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CLLS Litigation Committee: Response to the Preliminary Report

INTRODUCTION

1. This is the response of the City of London Law Society's Litigation Committee to Lord Justice Jackson's Preliminary Report on Civil Litigation Costs dated 8 May 2009 (the "**Preliminary Report**").

2. The City of London Law Society ("**CLLS**") is one of the largest local Law Societies in the United Kingdom. There are 17,000 solicitors practising in the Square Mile, who make up 15% of the profession in England and Wales and the CLLS represents approximately 13,000 of these solicitors through individual and corporate membership. The CLLS's professional work is conducted through seventeen specialist Committees drawn from the Society's membership, who meet regularly to discuss pending legislation, law reform and practice issues in their fields. These specialist Committees provide unique City expertise and have regularly influenced the Government's law reform activities. The Litigation Committee is comprised of sixteen partners from eminent City firms.

3. On 29 January 2009, two members of our Committee, Lindsay Marr of Freshfields (Chairman) and Hardeep Nahal of Herbert Smith, had a meeting with Lord Justice Jackson, along with two members of the committee of the Commercial Litigators

Form ("**CLF**"), Hilton Mervis of SJ Berwin and John Reynolds of White & Case. That meeting is described at paragraphs 11.1 to 11.17 of Chapter 10 at pp.116-119 of the Preliminary Report. We and the CLF then held a joint open meeting on 13 July 2009 at which Lord Justice Jackson spoke.

4. In this response we address the points insofar as they concern commercial litigation, including litigation in the Commercial Court but keeping in mind that commercial cases also take place in other parts of the High Court including the Chancery Division and the general Queen's Bench Division.

5. It is important in our view to keep at the forefront of this review that London is a popular venue of choice for international business clients for the resolution of their disputes. Any recommendations for reform of the civil justice regime in this jurisdiction should therefore be designed to ensure that this jurisdiction remains attractive to such clients for the resolution of their disputes.

PART 1: THE COSTS RULES AND THE COSTS WAR

Should the indemnity principle be abolished (Chapter 3, paragraph 5.48, page 37)?

6. No. We strongly disagree with the suggestion that the indemnity principle (namely, that a party cannot recover more than its actual costs) should be abolished. We consider that it is wrong as a matter of principle that a winning litigant should be able to claim more than its actual costs. If that were the case, the winning litigant would in effect be recovering additional damages. This would be contrary to the long-established principle in England and Wales of courts awarding compensatory damages as opposed to exemplary or punitive damages.

7. As litigators dealing primarily with large commercial claims, we have not been involved in the “Costs War”. However, the fact that parties to other types of

litigation have run technical arguments in respect of the indemnity principle (and on occasion have unfairly deprived winning parties of their costs) does not mean that the indemnity principle is wrong. Abolishing the indemnity principle would be unlikely to stop losing parties disputing the amount of costs which they need to pay, but it would lead to injustice by permitting winning parties to recover a windfall, over and above the costs which they actually incurred. Moreover, we understand that recent case law has largely disposed of the technical arguments that were being used.

Does the Costs War serve the public interest or benefit the profession as a whole (Chapter 3, paragraph 5.50, pp.37-8)? If not, what further measures should be taken to stamp out such litigation?

8. We agree that numerous expensive disputes about how much money should be paid to lawyers is undesirable, and that it is unfair that some claimant lawyers should secure windfalls whilst others should receive no remuneration for work properly done (Chapter 3, paragraph 5.50, pp.37-38). However, these disputes have been caused by changes in the rules with regard to certain types of claims (mainly personal injury cases). Whenever there are major changes to the rules, the operation of the revised rules will be tested in order to determine the boundaries. We agree with Lord Justice Jackson's comment that, even if the Access to Justice Act 1999 had not greatly increased the costs burden on liability insurers, it is likely that most of the Costs War would have been fought. Repeated amendments to the rules, and in some cases the poor drafting of the rules, have led to more disputes than would otherwise have been the case.

9. Since we do not conduct personal injury litigation, and have not been involved directly in the Costs War, we are not able to identify particular measures which

might have the effect of stamping out such litigation. That said, it is plainly in the public interest and the interests of the profession for the rules about costs recovery to be as clear and certain as possible. In order to reduce to a minimum the amount of litigation required to determine the boundaries of the rules, the rules need to be drafted precisely, and the courts need to issue clear guidance on how the rules are to be interpreted. Once a ruling has been made, parties (or their insurers) who make losing challenges should be penalised by having to pay the winning parties' costs in the usual way.

PART 2: COURT FEES

Should there be full-cost pricing for the civil courts (Chapter 7, paragraph 5.2, page 70)?

10. We agree with Lord Justice Jackson's provisional conclusion that the concept of full-cost pricing (namely, a scheme whereby litigants are obliged to pay for the full cost of the court service they receive) is wrong in principle (Chapter 7, paragraph 5.2, page 70). The maintenance of the civil justice system and the adequate resourcing of the courts is the proper function of the State. This is because the development of the common law is for the good of all, not just the few who take part in litigation. We would therefore be firmly against the introduction of daily hearing fees.

11. Whilst it is fair for litigants to make some contribution to the cost of the court administering their cases, this burden should not be transferred from the taxpayer to individual litigants. This is more important for smaller cases (where the court costs are much higher, relative to the amount in dispute), and for those parties who are less able to afford litigation, than for larger commercial cases.

PART 4: THE FUNDING OF CIVIL LITIGATION

Before the event insurance

12. We do not agree with the proposal put forward by the Bar's CLAF Group that compulsory BTE insurance should be extended so as to cover a wide range of accidents. In particular, we are opposed to the idea that those already required to have public liability insurance, viz. employers, occupiers of business premises and operators of trains among others, should be obliged to have BTE insurance as well (Chapter 13, paragraph 4.6, page 154). We do not understand the rationale for these entities essentially being required to fund personal injury litigation against themselves.

Third party funding

13. It is our opinion that third party funding of litigation should not be regulated by, for example, the establishment of a statutory code at this stage (Chapter 15, paragraph 4.2, page 163). The third party funding market is still nascent in this country and we do not think it should be stifled by regulation. As the market and market practice develop, this issue can be reviewed. If some form of regulation was seen to be required at this juncture, we would prefer the proposal for a voluntary code drafted by funders (Chapter 15, paragraph 4.3, page 163).

14. We are aware that there have been suggestions that there should be (a) automatic disclosure of the fact of third party funding where it is in place and (b) the ability on the part of the court to order security for costs in any third party funded case. We agree with these suggestions.

15. We consider that the court should have the ability to order the third party funder in an unsuccessful case to pay all of the successful defendant's costs (subject to

assessment in the usual way) and its ability to do so should not be circumscribed by the principle in *Arkin*.

Are [conditional fee agreements ("CFAs")] in their present form satisfactory (Chapter 16, paragraph 5.7(i), page 173)?

16. Our experience is that, after a long period when there was no interest amongst commercial clients in CFA funding, there are some signs that it is becoming more attractive to City solicitors and their clients. As has been noted in the Preliminary Report (Chapter 16, paragraph 3.3, page 169), the philosophy behind the success fee is that it covers the costs and expenses incurred by the solicitor in other CFA cases where the outcome was unsuccessful. It presupposes that the CFA practitioner has a flow of cases where the successful ones balance out the unsuccessful ones. As noted in the Preliminary Report, the concept is less reliable where lawyers rarely use CFAs (also Chapter 16, paragraph 3.3, page 169). This is necessarily so in City litigation practices, where there are comparatively few cases but the cost, and hence the cost risk, is much higher.

17. Despite this, with the rising cost of litigation and in response to client demand, more City firms are advertising their willingness to conduct "heavy" civil claims on a CFA basis. Their willingness to do this is made possible by three further developments namely: (i) an increased willingness among some commercial barristers, including QCs, to act on a CFA basis; (ii) the increased availability of third party funding for heavy cases; and (iii) the genesis of a partial / discounted CFA which has been enabled by a relaxation of the rules. A partial CFA, coupled with third party funding, includes the possibility of solicitors and barristers being paid a percentage of their fee on a regular basis, before the outcome of the case is known. This substantially reduces the cash flow burden which would otherwise fall

on solicitors and barristers of litigating a substantial case where previously they had only the hope of payment in the event of a successful conclusion of the case.

