CITY OF LONDON LAW SOCIETY

LITIGATION COMMITTEE

MINUTES OF MEETING

Committee Meeting held at Freshfields Bruckhaus Deringer

Date 27 January 2009, 3.30 pm

Present:	**Firm**	
Lindsay Marr (Chairman)	Freshfields Bruckhaus Deringer LLP	("LM")
Duncan Black	Field Fisher Waterhouse LLP	("DB")
Tom Coates	Lewis Silkin LLP	("TC")
Angela Dimsdale-Gill	Lovells	("ADG")
Gavin Foggo	Fox Williams	("GF")
Richard Foss	Kingsley Napley	("RF")
Nicola Gare (attending for Willy Manners)	Macfarlanes	("NG")
Simon James	Clifford Chance LLP	("SJ")
Colin Joseph (Attending for Kevin Perry)	Edwards Angell Palmer & Dodge	("CJ")
Keith Levene (attending for Stefan Paciorek)	Pinsent Mason	("KL")
Rory McAlpine	Denton Wilde Sapte LLP	("RM")
Arundel McDougall	Ashursts	("AM")
Hardeep Nahal	Herbert Smith	("HN")
Omar Qureshi (attending for Tony Marks)	CMS Cameron McKenna	("OQ")
Philip Vaughan	Simmons & Simmons	("PV")

In attendance:

Lara Woodward Freshfields Bruckhaus Deringer LLP (minutes)

Shona Crallan Freshfields Bruckhaus Deringer LLP (minutes)

Apologies:

Apologies were received from: Richard Smith (Allen & Overy)

1. JACKSON COSTS REVIEW ON THE RULES AND PRINCIPLES GOVERNING THE COSTS OF CIVIL LITIGATION

1.1 Meeting to provide feedback to Phase 1 of the Review

LM said that HN had arranged for HN and LM to attend a meeting with Lord Justice Jackson on 29 January 2009. The primary topic for today's meeting was to discuss the topics for which Jackson LJ had requested information to assist with "Phase 1" of his costs review (the ***Costs Review***) is review so that we could represent the Committee's views on a the meeting. It was agreed that the meeting with Jackson LJ would be in lieu of a written submission in respect of Phase 1 (of course, we may wish to comment at the subsequent consultation phase in the summer).

HN reported that Hilton Mervis (of Lovells on behalf of the Commercial Litigators' Forum) and John Reynolds (of White & Case) will also be meeting.

Referring to the Review, HN commented that the first 3 months of the Review would be spent looking at the issues, and that by Easter there would be an outline of the key issues and what required further investigation. There were also reviews being undertaken on the model in other jurisdictions.

It was agreed that it would be helpful to ask on Thursday what the problem areas are seen to be. In terms of the costs incurred, it was agreed that the Committee is not in a position to submit a survey of statistical data on recovery rates but it was noted that a number of firms are currently looking at providing this data.

The Committee thought that the Review's discussion on proportionality of costs was probably referring to personal injury cases, as it was considered that in general in the larger cases that made up most of the workload of the firms present, the cost would not exceed the damages recovered. However, it was agreed that this would not necessarily be the case, and that it was important to look at what the alternative outcome could be if the costs did exceed damages recovered.

It was agreed that it would be helpful to assess the key areas which result in disproportionate costs and look at how to best manage them. These are:

- Discovery
- Witness statements
- Pre protocol behaviour
- trial

1.2 List of Issues

The Committee queried whether there should be a List of Issues generally beyond the Commercial Court, but decided that this should be subject to it being tested in the Commercial Court first. The Committee felt that the List of Issues should be an evolving document. LM said that if the List of Issues works then it should be used in

other courts also. CV questioned whether it was thought of as a cumbersome cost but LM felt that generally people were in favour of the model. SJ said that the List of Issues was introduced because of criticism of the use of pleadings, so therefore it would be better to fix the pleadings rather than abandon them. He said it would be helpful to ask the following: what are pleadings and why do we have them?

ADG said that over time judges have added layers to the process by adding on skeletons and openings and closings. Extra steps tended to increase costs. AM said that at the forum on the LTWP proposals on 26 January 2009, there was an indication that judges were prepared to become more involved in managing cases. RM said that greater involvement by judges would help.

ADG said that the reason costs were so high in the private sector is because the public sector is under funded resulting in shortage of judicial resources. CV agreed, but said that this response was always rejected.

The Committee felt that the List of Issues has not yet been in operation for a sufficient period to see its effects on the subsequent stages of case preparation and on trial. While it costs more in itself, it was felt that if it reduces the length of witness statements and the scope of discovery then it would be beneficial. However, whether it achieved this result would not be known for a couple of years, and there were some on the Committee who did not think this would be the result.

