2019 will also be of assistance to paying parties with capacity to make lodgements or tender against legal costs liabilities with a view to avoiding some of the costs of adjudication. These measures were identified by the Haran Group as necessary to reduce costs and there are good reasons to believe that they will achieve this aim.

The Haran Group also advocated a three-pronged approach for reducing legal costs including replacement of the taxation of costs system, enhanced/meaningful lawyer client written retainers and an overhaul of court processes with a view to increased efficiency. Progress has been made in all three areas. The newly appointed Chief Legal Costs Adjudicator brings a vast amount of experience in legal costs knowledge. He has undoubted expertise and is well placed to improve the

operation of the rules for all parties by way of practice directions, protocols and other informal guidelines. The new four phase bill of costs which replaces the traditional lump sum approach is aimed at providing more transparency in the process. However, I would note that transparency in costs claimed is an area in which further work could prove beneficial.

5. Legal Costs Initiatives in England and Wales

Finally, I would note that the legal costs landscape in England and Wales has been undergoing major transformation in recent years. While these reforms remain ongoing and it may be too soon to draw conclusions as to their overall effect, there are two particular initiatives, proportionality and costs management, which I would draw to the Committee's attention.

Under the principle of proportionality, no more should be payable than if the litigation had been conducted in a proportionate manner. The so called *Lowndes test* indicates that where global costs are disproportionate, then individual items should be only allowed if established that they were *necessarily* incurred and reasonable. A more radical approach evolved whereby a final costs figure was effectively guillotined if the outcome was deemed to be disproportionate to the issues litigate d. In recent times, there has been a move away from the guillotine approach towards the original *Lowndes test* enunciated in 2002.

Section 17 of the Courts Act 1981(replaced by Section 14 of the Courts Act 1991) is an example of an earlier Irish experience with this principle. The rule was generally unsuccessful as the prevailing view on an adjudication of costs was that the statutory cap had no application in respect of negotiated settlements or consent orders where the onus was placed on the paying party to expressly provide the limitation as a term of the settlement. Furthermore, increases in jurisdiction of the courts have rendered the 1991provision redundant.

Proportionality can be of particular use in lower value claims where costs claimed and allowed can, in some cases, exceed the damages awarded.

In England and Wales, costs management is inextricably linked to case management as an overriding principle of the Civil Procedure Rules in force. A costs budgeting approach is regularly used in the UK courts at a preliminary phase of proceedings and is prospective in nature. The parties apply to the court for approval of a litigation budget which is enforced with liberty to increase the amount fixed for costs in only limited circumstances. Such a system can have benefits for larger claims where case management directions are presently in use.

6. Conclusion

I will conclude by saying I hope my remarks have been helpful to the Committee and I am happy to assist the Committee with any further queries you may have.

Appendix

Legal Cost Claims Settled 1 January to 30 November 2019*

	Number of Cost Claims Negotiated	Amount Claimed €m	Cost of Claims Agreed €m	Legal Cost Saving %
SCA Clinical	183	47.1	30.1	36
SCA General	112	6.3	4.4	30
Tribunals of Inquiry	16	3.1	1.5	52
Other	419	39	23.5	40
Total	**730**	**95.5**	**59.5**	**38**

• as at 30.11.19

Legal Cost Claims Settled 2018*

	Number of Cost Claims Negotiated	Amount Claimed €m	Cost of Claims Agreed €m	Legal Cost Saving %
SCA Clinical	187	47.4	29.8	37
SCA General	138	9.3	6.2	34
Tribunals of Inquiry	38	13.3	5.6	58
Other	193	20.6	12.0	42
Total	**556**	**90.6**	**53.7**	**41**

•as at 31.12.18

Legal Cost Claims Settled 2017*

	Number of Cost Claims Negotiated	Amount Claimed €m	Cost of Claims Agreed €m	Legal Cost Saving %
SCA Clinical	156	37.2	21.9	41
SCA General	110	6.2	4.2	33
Tribunals of Inquiry	51	41.7	17.2	59
Other	123	21.7	12.0	45
Total	**440**	**106.9**	**55.2**	**48**

•as at 31.12.17

Figures may not total due to rounding.