18. There is an issue as to whether the CFA uplift should be recoverable in commercial cases, as to which see paragraphs 120 – 123 below.

If not, what reforms might be made in order to create appropriate incentives for all involved in the litigation process (Chapter 16, paragraph 5.7(ii), page 173)?

19. See above.

The impact of CFAs on particular categories of litigation (Chapter 16, paragraph 5.7(iii), page 173)

20. CFAs for heavy civil cases are still uncommon, despite the increased willingness of City solicitors and their commercial clients to consider them. It is too early to say what effect increasing use of CFAs in such situations will have.

Self financing (Chapter 17, paragraph 4.1, page 176)

21. We agree that the policy considerations mentioned in paragraphs 3.2 to 3.4 of Chapter 17 (page 175) should continue to restrain the extent to which litigants in person should be able to recover their own costs.

CLAF and SLAS (Chapter 18, paragraph 1.6, page 178)

22. The types of cases to which these schemes relate (e.g. the Hong Kong scheme which covers personal injury and clinical negligence) would appear to exclude heavy commercial disputes involving corporate clients, which is where this Committee's experience lies. We can see, however, no major objection to the establishment of a scheme along the lines of the Hong Kong example, so long as the cost shifting rule operates against a losing party funded by such a scheme.

Contingency fees (Chapter 20, paragraph 4.1, page 194)

Should solicitors and counsel be permitted to act on contingency fee agreements?

23. Whilst we have some concerns as to whether contingency fees would incentivise claimants' lawyers to too great a degree, with the potential to cause conflicts of interest and reputational damage to the legal profession, it seems to us that the "conflict of interest" issue has existed for some time in relation to CFAs and therefore, assuming CFAs are to remain, it is difficult to see an in principle objection to contingency fees. We are therefore cautiously in favour of the introduction of contingency fees as defined in Chapter 20 (paragraph 1.1, page 189).

If so and if costs shifting remains, what form should that cost shifting take? In particular, should the losing party pay the additional element of costs (i.e. the amount by which the contingent fee exceeds costs assessed on the conventional basis)?

24. We consider that the Canadian model referred to in paragraph 2.5 of Chapter 20 at page 192 should be introduced in this jurisdiction. In other words, the unsuccessful defendant could on our view only be required to pay, as costs, a reasonable sum in respect of the time spent by the claimant's lawyers (plus disbursements), in the usual way (and subject to the limitation that the amount recovered by way of an award of costs for the work done assessed on the usual basis may not exceed the amount that the receiving party has actually paid by way of the contingency fee).

If contingency fees are permitted, what form of regulation should be imposed?

25. In principle we believe the size of contingency fee should be a matter of negotiation between the client and the lawyer, subject to the type of long-stop

which currently exists where a client wishes to challenge solicitor and own client costs. That said, the trial judge should have the power to review the success fee as to reasonableness, and to limit its recoverability as between solicitor and client.

If the concept of lawyers working on contingency fees is unacceptable, do the considerations set out in this chapter militate in favour of setting up a CLAF or a SLAS, as discussed in chapters 18 and 19?

26. We do not believe contingency fees are unacceptable.

PART 5: FIXED COSTS

Fixed costs, tariff costs or predictable costs across the board? (Chapter 23, paragraph 5.1, page 218)

27. The whole architecture of the English costs system is based on the premise of substantial costs recovery for the winning party. If fixed costs recovery is introduced, it will make substantial inroads into that basic premise, and will have knock-on effects on many of the other issues considered in the Preliminary Report. It would arguably also make this jurisdiction much less attractive as a choice of venue for litigation for international business clients. Moreover, those jurisdictions which operate a fixed costs system, such as Germany, have much simpler procedural requirements than those which operate in this jurisdiction.

28. There would not be any material benefit, in relation to high value business litigation, to fixed costs recovery. It would be a disadvantage to the successful party, because the assumption is that fixed costs recovery would be at levels lower than the current recovery under retrospective assessment allows. There would be a concurrent advantage to the unsuccessful party. This does not seem to be a strong argument in favour of change. There would be a benefit in that less time

and money would be spent on litigating costs orders or costs assessment. However, we believe that time and money spent in litigating costs matters is in some respects self-regulating; no sensible client or solicitor will spend disproportionate amounts litigating over costs matters. We would therefore be firmly against the introduction of a fixed costs regime for commercial litigation.

Retrospective assessment of costs by reference to the amount of work reasonably done?

29. On balance, we prefer to leave the current principle of retrospective cost assessment in place. Its advantages are that:

(A) it rewards the successful and penalises the unsuccessful;

(B) it controls the behaviour of litigants;

(C) it reflects the expense incurred by the parties;

(D) profligate expenditure is disallowed on assessment; and

(E) typically only two thirds of costs are recovered which means the successful party still has some 'skin in the game', thus reducing the lottery element and controlling litigant behaviour and expenditure.

30. We therefore confirm that the impression referred to in paragraph 3.5 of Chapter 23 is accurate.

31. We believe there is scope for simplifying procedures and rules associated with retrospective costs assessment. See further paragraphs 145 to 148 below on assessment.

Litigation divided into categories, with a fixed costs or similar regime for some categories only

32. Our response is only in relation to commercial disputes. We make no comment in relation to other types of dispute.

Benchmark costs

33. We do not consider that stages of litigation proceeding on the multi-track are amenable to so-called benchmark costs. We note that Senior Costs Judge Peter Hurst points out that benchmark costs could only apply to a limited range of applications, but we respectfully think that, even restricted to such applications, in complex commercial cases there is no room for the artificiality of benchmark costs.

PART 7: SOME SPECIFIC TYPES OF LITIGATION

Large commercial claims (Chapter 32, paragraph 4.2, page 281)

34. Lord Justice Jackson states in the Preliminary Report that recommendations in his final report must encompass all civil courts, including the Commercial Court, but recognises that "one size does not fit all". We welcome Lord Justice Jackson's recognition that "one size does not fit all". As recognised in the Preliminary Report, certain processes which might be appropriate for, say, personal injury matters might not be appropriate for complex commercial (often high value) claims.

35. As indicated at paragraph 4 above, our comments apply to commercial litigation, including such litigation conducted in the Commercial Court.

Chancery litigation

Should *Agassi v Robinson* ([2005] EWCA Civ 1507) be reversed (Chapter 33, paragraph 6.2, pp.299-300)?

36. The *Agassi* decision has been criticised by the accounting profession, and some members of the Bar. Clearly litigants should not be forced to choose between (i) litigating at a reduced cost or (ii) litigating at a higher cost in order to maximise recovery of costs from the other side.

37. However, rather than overturning the decision in *Agassi*, one way of resolving this problem is for a suitable body of tax experts to become an "authorised" body within s. 28 (5) Courts and Legal Services Act. In *Agassi*, Lord Justice Dyson describes this as the "obvious solution". As Lord Justice Dyson also noted, being an authorised litigator brings responsibilities as well as rights. It is inappropriate for tax experts to be granted the latter without taking on the former.

38. We note that fewer tax cases will be dealt with by the High Court following the creation of First Tier and Upper Tier Tribunals in April 2009. The impact of the analysis of costs in Revenue cases will therefore be of limited significance.

<u>The cost neutral regime and *Beddoe* applications (Chapter 33, paragraph 6.3, page 300)</u>

39. From the perspective of a trustee, the *Beddoe* procedure performs an essential function. Given the increasingly critical and litigious approach adopted by beneficiaries, it provides the trustee with the necessary confidence to pursue or defend litigation.

40. On the other hand, there is no doubt that the *Beddoe* procedure adds an extra layer of expense to the cost of litigation. In our experience, the Court nearly always sanctions the approach advised by Counsel in the opinion attached to the application. Arguably, therefore, the *Beddoe* procedure often amounts to no more than an expensive "rubber stamping" process.

41. The cost of making a *Beddoe* application cannot sometimes be justified where the trust fund is small. The second sentence of Paragraph 7.2 to Practice Direction 64B says the following:

> *"There are cases in which it is likely to be so clear that the trustees ought to proceed as they wish that their costs of making the application, even on a simplified procedure without a hearing and perhaps without defendants, are not justified in comparison with the size of the fund or the matters at issue".*

42. Notwithstanding the above, there is, at present, an expectation that trustees will always make a *Beddoe* application and a belief that trustees who fail to do so are "fair game".