A further point that was made was that when looking at the issue of costs, the aim is to provide justice at a proportionate cost. So the next question has to be what standard of justice do you want. If you consider that England has a Rolls Royce justice system because of some of its present features, including discovery and that this should be preserved, then you have to accept the reality that it takes time and money to operate in that way.

The point was raised that the quality of justice is relevant when considering what cost is proportionate. It does not make sense to have the same procedure (and therefore expense) in a personal injury case for £10,000 as in a case for £10m (although the value of a "small" PI claim may be great to the individual involved).

1.3 Cost capping

It was noted that cost capping does not in fact control costs, but is merely a limit on the recovery of costs rather than how much is spent in the first place.

LM felt that there must be a more up to date way to do a cost assessment than the present cumbersome approach to a detailed assessment. KL said that it is common to submit 2 pages summarising costs to the Court, and that this is usually accepted. AD raised the concern that costs can become an action in itself. The Committee was of the view that the way costs are assessed is removed from how time is actually recorded. It was suggested that costs should be detailed to the Court in the same way as you provide a costs narrative to a client. This would save time as you could simply copy and print the client's costs narrative for the court.

TC said that the paying party should disclose their costs by the same categories as the other side. HN agreed this would be a good idea. TC said that if both sides had broadly the same number of witnesses and discovery a comparison between the amount spent by each party might save the need for a costs assessment.

HN suggested that an alternative approach to costs might remove the need for a detailed assessment in the majority of cases. His suggestion was that the wining side could be offered, say, 70% of their costs or the choice of an assessment. If the assessment resulted in a greater amount being awarded then they would receive this difference but if less, they would have to pay the cost of the detailed assessment.

AD felt that this was a very good idea but that it was too radical for the courts at present. TC asked whether, under this system, the paying party would also have the right to challenge? DB suggested that they would, but that the same rule would apply that if they requested a detailed cost assessment and it resulted in their being awarded less, they would have to pay the cost of the assessment. Concern was raised that with this model, the successful party could receive costs without having to create a detailed statement. KL felt that the problem at present is the interim payment, and DB said that this model would not require an interim payment provision since the 70% would be payable up front.

It was queried whether the indemnity principal was sufficient to deal with a situation where one party pays their lawyers a very high figure.

HN concluded that there were some good ideas to raise with Lord Justice Jackson.

1.4 Witness statements

The question was posed whether the procedure should revert to the old system of relatively short witness summaries coupled with examination in chief.

RA said that he was in favour of witness statements and that he felt they were criticised unjustifiably. He said that the length of witness statements was not a problem when they can save time and cost at trial. There were differing views as to whether a detailed witness statement allowed a dishonest witness to hide behind the statement or tended unfairly to trip up n honest witness.

LM said that he would prefer to have witness statements than not, although he felt it would be better if they were reigned in somewhat in their length. HN referred to the fact that Andrew Smith had clarified that the rules as to lists of issues had not been intended to move away from a statement being a chronological narrative. Linking the statement to the issues could be done by a marginal cross reference against each paragraph in the statement to the relevant issue(s).

1.5 Disclosure

There was a discussions about the considerable disclosure burden even under the Woolf reforms, aggravated by the massive expansion of electronic documentation. It was noted that Lord Woolf wrote his report at a time when electronic documents were increasing rapidly. The reforms had therefore not achieved the aim of reducing the

cost of disclosure. It was noted that the disclosure process had a huge impact on the costs of litigation, both in its own terms and because its affect on the scope of subsequent evidence. DB highlighted the concern that judges and counsel were not usually the best placed to determine disclosure issues and said that these matters would often be better dealt with by solicitors. DB also noted that in the USA there was no obligation to list disclosed documents, and he suggested that this approach could save significant costs since it takes so long to prepare the list. It was suggested that it might be preferable if there was a system whereby the costs of detailed review were borne by the other party rather than the disclosing party

It was suggested that to make a significant impact on reducing the cost of disclosure process, it would be necessary to move away from the present approach of having to disclose both documents on which the disclosing party wishes to rely and those which may help the opposing party. A narrower obligation as the initial disclosure would reduce the extent of document reviews. It was noted that at the recent Commercial Litigators' forum, Mark Humphreys (Linklaters) had suggested that we should move away from automatic disclosure. On the other hand, this would risk undermining an important protection of our legal system, although there would still be an obligation to preserve documents so that they were available if an order for targeted disclosure was made.

It was considered that the Commercial Court list of issues might prove of some assistance in controlling disclosure.

1.6 Trial estimates

The intention of the LTWP had been for all trial estimates to be for a maximum of 3 months. SJ suggested not having speeches, as it is faster to read than be read to. LM said that oral closings should be kept since it was the only time now when the advocate could fully develop an oral presentation of his submissions, although he accepted that a tighter control was necessary on lengthy oral advocacy. SJ agreed that an oral closing could be something that the Judge would ask for if required, but suggested they could be severely time limited, e.g. to 30 minutes. AD agreed that oral advocacy is a valuable part of the English legal system. It was agreed that limits on cross examination generally work.