43. As an alternative to making a *Beddoe* application, trustees of small funds could be obliged to seek legal advice before bringing or defending proceedings (in the same way that trustees are required to seek advice before making other kinds of investments). Under this alternative mechanism, trustees who receive advice that:

(A) the costs of making a *Beddoe* application would be disproportionate to the value of the fund; and

(B) the litigation in question is reasonably likely to be in the interest of the beneficiaries as a whole;

should be able to pursue the relevant litigation as if they had been granted *Beddoe* protection.

44. Where the size of the fund justifies it, trustees should be able, and should be expected, to go through the more rigorous procedure required for a *Beddoe* application.

45. In our experience, *Beddoe* applications are already generally dealt with on paper. That said, it may be helpful to encourage more *Beddoe* applications to be dealt with under paragraph 7.2 of Practice Direction B supplementing Part 64.

What should be done about pre-action protocols (Chapter 33, paragraph 6.4, page 300)?

46. A “one size fits all” approach to pre-action procedure may not be appropriate for Chancery proceedings, given the different sorts of cases which find their way into the Chancery Division. That said, pre-action requirements should be as cost-effective as possible.

47. A key problem with pre-action protocols is that they give defendants (particularly insurers and other "deep pocket" defendants) an opportunity to delay the commencement of court proceedings and test a claimant's resolve and ability to fund the litigation by constantly requesting further information and further time to respond.

48. This problem might be reduced if a claimant could be encouraged to commence proceedings and then make an immediate application for directions in relation to its compliance or otherwise with the pre-action protocol (prior to Particulars of Claim being filed or served) in cases where it considers that a defendant is abusing the pre-action protocol. This approach is encouraged where there are limitation issues and there seems to be no reason why the courts should not be prepared to deal with such an application where a claimant considers that a defendant is abusing the pre-action protocol. The court could then make appropriate orders in relation to the steps required, if any, to comply with the pre-action protocol and consequential costs orders. The advantages of this would be that:

(A) defendants would be wary of making unjustified demands if they thought that such demands could result in an application being made to the court and the court potentially making a costs order against them at such an early stage of the proceedings;

(B) claimants, similarly, would only be likely to make such an application in clear cases of abuse given the risk of a costs penalty being imposed on them at an early stage of the proceedings if they had unreasonably refused to comply with requests from a defendant; and

(C) the courts would be able to ensure at an early stage that parties comply with the pre-action protocol and that its objectives are achieved rather than having to consider the imposition of costs penalties late in proceedings when it is far more difficult to judge the merits of the positions adopted in relation to compliance with the pre-action protocol.

49. Another problem with the pre-action protocols is that they give claimants an opportunity to advance unmeritorious claims against defendants in circumstances where they take no costs risk in the hope that defendants will make a payment to avoid the substantial costs of having to comply with the pre-action protocol and/or to avoid a costs penalty in the event that the claimant subsequently commences court proceedings and the defendant has refused to incur the costs of complying with the pre-action protocol.

50. This problem might be reduced if a defendant had the ability to apply to the court for an order that costs incurred in complying with the pre-action protocol be awarded to it if:

(A) proceedings are not commenced within, say, 2 months of the final step in the pre-action protocol; and

(B) the court is satisfied that the defendant would have been awarded summary judgment if a claim had been commenced.

51. We set out further comments on pre-action protocols at paragraphs 83 – 89 below.

Should there be a limitation on the amount of costs which can come out of a trust fund or estate (Chapter 33, paragraph 6.5, page 300)?

52. Lord Justice Jackson comments that it is more unusual for costs to be payable out of the estate or fund than is commonly believed (Chapter 33, paragraph 4.1, page 292). In modern trust and estate litigation the most common reason for trust funds to be exhausted is because of the need to pay trustees' legal costs. Lord Justice Jackson's Preliminary Report recognises (see footnote 120 on page 300) that no limit should be placed on the ability of trustees to recover all of their costs where they do not stand to gain from the litigation.

53. The best way of protecting a fund is to make greater use of orders of the kind made in *Kostic v Chaplin* ([2007] EWHC 2909 (Ch)) where the Conservative Party Association was awarded its costs of investigating the claim out of the estate down to a stage where a realistic assessment of the merits of the claim could first properly be made. Thereafter costs followed the event in the normal way. "Split" orders of this nature will ensure that the amounts taken out of a fund to meet legal costs are kept to a minimum.

What to do about neighbour disputes (Chapter 33, paragraph 6.6, pp.300-301)?

54. We disagree with the sentiment expressed by Mummery LJ in *Bradford v James* [2008] EWCA Civ 837 and quoted in the Preliminary Report in Chapter 33, paragraph 5.10, page 297.

55. Disputes can have value to the parties that extends beyond the financial. This is particularly true of neighbour disputes where parties are arguing about their homes. Ensuring that the cost of a dispute is proportionate to the financial value of the underlying asset is less important in neighbour disputes than in disputes between businesses where purely commercial considerations apply.

56. Under the Solicitors' Code of Conduct 2007, parties' solicitors are under an obligation to inform their clients of the likely overall cost of litigation. Parties who take an informed decision that it is worth spending large amounts of money to protect their homes should be entitled to do so.

57. The important issue in neighbour disputes is to ensure that one party is not forced to settle on unfavourable terms out of fear of being held responsible for the opposing party's costs following judgment.

58. This could be achieved in neighbour disputes by limiting the costs recoverable by the winning party to the amount of costs incurred by the losing party. For example, if the winning party spends £300,000, but the losing party only incurs £10,000 in legal costs, the winning party's maximum recovery will be £10,000. In these circumstances it will obviously be in the interest of both parties to keep their costs to a minimum and not to ratchet up costs. In this way, the parties would be entitled to decide for themselves how much the underlying asset is worth and how much

they are prepared to spend and/or risk on it. (We do not advocate this form of cost capping outside the arena of neighbour disputes.)

Should there be a Chancery fast track (Chapter 33, paragraph 6.7, page 301)?

59. We are not well placed to comment on this issue because we are only rarely involved in fast track claims. However, a rigid "fast track" procedure may not be appropriate for the complexities of Chancery litigation. The best way to reduce the costs of small value Chancery litigation is to keep the amount of factual evidence to a minimum.

Minority shareholder petitions (Chapter 33, paragraph 6.8, page 301)

60. It is not clear why issue based costs orders or orders awarding a proportion of costs do not resolve the problems identified in the Preliminary Report. Our view is that this issue should be investigated further before resort is made to costs capping orders

Encouraging settlement of probate claims (Chapter 33, paragraph 6.9, page 302)

61. A formal pre-action procedure is often not appropriate for probate claims. The effect of a letter before claim is often to entrench parties' positions. References to issues such as "undue influence" and "lack of testamentary capacity" and even "lack of knowledge and approval" are necessary to the formulation of a legal claim in a letter before action but are almost inevitably inflammatory. Therefore, we agree that early mediation which allows parties to resolve their disputes in a way that they consider to be fair (against the relevant family background) is a good idea, although district judges and circuit judges would not necessarily be the best people to act as mediators.

62. For the reasons given in paragraphs 52 and 53 above, we do not consider that costs recoverable from an estate should be capped. The best way to protect the value of the estate is to encourage greater use of split orders of the type made in *Kostic.*

The role of conventional mediation (Chapter 33, paragraph 6.10, page 301)

63. The problem with mediation at present is that some parties use offers of mediation as a way of delaying proceedings and running up costs. If the courts are to persist in requiring parties to mediate disputes, then, as suggested in the Preliminary Report, it seems sensible that research is carried out to decide the most appropriate stage of proceedings for the courts to put pressure on the parties (Chapter 33, paragraph 6.10, page 301).

Collective actions

64. We are in favour of retaining costs shifting in the context of collective actions. While we note Lord Justice Jackson's comments (Chapter 38, paragraphs 8.1-8.2, page 369), we think that as the third party funding market develops, this will become the usual way of funding collective actions. In such cases, it would only be fair to allow the successful defendant to be able to recover its costs, and indeed, it should in practice be possible for the successful defendant to secure payment from the third party funder pursuant to a third party costs order. We note that this is in line with the Government's response (published on 20 July 2009) to the Civil Justice Council's December 2008 report on "Improving access to justice through collective actions". The Government agreed with the Civil Justice Council that the "loser pays" principle for costs should be maintained in the context of collective actions to deter "unmeritorious litigation".

Court of Appeal

65. We agree that controlling costs on appeal to the Court of Appeal is a secondary matter: the focus should be on costs at first instance (Chapter 39, paragraph 2.2, page 370). This is because of: (a) the far greater number of first instance cases; (b) the relatively lower costs on appeal; and (c) the current rules which ensure that, at least so far as commercial cases are concerned, appeals are handled with reasonable efficiency. (As suggested, we will not comment in detail on Civil Procedure Rule ("CPR") 52, given that it is actively under review.)

66. The question is raised as to whether additional case management might reduce the costs of appeals, following the example of the Court of Appeal in Victoria. In that example, an Associate Justice controls the volume of documents included in the appeal bundles, the length of skeleton arguments to be submitted and the length of hearings. We do not regard any of these points to be of major concern, each of which is considered in turn.

(A) Hearing

The anticipated length of an appeal to the Court of Appeal has to be certified by the advocates appearing on the appeal. In our experience, such estimates are generally both relatively modest and reasonably accurate.

(B) Bundles

Appeal bundles are invariably prepared on a conservative basis, including all documents that may possibly be relevant to the appeal. This seems to us inevitable. The danger of omitting something of relevance is considered a greater danger than including documents in the bundles that

are not, in the event, required. It must be doubtful if a lengthy discussion at a case management conference as to what should, or should not, be included in appeal bundles would be productive. The contents of the bundles should be left to the good sense of those preparing the appeal.

(C) Skeleton arguments

The Court of Appeal is free to limit the length of skeleton arguments, if thought desirable, through the CPR. Our experience in commercial cases is that it is rare for skeletons, prepared by experienced advocates, to be substantially longer than is required.

67. It may be that greater control is required in the Victorian Court of Appeal because, we note, final judgments can be appealed as of right (Chapter 58, paragraph 4.16, page 592) and not only with permission, as is the case in England and Wales. Without our control mechanism, more speculative appeals may be coming before the Victoria Court of Appeal. Whether or not that is correct, our overall view is that the current mechanisms are working reasonably well and that the introduction of more formal case management will inevitably serve to increase costs, while an appeal is pending. It seems to us improbable that these additional costs will be offset by a reduction in the length of the appeal (which is managed by the Court in any event) or any saving in preparatory work. Further, if additional case management were to be considered, we would need to be convinced that it would engender a real costs saving; in our experience an increase in case management is often accompanied by a commensurate increase in costs.

68. In any event, we note that it is unlikely that judicial resources could be made available to undertake more active case management in the Court of Appeal.

PART 8: CONTROLLING THE COSTS OF LITIGATION

Electronic disclosure

69. We agree with Lord Justice Jackson's comment in his Preliminary Report that "the existence of a vast mass of electronic documents presents an acute dilemma for the civil justice system" (Chapter 40, paragraph 1.1, page 373).

70. However, we also agree that the disclosure of all electronic material might in theory assist the court in uncovering what actually happened and as Morgan J stated in the leading case on the issue of e-disclosure, *Digicel (St Lucia) Limited v Cable & Wireless PLC* [2008] EWHC 2522 (Ch), "it may only take one revealing statement, perhaps in an email, to show clearly what people really thought" (Chapter 40, footnote 1 to paragraph 1.1, page 373). This is particularly important in fraud cases. The search for the so-called smoking gun drives up the cost of disclosure as innumerable documents are sifted through.

71. In our view, the challenge is to find sensible ways of controlling the costs of e-disclosure, but without jeopardising the ability of the court to do justice between the parties with "all the cards on the table". To that end, we believe the key to controlling the costs of e-disclosure is for the parties to focus on the disclosure exercise at an earlier stage and for greater transparency and cooperation in setting the scope of the disclosure exercise: see further paragraphs 72 to 74 below. We also support increased judicial training in this area.

Disclosure generally

72. We agree that the process of providing and reviewing disclosure can be a very time consuming and costly exercise: despite Lord Woolf's attempt to limit the scope (and therefore the cost) of disclosure, the cost of this exercise has spiralled

over the last ten years (Chapter 41, paragraph 4.1, page 394). Of course, Lord Woolf's report was written at a time (1997) when there were far fewer electronic documents at large in disclosure.

73. The standard disclosure regime, where complied with, has driven up costs because reasonable minds may differ as to whether a particular document advances or hinders a party's case on a particular issue. Lists tend to be more narrowly drawn as a result, which means specific disclosure applications ensue, often right up to trial.

74. The Preliminary Report puts forward wide-ranging options for reform. In our view, a rigorous disclosure regime is a feature which makes England and Wales an attractive jurisdiction and we would therefore not support the removal of disclosure from our system. We consider that particular attention should be given to: the idea of "disclosure assessors"; a regime with limited automatic disclosure, akin to the IBA rules, coupled with a mechanism for disclosure requests; and a return to the *Peruvian Guano* test. It may also be that the idea of a disclosure "menu" could appropriately cater for all of these possibilities. We consider these options in turn:

(A) Disclosure assessors

We consider that it could be useful to have as a disclosure assessor a practitioner experienced in the commercial field who would be given sufficient time to get to grips with the statements of case and make decisions on disclosure issues at the case management conference ("CMC") stage. This process would act as an adjunct to the CMC. The introduction of such a role could limit disclosure to documents which are likely to affect the court's decision on the issues in dispute where the judge at the CMC would not have the time or resources to devote to

disclosure. The mechanism would be expensive in that the assessor would be paid by the parties, but his/her fee (shared in the first instance) would be recoverable as litigation costs and the mechanism could save a huge amount of costs in relation to disclosure and the later stages of litigation. We note that Lord Justice Jackson has found that the US Federal Court operates a similar system for high value cases (Chapter 60, paragraph 1.9, page 608).

(B) Disclosure requests

We think there is merit in considering a system where there is automatic disclosure only as to the documents that you rely on. These would then be provided together with the relevant statement of case or within two weeks of the statement of case being filed (but crucially before the first case management conference). Within, say, 7 days after the close of statements of case, each side would be able to put forward a "wish-list" of additional documents or categories of documents that it wished to see. At the first CMC, the disclosure assessor would go through the requests and decide which documents or categories of documents should further be disclosed. This would avoid a number of specific disclosure applications which can dog proceedings right up to trial itself, by effectively bringing specific disclosure issues forward to the CMC.

(C) IBA Rules

A variant on this would be to use the IBA Rules. These are the rules used in international arbitration as guidance for the document production process, the term given to describe disclosure in that field. The rules

permit a party to submit a "Request to Produce" to the tribunal, in which the requesting party may set out:

(i) documents or a narrow and specific requested category of documents that are reasonably believed to exist and to be in the possession of another party; and

(ii) an explanation of how the documents requested are relevant and material to the outcome of the case.

(D) Return to *Peruvian Guano*

Returning to this test could reduce costs because, at the moment, reasonable minds may differ as to whether a particular document advances an issue and senior lawyers are needed to make those judgment calls on particular documents whereas on a *Peruvian Guano* basis the giving party would be disclosing all documents that are in a much broader sense relevant. The main objection to reverting to *Peruvian Guano* is that it would simply transfer costs to the receiving party.

The answers to this are that:

(i) both sides would have "transferred" costs so the net effect on an outlay basis would be nil or negligible; and

(ii) the "transferred" costs would be recoverable as litigation costs in any event.

(E) "Menu" option

We think that serious consideration should be given to introducing a "menu" system of disclosure whereby there is no default position as to the

standard of disclosure applied to a case but rather the parties approach the court at the first CMC with a suggestion of the most appropriate standard of disclosure in their case (whether it be no disclosure, documents relied upon, current standard disclosure, *Peruvian Guano* or another standard).

This would require the solicitors on each side to file a report describing in broad terms: the documents that exist or may exist; where such documents are or may be located; and the broad range of costs involved in giving standard disclosure. While there would be additional costs associated with the production of such reports, the court would need to be provided with some material to enable it to ensure that the disclosure exercise embarked upon was proportionate to and targeted on the issues at the heart of the dispute and therefore the most appropriate for the particular circumstances of the case.