1.7 Cost Capping/Estimates

The Committee felt that that costs capping was not generally helpful for commercial cases.

1.8 Cost Shifting

Concern was raised as to what the results would be if cost shifting were to be abolished. SJ felt that it should not be, and LM agreed.

DB proposed that contingency fees were acceptable. KL noted that pure no win no fee cases are very rare in commercial cases. Usually commercial cases adopting a conditional fee approach would use a hybrid so that lower fees (rather than no fee) are charged in return for an uplifted fee if successful. It was suggested that a problem

with contingency fees, in the same way as third party funding, is that the third party funder is liable – so then lawyers expose themselves to that. Although lawyers can take out insurance to protect themselves against this.

The situation in employment claims was discussed, where because there is no cost shifting in employment disputes, there is value to settling a host of unmeritorious claims because the employer can not get the costs back even if they win.

The question was then raised whether contingency fees can exist within a cost shifting model. It was felt that they could so long as the contingency itself wasn't recoverable. Contingency fees and costs shifting were not necessarily alternatives. The Committee agreed that in principle there is no difference between contingency fees and a success fee. It was suggested that you could add contingency fees as a different layer. It was suggested that because pure no win no fee contingency fee arrangements are very rare in commercial cases, litigation is unavailable to many who could not afford the hybrid model. However it was also noted that contingency fees are not common in the USA for large commercial firms. Clients who can pay will choose to pay all the cost and receive the full amount if they win. It was agreed that the access to justice argument is not aimed at big commercial clients.

1.9 C.F.A's

The Committee had no comments in respect of CFAs in the present context.

1.10 Hourly Rates

The Committee recognised that lawyers' rates may have been slightly higher in the UK than in the US in recent years, but that was heavily influenced by the exchange rate and given the current depreciation of sterling, would no have been reversed. Hourly rates were not the whole story in arriving at the cost of litigation. Work for international clients took place in a competitive market. The reason that costs were cheaper in Europe other than the UK was said to be the difference in legal systems – an inquisitorial system will be cheaper as you do not have disclosure.

Some on the Committee doubted that clients would favour a large scale move away from hourly rates for litigation because of the uncertainties of litigation and that hourly rates were at least transparent. (Contingency fees would of course be moving away from that model.)

2. COMMERCIAL COURT REFORM

2.1 The Committee noted the questionnaire circulated by Flaux J regarding the experience with the LTWP pilot. It was agreed that in view of the feedback already provided to the Commercial judges via the Committee's open meeting in December, the Committee would not look to respond to the questionnaire. It was noted that it was likely that some individual firms would be responding.

3. MOJ CONSULTATION PAPER DATED 10 DECEMBER ON CIVIL COURT FEES 2008

3.1 The consultation was noted but it was considered that the particular fee revisions proposed concerned mainly matters in the Magistrates' Courts and in family/matrimonial proceedings. These were areas of work outside the general experience of the Committee and so it was therefore agreed that the Committee would not respond to this consultation.

4. SRA CONSULTATION PAPER DATED 21 JANUARY 2009 ON MANDATORY ACCREDITATION FOR HIGHER COURT ADVOCATES

4.1 The Committee noted that they had already voiced their dislike for mandatory accreditation in responses to the previous two SRA consultations on this topic in 2007 and 2008. It was agreed that ADG would produce a short further submission in response the latest paper for further discussion at the meeting in March 2009.

5. LAW SOCIETY CONSULTATION PAPER DATED 18 DECEMBER 2008 ON LITIGATION FUNDING

5.1 The Committee agreed that they would consider this consultation paper at the meeting in March 2009.

6. CJC RECOMMENDATIONS ON COLLECTIVE ACTIONS (FINAL REPORT OF NOVEMBER 2008)

6.1 HN said he understood from a discussion he had had in December 2008 with one of those involved that a CP was being prepared on the question of collective redress and the reform of CPR Rule 19. He understood that there could be the option of an "opt in" or an "opt out" approach, but with a bias towards opt in (which is what Rachael Mulheron was arguing for). HN said that he would see if he could find out when a draft of the new rules might be available and whether there was yet a date for the white paper.

7. EU GREEN PAPER ON COLLECTIVE REDRESS DATED 27 NOVEMBER 2008

7.1 It was agreed by the Committee that they would not respond to this consultation. It was considered premature to do so at a point when there was about to be major domestic consultation on possible domestic reforms in this area.

8. NEXT MEETING

8.1 LM said that an email would be sent regarding the next meeting in mid March 2009.