We have seen a draft rule concerning the "menu" option which seems to us generally to strike the right balance, though we consider that *Peruvian Guano*-type disclosure should be added as one of the options: whilst that type of disclosure could be ordered under the "catch all" option (e), the same could be said of the disclosure methods set out explicitly in the other options. We do not see why *Peruvian Guano* should not also be explicitly set out because in practice it is one of the specifically identified options (as opposed to the "catch all") that is likely to be used. Further, we have reservations about granting the court an option to direct that disclosure be linked to the issues of the case (option (c)). In our experience, documents tend not to be arranged according to issues that arise in subsequent litigation and therefore the organisation of documents

for disclosure on an issue basis would require additional cost for no real benefit.

Witness statements

75. Witness statements were brought in to save the time and cost of oral evidence-in-chief; and to enable each party to know what evidence it has to meet, thus avoiding "trial by ambush" and, in some cases, encouraging settlement. However, they have in our view become a key driver of litigation costs: lengthy lawyer-driven documents that are endlessly pored over by client representatives and legal teams and which address every event in the relationship between the parties and every document even where there is nothing of any value added by the witness to what is in the document.

76. Most commercial cases settle before trial, so the perceived benefit in terms of saving trial costs has not been realised. Moreover, in the rare cases where a trial takes place, it is doubtful whether witness statements save costs because a great deal of time is taken up in reading the witness statements before trial, they have probably expanded cross-examination and in any event many (If not most) commercial cases turn on the documents. We therefore confirm Lord Justice Jackson's impression that in larger and more substantial cases there is a real concern that witness statements have led to disproportionate costs (Chapter 42, paragraph 1.3, page 401).

77. We can see benefit in a situation where witness summaries became the norm. These would be succinct statements of the points which the witness intends to cover in court, so old style "ambush" would largely be avoided ("ambush" would in any case be much less likely in commercial cases where the key facts usually emerge from the documents). Oral evidence in chief could then be restored, in a

strictly controlled form (see further paragraphs 96 to 99 below as to trial). Lord Justice Jackson mentions in his Preliminary Report that where he has heard oral evidence in chief supplementing a witness summary it has been helpful, well focused and not unduly time consuming (Chapter 42, paragraph 6.3, page 407). There could be a residual discretion to allow witness statements for good reason (e.g. where the witness is abroad or seriously ill).

78. The main argument against the introduction of witness summaries is that the parties would still have to prepare proofs of evidence for their own side. The answer to this is that a proof is a very different sort of document from a witness statement: it is a draft of the evidence which the witness would give if skilfully cross-examined, i.e. "warts and all". By contrast, a witness statement is a heavily-edited document in which virtually every word is scrutinised at great length by teams of lawyers and client representatives as part of a lengthy, lawyer-driven process.

79. If witness statements are to be retained, rather than seeking an artificial solution such as a page limit or a ban on addressing matters which are already in the documents, we can see merit in a requirement that the parties provide, prior to the CMC, a list of the points which they intend each witness statement to address. This would enable guidance to be given to limit the witness statements strictly to relevant matters, and to enable the court to impose costs sanctions for irrelevant material in witness statements.

80. A further possibility would be to introduce full flexibility, i.e. to enable the court to decide in the circumstances of the case whether witness statements, witness summaries or depositions should be required (whether in relation to all or particular witnesses), taking into account the parties' views.

Expert reports

81. We agree that expert evidence is a substantial and ever-increasing cost of litigation (Chapter 42, paragraph 14.3, page 415).

82. We consider that the current procedures for expert evidence generally work well in commercial cases, but there may be merit in adopting some of the procedures proposed in the Preliminary Report at Chapter 42, paragraph 14.1, pp.414-5:

(A) Sequential exchange of reports

We note that under the new Commercial Court Guide (published on 30 April 2009) there is no presumption for the sequential exchange of expert reports, but that the court will direct this in appropriate cases. In our view, sequential exchange generally saves time and costs by helping to identify and focus on the issues in dispute and by avoiding repetition of undisputed factual material: it avoids the "ships passing in the night" problem of simultaneous exchange where the experts do not address the same issues or provide reports in such a way that it is not possible to compare their views on particular issues. We therefore consider that sequential exchange should be the norm, unless there is a good reason for simultaneous exchange.

(B) Single joint experts

With regard to the proposed presumption that quantum experts be instructed on a "single joint" basis, we agree that in commercial cases a single joint expert is only appropriate if the subject matter is either not central or relatively uncontroversial (Chapter 42, paragraph 7.7, page 410). This is for obvious reasons. Whilst quantum may in some cases be less

controversial than liability, this is by no means always the case. In many cases quantum is hotly disputed. We would not therefore support a general presumption of this sort.

(C) Hot tub

We agree with Lord Justice Jackson that consideration should be given to the practice of hearing evidence concurrently from the experts known colloquially as the "hot tub" (Chapter 58, paragraph 4.18, page 593), given the apparent benefits discovered in Australia. It may be that the "hot tubbing" should take place after each expert has been cross-examined in the usual way.

Case management

Pre-action protocols

83. We recognise that the problem with any pre-action procedure is that it can lead to more work before litigation and so generate considerable cost. Practitioners, concerned neither to arouse the hostility of the court nor to incur costs penalties for their clients, often adopt a cautious attitude to pre-action behaviour. This can mean an enormous amount of time and money is spent on pre-action correspondence and the compilation of extensive bundles of material. Yet, in our experience, commercial cases rarely settle by virtue of pre-action behaviour, which tends to produce posturing and the exchange of "helpful" documents only, rather than constructive attempts at resolution.

84. We have identified three particular points of concern:

(A) a defendant is powerless to prevent cost accumulation where a claimant prolongs the process;

(B) the court has no power to intervene in case management until the claim is actually issued (in many cases, substantial costs have already been accumulated by this point); and

(C) there is a certain amount of duplication of work pre- and post-issue of the claim, so that where an action ensues it is rarely the case that the investment in pre-action behaviour yields a saving later.

85. We agree with Lord Justice Jackson that a radical re-think is required in this area (Chapter 43, paragraph 3.20, page 426) and to that end we make the following suggestions:

Simplification of the protocols / stricter time limits

86. The prescriptive nature of some of the protocols presents a series of hoops through which the parties must jump. A radical solution could be to reduce the protocols to a minimum requirement of a 7- or 14- day letter before action, on the basis that (a) it is always open to the parties to engage in a dialogue or ADR pre-action if they so choose and (b) it would remain a feature of the costs regime that the court could take pre-action behaviour into account when making orders about costs later. The parties would have to make judgments about the extent to which costs that they elect to incur pre-action are proportionate to the value of the case. In the Commercial Court, it is suggested that parties should exercise restraint in pre-action procedures (Commercial Court Guide, paragraph B3.2).

87. Letters of claim have become increasingly lengthy and unwieldy. The size of the document in some cases manifests the vast resources ploughed into the claim at

the pre-action stage. Letters of claim should be concise, identifying key facts and dates. The detail should be saved for the particulars of claim.

88. If something akin to the current protocols were to be thought desirable, a short protocol could be introduced requiring only essential documentation to be provided with the letter of claim and letter of response, along the lines suggested in the Commercial Court Guide (paragraph B3.3). This could cut costs and lessen the degree to which pre-action processes generate excessive costs through endless requests for additional documents / information.

Ability of defendants to issue proceedings

89. Where pre-action processes are being prolonged by the claimant, the defendant might be empowered to issue proceedings itself. This could also act as a deterrent against lengthy letters of claim and the full preparation of the case / expert evidence before the claim has been issued.

Process to trial

90. We agree that there are instances where the court system fails to impose sanctions for non-compliance that are strict enough to be a genuine deterrent (Chapter 43, paragraph 4.17, page 431). Where a direction is ignored, an application must generally be made for a "final" order followed some time later by an application for an "unless" order. We therefore welcome the suggestion that sanctions for delay / non-compliance could be imposed without further application, so that a case or evidence could be struck out where deadlines are routinely not complied with. These proposals should be made subject to the Court's overriding discretion to provide relief from sanctions when there is a good reason justifying non-compliance.

91. We also think that consideration should be given to the suggestion that a party should be able to file its evidence at court (rather than on the other party) where the other party fails to exchange documents.

Docket system

92. We note that all seven of Lord Justice Jackson's assessors strongly support such a system (Chapter 43, paragraph 5.13, page 434). We are of the same view. There would be practical issues to be overcome, but they should not be insuperable, particularly given the availability of email communications and telephone hearings where the docketed judge is out on circuit. One point to note is that there would need to be a degree of flexibility in the system so as to permit certain interlocutory applications – such as an Anton Piller application or an application for a Freezing Order – to be heard by another judge, given the potentially prejudicial material that can arise on such applications.

93. If one judge runs a case from start to finish under a "docket" system, he / she will be much better placed than judges are under the present system (where they dip in and out of cases) to exercise the case management powers which already exist – in other words, they would be better placed to exercise informed case management. He or she would be much better placed to impose sanctions for non-compliance, deal with interim applications, encourage the use of ADR and require costs estimates as appropriate for various stages of the proceedings. Docketing could therefore be a key element of cost reduction in commercial litigation.

94. The Commercial Court has declined to introduce a docket system, apparently on the basis that its judges prefer not to be confined to commercial cases (Chapter 43, paragraph 5.10, page 433) and wish to be able to continue to turn their hand to

criminal cases in particular. In a world where clients increasingly expect specialisation in the resolution of their problems, this approach is, in our view, not the right one. It would be better for efficient case management, and for promoting the English courts internationally, if a case within a broad category (e.g. commercial / business) were to be handled by a judge habitually engaged in cases in that category.

ADR

95. We agree with Lord Justice Jackson's tentative view that, in complex commercial litigation, parties are well informed about the existence of alternative dispute resolution techniques and are well placed to make decisions about entering into ADR without judicial direction (Chapter 43, paragraph 6.33, page 444). Although we are not particularly experienced in the use of ADR away from a business context, we do not think that a policy geared to promoting ADR in non-business cases should necessarily be extended to high value commercial litigation.

Trials

96. We agree with the view that trials in commercial cases may generate excessive costs (Chapter 44, paragraph 1.1, page 446).

97. Trial is the key stage in the litigation process, allowing the judge to test the strength of each party's evidence and arguments. Care must therefore be taken to ensure that any measures introduced with a view to saving trial costs do not interfere with either party's opportunity to present its case.

98. Nonetheless, and with that proviso, we agree that there is significant scope for the judge to use existing case management powers to control the trial process so that costs are not allowed to spiral out of control, including by using a "chess clock"

system in appropriate cases. If a docket system were introduced so that the judge hearing the trial was familiar with the case from its earliest stages this would be more likely to occur (for more on a docket system, see paragraphs 92 to 94 above).

99. Further, we consider that written openings should be the norm and that there should be no repetition of them by way of oral openings: instead, a short amount of time should be allowed at the start of the hearing for the judge to ask questions on the written openings. A similar approach should apply in relation to written closings and oral closing submissions.

Cost capping

100. We are firmly against cost capping in commercial cases. We agree that the problems summarised at Chapter 45, paragraph 3.4, page 460 would arise if cost capping were to be more widely introduced.

101. We therefore concur with the approach outlined at Chapter 45, paragraph 7.3, page 466, that cost capping should be reserved for exceptional circumstances.

Should the cost shifting rule be modified?

102. Chapter 46 of the Preliminary Report considers the question of cost shifting and concludes with a request for views on certain specific issues.

103. Before we address those specific issues, we consider it would be helpful to set out some general observations on the practice and principle of cost shifting to place our views in context.

<u>Preliminary observations</u>

104. England and Wales has had the cost shifting rule for many years and is highly regarded internationally for the quality of its civil judiciary and civil justice. Many commercial parties make a positive choice to litigate their business disputes here.

105. Many business disputes are also resolved by arbitration in London. Most arbitral rules and institutional rules (including the Arbitration Act 1996 itself) embody the presumption that the successful party should be awarded its costs. Moreover, the procedures for assessment of costs awarded in arbitrations are generally simpler than in English litigation.

106. If London is to continue to thrive as a centre for the resolution of business disputes, it should not introduce new cost shifting rules which would make other regimes (such as arbitration) a more attractive option.

107. In any event, there is already a partial cost shifting system in England and Wales because a successful party will very rarely recover 100% of its costs, however reasonably that party has conducted itself in the relevant proceedings.

108. In our experience, costs recoveries for successful parties in commercial litigation are between 60 and 80% of the costs actually expended in bringing or defending an action (depending upon whether the costs award is on the standard or indemnity basis). Such awards still leave a substantial irrecoverable element for the winning party.

109. Interim summary assessments and interim payments on account have also proved to be useful devices in moderating litigation behaviour and in ensuring that parties think twice before launching applications before the court. Greater judicial consistency is, however, required in the exercise of these powers.

110. The extension of partial cost shifting by, for example, awarding costs in favour of successful individuals or claimants only, would result in commercial parties and / or defendants being treated unequally before the courts even though they too are, of course, entitled to access to justice. It would also worsen litigation behaviour since claimants with bad cases would know that the costs risks against them had been alleviated or removed altogether.

111. That would be likely to encourage more frivolous litigation because of the pressure on the defendant to settle rather than incur irrecoverable costs in a case which it should nevertheless win. That is of particular concern to commercial entities which, in the litigation environment, are sought out as defendants with deep pockets.

112. The position would be worse with the total abolition of the costs shifting rule since, not only would it encourage claimants to bring bad claims, it might also encourage more intransigent defendants to drag out good claims brought against them in the hope that the claimant might settle more cheaply. In relation to those claims where it is more difficult to assess the outcome, and where settlement should be encouraged, the removal of the risk inherent in the costs shifting rule may also undermine the goal of achieving settlements.

113. Accordingly, the erosion of cost shifting (partial or total) may well exacerbate one of the vices to which it appears to be directed to counter, namely the moderation of unreasonable or uncommercial behaviour in litigation, and may, in fact, undermine one of its suggested aims, namely access to justice.

114. No legal system is, of course, perfect but if costs are having an inhibiting effect on certain parties bringing proceedings before the court or making it more difficult or expensive for parties when they are before the court, we would suggest that the answer lies not in the removal of cost shifting but in the more effective and creative

use of case management (powers which the judiciary already have), the more consistent and creative use of interim costs orders, more effective devices for encouraging settlement of cases and simpler mechanisms for the assessment of costs with more input from the judge who heard the case.

Issues identified in Chapter 46 of the Preliminary Report

115. Some of these matters are discussed elsewhere in this response but we now address the specific issues raised at paragraph 7.1 of Chapter 46 on page 476 of the Preliminary Report.

116. At paragraph 7.1(i), the Preliminary Report asks whether there are any further discrete areas of litigation where the costs shifting rule should effectively be abolished altogether. We consider that there are none. We note the existing regimes which operate without a cost shifting rule. Having regard to the nature of many of those jurisdictions and the disputes before them (e.g. employment, matrimonial, small claims), there are legitimate policy reasons why it is appropriate to treat those jurisdictions differently. However, we do not believe that those reasons have wider application to other jurisdictions, and certainly not to commercial cases.

117. At paragraph 7.1(ii), the Preliminary Report asks whether there is a case for a presumption of one way costs shifting, either in personal injury litigation or across the board. We disagree with one way costs shifting for the reasons stated above. Insofar as personal injury cases are concerned, we do not represent personal injury lawyers but our clients are often the subject of personal injury claims. We believe that potential claimants have more than adequate access to justice through the existing conditional fee and after the event ("ATE") arrangements which have shown a huge growth in the personal claims industry in recent years.

118. At paragraph 7.1(iii), the Preliminary Report asks on what principle costs shifting should operate if it is to be retained. As indicated above, we favour "loser pays". The commercial clients we represent are generally conversant with ADR and will use it in their business disputes where appropriate although we would agree to greater judicial encouragement for its use generally. Interim costs orders have also proved to be effective devices but we would encourage greater consistency and creativity in their use.

119. At paragraph 7.1(iv), the Preliminary Report asks whether the impact of costs orders should be mitigated in respect of claimants or individuals. For the reasons stated above, in particular the undesirability of frivolous claims, we consider such mitigation measures would be undesirable.

The recoverability of success fees and ATE premiums (Chapter 47, paragraph 5.1, page 482)

<u>The appropriateness of the levels of success fees currently set in different types of litigation</u>

120. In relation to high value business disputes, there is as yet insufficient evidence to make detailed comments about the appropriateness of success fees which are being allowed.

<u>The appropriateness of the levels of ATE premiums currently charged in different types of litigation</u>

121. We are aware of the size of premiums being quoted for ATE insurance in relation to high value business disputes. We note the comment from the Treasury Solicitor who argues that ATE premiums are excessively high and that market forces are not working efficiently to reduce them (Chapter 47, paragraph 3.7, page 479).

Premiums may be high but, as with solicitors' fees generally, the practitioner charges what the market will bear. It is possible that ATE premiums will reduce if the market for ATE continues to grow and if their claims experience alters so as to justify a reduction in premiums.

Should success fees and ATE premiums continue to be recoverable under costs orders?

122. We note that the recoverability of success fees and ATE premiums has promoted access to justice for claimants (Chapter 47, paragraph 4.1, page 481). Yet we understand that the statistics show the number of claims being issued continues to drop year by year. So we do not believe, purely as a matter of empirical evidence, that such recoverability has resulted in greater access to justice.

123. We do not believe that there is any reason of principle why ATE premiums and success fees should be recoverable in commercial cases. In our view it is neither fair nor proportionate that a defendant in a commercial case should bear the burden of success fees and / or ATE premiums. Private arrangements negotiated by the claimant should not be visited on the defendant in that way. Further, if non-recoverable contingency fees are permitted (see paragraphs 23 – 26 above), they will be unlikely to gain traction if recoverability is retained for success fees (under CFAs) and ATE premiums.

Costs management

General remarks

124. We agree that costs management would have no place in the general run of commercial cases (Chapter 48, paragraph 4.2, page 497).

125. Insofar as costs management may be desirable in commercial litigation, we consider that the current rules provide the judiciary with sufficient powers actively

to manage the costs of cases under CPR 1.1 and 1.4. The case management rules contained in CPR 3.1 support the existence of costs management orders. However, in our view, costs management is not a feature of case management and is often ignored by the judiciary and, to some extent, the parties. The judiciary often makes case management decisions without considering their economic effects. If consideration is given to changes to costs management in terms of elevating or introducing new provisions to the rules, these should not be considered in isolation in terms of case management. Amending or introducing new costs management rules without considering the requirement of dealing with issues relating to disclosure, witness statements, experts and the like, will simply fail to resolve the issues relating to costs. The comments put forward on these questions are therefore on the basis that all related procedural rules should be considered.

126. There are many reasons why costs are too high in many cases. These include:

(A) the very nature of our legal system, which is adversarial as opposed to inquisitorial;

(B) delays and inefficiency on the part of the courts;

(C) the need to fulfil the requirements of the pre-action protocols and the Practice Direction on Pre-Action Conduct ("PDPAC"), as a result of which costs are front-loaded;

(D) the procedural requirements in relation to disclosure, witness statements and experts which encourage, even require, substantial costs to be incurred; and

(E) the general lack of case management by the judiciary using the CPR rules. The CMC tends to be an occasion where judges could take the opportunity to manage claims and challenge the parties in terms of disclosure, witnesses and experts. In our experience, this is more of an occasion to sort out the timetable rather than look at the actual substance in these areas.

127. The Preliminary Report asserts that costs management should not involve the kind of expense and waste that practitioners have experienced in the exercise of cost capping, since solicitors are required to prepare cost estimates for their clients in any event (Chapter 48, paragraph 3.25, page 495). However, the pilot procedures (trialled in the Birmingham TCC and Mercantile Court from 1 June 2009) require parties not only to produce detailed estimates for each stage of the litigation, but also to monitor time spent on each stage against the estimates submitted. For sophisticated parties, new costs management procedures such as those would be likely to introduce an unnecessary (and costly) level of bureaucracy as the case progresses, in preparing and monitoring costs budgets. Lawyers would invariably propose budgets on the very high side, which would denude the process of any real value. There is also the difficulty that a costs management order would have to be made in relation to each step just before that step is embarked upon (for example, it is not possible to give an accurate estimate for the costs of witness statements until after the disclosure is in, or for expert reports until the witness statements are available, or for trial until the expert reports have been exchanged). This would add to the overall costs and slow down litigation considerably.

128. We note that, whereas the Preliminary Report refers to notifying the court and opponents where a submitted budget was exceeded by 20% or more (Chapter 48, paragraph 3.18(iii), page 494), the pilot procedures referred to at paragraph 127

above require notification whenever the costs for any activity exceed those previously estimated. This leaves no reasonable margin for error.

129. There is also the potential for additional costs being incurred as a result of disputes relating to the costs management process. For example, parties are likely to argue over the level at which budgets should be approved and the adequacy of explanations given where they are exceeded.

Should costs management become a feature of or adjunct to case management? (Chapter 48, paragraph 5.2(i), page 498)

130. We are against costs management for commercial cases: see paragraph 124 above. That said, we understand that, in cases dealt with under the multi-track there are serious concerns about the level of costs incurred by parties in the course of litigation. In order to manage cases efficiently and comply with the overriding objective in terms of dealing with cases in a proportionate manner and ensuring that the parties, where possible, save expense, costs need to be managed first and foremost by practitioners. Most commercial practitioners do not consider that the courts take a proactive role in this regard and feel that often very little thought is given to the cost consequences of decisions which are made.

131. Case management decisions could be looked at in the round, taking into account the costs consequences. In our view, if costs management were to be thought desirable for commercial cases, costs management would therefore need to become a feature of, as opposed to an adjunct to, case management, in order to meet the criticisms that have been levelled at the system as it currently stands.

132. If the judiciary is going to deal with costs management decisions then training in relation to costs is vital in order to ensure that a consistent approach is taken in

case management decisions. Alternatively, judges could sit with cost assessors (certainly in the early days of any changes) to assist with this process, although this may prove a resource issue.

Should section 6 of the [Costs Practice Direction ("CPD")] or any equivalent be "elevated" to a rule? (Chapter 48, paragraph 5.2(ii), page 498)

133. Given our reservations about costs management in commercial litigation, we do not consider that section 6 of the CPD or any equivalent should be "elevated" to a rule.

Should those provisions (whether in the rules or in a practice direction) be strengthened to give the court greater power to manage and control costs? (Chapter 48, paragraph 5.2(iii), page 498)

134. There are sufficient case management powers to manage and control costs. Section 6 of the Practice Direction, at section 6.3, provides that the court may at any stage order any party to file a costs estimate. This is generally provided with the allocation questionnaire. An estimate is also required when filing the listing questionnaire (pre-trial check list) and when filing Case Management Information Sheets within the TCC and the Commercial Court.

135. We turn to the reliance placed on the costs estimate. The wording of section 6.5A(1) and the case law provide that, if reliance by the paying party can be shown, where a party's costs are more than 20 percent above the estimate it will have difficulty recovering more than this figure. However, there must clearly be reliance. This has resulted in case law to determine what constitutes reasonable reliance. Recent cases, such as *Woolley v Haden Building Services Limited (No 2)* [EWHC] 90111 (Costs), show that there needs to be reasonable reliance, otherwise the

court will not take into account the estimate and will only consider whether costs are reasonable and proportionate. There is an argument that guidance could be provided as to what amounts to "reasonable reliance". Clearly the parties can apply for an update of any estimate, which we suspect is rarely done. The alternative argument is that, if the parties are tied to a particular figure, a situation may arise where a costs estimate becomes a costs cap by the back door. It would be far better if costs estimates were updated at appropriate stages, which practitioners would find more attractive.

136. We consider that sufficient powers exist to manage costs and no strengthening of them is required.

What further amendments are required to the rules to enable the court to carry out effective costs management? (Chapter 48, paragraph 5.2(iv), page 498)

137. It would be helpful to both practitioners and the judiciary if the requirement for the practitioners to produce timely estimates containing more detail, together with the sanctions for failure to either produce the estimate or keep within it, were set out in clear terms. A simple, clear template should be developed for costs estimates (see further below).

What improvements, if any, should be made to Form H? In particular, should a detailed breakdown of costs estimate/budget be required? (Chapter 48, paragraph 5.2(v), page 498)

138. In our experience, many commercial practitioners consider that Form H is not sufficient for its purposes. There are concerns about when it is required to be used. The allocation questionnaire (N150) provides under item (G) that "in substantial cases these questions should be answered in compliance with CPR

43". The resulting question is: what are the substantial cases that require completion of Precedent Form H? There appears to be no clear guidance.

139. Many commercial practitioners see the completion of Form H as time consuming and expensive and clients often resist time being spent on this exercise. We consider Form H should be abandoned and a new simpler form introduced which is fit for purpose (which could be a modification of the form used for summary assessment). It is important that a consistent approach is taken by the courts to the completion of Form H or whatever form replaces it. Most practitioners prepare detailed costs estimates in order to comply with their obligations under the Solicitors' Code of Conduct and produce those estimates in a simple form. Ideally a simple form should be adopted, which would make the preparation of costs estimates much easier. It might also assist the Court in appreciating the many variables involved. In addition, an active discussion between the practitioners and the judiciary should take place as to what the variables might be. There is, however, a concern that if opposing parties view a more detailed estimate, they may obtain tactical information which could be used to their advantage.

Should the more draconian forms of costs management canvassed in paragraphs 3.21 to 3.24 be introduced for any categories of litigation e.g. business disputes? (Chapter 48, paragraph 5.2(vi), page 498)

140. There is a real concern in the use of costs capping in terms of fairness, realism and the fact that it only looks forward and does not look at past costs. However, cost capping orders should also be seen in light of Human Rights Act 1998 in terms of access to justice. We are strongly of the view that such orders should only be made in exceptional situations where costs cannot be managed by conventional case management means. Such orders should be considered on a

case by case basis and no order should be made without the involvement of a specialist costs judge, to ensure that realistic budgets are set for future costs.

141. The proposal mentioned at 3.21, of capping costs at each stage of the litigation process with the court attaching a price tag to each stage is fraught with difficulty; see also paragraph 100 above. In particular, it is not possible to produce accurate "price tags" for the various litigation tasks at the CMC: it is not possible to say how much time will be required to review the other side's disclosure until the documents are in; a party cannot accurately estimate the costs required for witness statements until the disclosure has been reviewed; experts cannot give accurate costs estimates until the witness statements are available; and it is not possible accurately to estimate trial costs until all of the evidence has been compiled and trial bundles prepared. For there to be anything close to accurate cost capping, therefore, the court would need to be troubled before each task, which would add to the costs and slow down litigation. There would also be likely to be satellite litigation at the end of the day on recoverability, with parties seeking to show that circumstances occurred which mean that their recoverability should be limited to the cap. We would therefore be strongly opposed to the introduction of the more draconian form of costs management canvassed in paragraphs 3.21 to 3.24 of the Preliminary Report (pp. 494-495) for business disputes.

142. At present, practitioners have to comply with detailed and complex rules. This means that to apply cost capping, in stages, to certain types of business dispute involving small and medium-sized enterprises ("SMEs") up to a particular value, is too arbitrary and potentially unfair. The fact that a claim is worth X does not mean that it is not complex. Indeed, it may have very important economic effects for a business in the future. A straightforward contractual claim may be suitable, but what happens where the points for determination by the court concern questions of

interpretation/ declarations where there are no damages to recover? These cases may be adversely affected by the use of the cost capping stages. In addition, there is a concern that parties with deep pockets, who are prepared to accept that there will be an element of unrecoverable costs, will gain an unfair advantage over those with lesser means.

143. The point needs to be emphasised that any limiting of costs would be unrealistic and unfair in isolation: it must be tied into changes to the rules on procedure. It would be necessary to look at each case on a case by case basis rather than fix arbitrary limits for each stage.

144. We understand the concern that for SMEs there should be a way of obtaining justice within certain costs bounds. However, we do not think it realistic or practical to devise a system by reference to the nature of the litigant. There might be a dispute between two SMEs or a dispute between an SME and, for example, IBM, in respect of a £100,000 contract for the supply of goods and services by an SME. Rather, we think that a fundamental review is required to allow for the possibility of a certain "rough justice" category of case whereby up to a certain value of claim (say, £100,000), and excluding certain types of cases where important declaratory relief is required, the procedural rules are relaxed so that the case can be brought to a hearing within more predictable limits. The point about such a "rough justice" approach is that it enables justice for both sides. One problem with cost capping is that it will not prevent a party which has very significant means from conducting a Rolls Royce exercise on a case, and absorbing a high level of irrecoverable fees because of the importance of the case to it. In such a scenario the party with substantial means might well "steam roller" the other party which has tried (or is obliged) to cut its cloth according to the costs cap. In a "rough justice" type of case, the less substantial party will not be

prejudiced by large amounts of extra work done by the more substantial party (at its own cost) because the judicial mindset in a "rough justice" type of case should be against overkill, over-elaboration and any suggestion of steam-rollering. A "rough justice" approach to lower value multi-track cases could draw upon the experience of the Employment Tribunal, where the culture is in favour of getting to a fair result cheaply and quickly. A "rough justice" type of case might also make use of lay assessors and / or experienced (or retired) solicitors / counsel sitting on a three person tribunal to assist the judge. There could also be a rule that a decision in a "rough justice" case would not have any precedent status, so that the judge would not feel it necessary to ensure that every facet of the relevant law was considered. Such an approach might not be so far removed from adjudications in the construction industry which are thought to be relatively successful due to the cost / availability of adjudicators, a relaxed procedure (in the nature of "rough justice") and a speedy timetable. Another approach could be to extend the fast-track regime to cases claiming up to, say, £100,000.

PART 10: THE ASSESSMENT OF COSTS

Summary assessment

145. In our experience, summary assessments can be arbitrary, rushed and inconsistent (Chapter 52, paragraph 3.6, page 530). Summary assessment also increases costs, due to the preparation required. We see merit in the proposal of a provisional assessment (at, say, 70%) which would then become final unless either party applied for detailed assessment; the party unsuccessful in the challenge would pay the costs of the detailed assessment process (the second limb under Option 2 in Chapter 52, paragraph 4.3, page 531). This would mean

that, in most cases, the significant (and generally disproportionate) costs of the detailed assessment process would be avoided.

Detailed assessment

146. We consider that the current detailed assessment process generates disproportionate costs. It is often said that detailed assessments usually settle but that is only some time after the successful party has been put to the often huge, and invariably disproportionate, cost of preparing the arcane and extremely lengthy document known as the "Bill of Costs" which is required to start the detailed assessment process, and indeed usually after the losing party has then incurred further disproportionate cost in compiling extremely detailed and lengthy "Points of Dispute" on the "Bill of Costs". We would therefore support efforts to streamline the detailed assessment process including developing an improved bill format, and to encourage early settlement of assessment issues perhaps through some form of ADR for costs disputes.

147. That said, we consider that provisional assessment (as outlined above for summary assessment) could also be introduced to address detailed assessment (i.e. provisional assessments could be used for hearings of more than one day and trials as well as for hearings of a day or less), at least where there are no success fee or ATE issues. This is because, as things stand, we routinely advise clients that they are likely to recover ⅔ to ¾ of their costs on detailed assessment after trial, on the basis that detailed assessments generally produce results in that range. A 70% provisional assessment basis would merely reflect that reality.

148. An alternative would be for the parties to exchange and file streamlined costs summaries for the handing down of judgment and for the trial judge, after having decided principles as to costs (i.e. made the costs orders themselves), to

determine the amount of costs payable. Were a docket system to be introduced (see paragraph 92 to 94 above), the trial judge, having been involved in the case all the way through, would be well placed to carry out such an assessment.

FURTHER ASSISTANCE

149. Should Lord Justice Jackson wish to discuss any aspect of this response or seek clarification of any of the points contained in it, we would be pleased to offer further assistance. In this regard, the principal contacts on our Committee will continue to be Lindsay Marr (e: lindsay.marr@freshfields.com, t: +44 (0) 207 832 7317) and Hardeep Nahal (e: hardeep.nahal@herbertsmith.com, t: +44 (0) 207 466 2184), who would be pleased to assist.

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