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Litigation Committee response to the Civil Procedure Rule Committee's consultation on costs budgeting and costs management

1. The City of London Law Society (the "CLLS") represents approximately 14,000 City lawyers through individual and corporate membership, including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multi-jurisdictional legal issues.

2. The CLLS responds to a variety of consultations on issues of importance to its members through its 18 specialist committees. This response has been prepared by the CLLS Litigation Committee.

Summary

3. The CLLS does not agree with the preliminary view of the majority of the sub-committee of the Civil Procedure Rule Committee in its consultation paper dated 14 June 2013 that the Commercial Court's exemption from automatic costs budgeting "may be unnecessary and inappropriate". The CLLS considers that the Commercial Court's exemption should be retained for four related reasons:

   - any change to the CPR should be based on evidence, and there is no evidence that automatic costs budgeting is either needed or wanted in commercial litigation of the sort conducted in the Commercial Court - indeed, the evidence is firmly in the opposite direction;

   - the proper response to any issues that the Commercial Court's exemption may cause for other courts is not to impose automatic costs budgeting on the Commercial Court, where it is neither needed nor wanted, but rather to amend the rules applicable in those other courts;

   - it is premature to make major changes to the implementation of Sir Rupert Jackson's Report; and

   - there are significant practical differences between work in the Commercial Court and that in other parts of the court system that render automatic costs budgeting in the Commercial Court inappropriate.

The need for automatic costs budgeting

4. Sir Rupert Jackson was commissioned by the then Master of the Rolls to review the rules and principles governing the costs of civil litigation and to make recommendations in order to promote access to justice at proportionate cost. Sir Rupert found that:

   (a) The Commercial Court has a formidable reputation for commercial dispute resolution (Sir Rupert Jackson's *Review of Civil Litigation Costs: Final Report* (the "Report"), chapter 40, paragraph 7.1).

   (b) There is a high degree of satisfaction with the service provided by the Commercial Court to court users (the Report, chapter 27, paragraph 1.5).

   (c) It is inappropriate to tinker with parts of the civil justice system that work well and where costs are usually proportionate (the Report, chapter 27, paragraph 1.9).

   (d) Most (but not all) cases in the Commercial Court are resolved at proportionate cost (the Report, chapter 27, paragraph 1.7).

   (e) Costs management generates additional costs (the Report, chapter 40, paragraph 7.1).

   (f) The general view (even amongst those who support the concept of costs management) is that costs management would not be appropriate for the high value cases which generally pass through the Commercial Court (the Report, chapter 27, paragraph 2.24).

   Accordingly, Sir Rupert Jackson concluded in the Report that it would be inappropriate to impose automatic costs budgeting on the Commercial Court.

5. The Consultation Paper does not contend, nor could it, that new evidence has emerged since the Report was published that requires the conclusions set out in the Report with regard to the Commercial Court to be reconsidered. For example, the Report by King's College expressly states that limited conclusions can be drawn from the pilot scheme it examined as to the advantages and disadvantages of automatic costs budgeting, particularly in relation to high value claims (for example, pages 48-49 and 22 of the King's College report).

6. Instead, the approach of the Consultation Paper is to reverse the burden of proof with a double negative: "there is no obvious reason why [automatic costs budgeting] should not apply to all specialist courts" (paragraph 4.1 of the Consultation Paper). The CLLS considers that this is incorrect and that the Report offers, and continues to offer, clear reasons for maintaining the current position. In any event, when considering a major change to a successful part of the court system, there must be positive evidence to justify that change. There is no evidence justifying any change in this instance; as we have said, the evidence is firmly against the change proposed.

7. The rules applicable in each court should aim to meet the needs of the type of business that the court conducts, not to impose uniformity for uniformity's sake. The primary function of costs budgeting is to ensure that costs incurred are not only reasonable but are proportionate to what is at stake in the proceedings.[1] As the Report sets out, costs are already generally proportionate in the Commercial Court. Imposing the extra cost of automatic budgeting on all cases would therefore merely increase litigation costs with no benefit to the parties. The purpose of the Jackson review was to reduce the cost of litigation, not to increase it as the Woolf reforms have done.

8. Echoing the findings set out in the Report, the members of the CLLS's Litigation Committee have not experienced any demand from their clients for the Commercial Court to become involved in setting budgets. This is unsurprising. The parties to litigation in the Commercial Court are generally commercial organisations, sophisticated users of legal services and well able to look after their own interests. They will, for example, commonly agree rates or fees with their lawyers and require their lawyers to estimate the cost of litigation (as solicitors are required to do by SRA Code of Conduct O(1.13)). They are not parties who (before 1 April 2013, at least) had no interest in the level of their fees because they would never have to pay them or who need the court to protect them from disproportionate costs. There is no reason of consumer protection or any wider policy imperative requiring the court to supervise commercial parties' expenditure.

9. In any event, costs management by the court is only concerned with placing a cap on the costs that a successful party can recover, not with controlling a party's own costs. An estimate that a lawyer prepares for its own client therefore fulfills a very different purpose from a budget prepared for the court. Absolute certainty of recoverable costs if successful and of costs payable if unsuccessful is not generally as significant in complex commercial cases as it may be for parties in some other types of litigation. With the aid of their lawyers, parties can decide how much they wish to spend on litigation, when and on what terms, and can estimate in broad terms their potential liability in costs. The parties may, indeed, consider it unacceptable for the court to compel them to reveal their budgets and plans to the other side because of the light the budget may shed on their tactical approach to the litigation.

10. The CLLS therefore considers that the exemption in CPR 3.12 given to the Commercial Court is appropriate because automatic costs budgeting is neither necessary nor wanted in major commercial litigation and because it will increase the cost of that litigation.

11. In reality, however, the choice in the Commercial Court is not between costs management and no costs management but between requiring all parties in all cases to prepare a budget or only requiring this in cases for which costs management is appropriate. In this regard, paragraph 4.2 of the Consultation Paper argues that, if automatic costs budgeting were to apply, parties who do

[1] *Henry v News Group Newspapers Ltd* [2013] EWCA Civ 19, at [28].

not want automatic costs budgeting could apply at an early stage to be exempted. This puts the burden in the wrong place. Parties in a court in which costs are already generally proportionate should not be required to incur the additional costs of applying to the court in order to gain an exemption from a rule aimed at ensuring that costs are proportionate. The burden should be on the party who wishes the court to manage costs to apply for the court to do so or on the court itself to raise the issue. This is what CPR 3.12 currently provides.

The Practice Direction under CPR 3.12

12. The amendment to CPR 3.12 announced on 18 February 2013 and the Consultation Paper arose from concern in the Chancery Division and other courts that the absence of automatic costs budgeting in the Commercial Court would lead to commercial work migrating from the Chancery Division to the Commercial Court (or, as the Consultation Paper puts it, "a risk of distortion in the spread of legal business between different courts"). The existence of the concern is telling in itself. It shows a recognition that commercial lawyers and their clients neither want nor need automatic costs budgeting and, as a result, that they may choose to proceed in a court that does not have that feature. The CLLS does not see this freedom of choice as a "distortion" or as "forum shopping". In commercial proceedings between sophisticated parties, there is no reason to impose on the parties steps of this sort if the parties do not want them. Commercial parties will understandably and justifiably move to those courts that offer the service they want and need without unnecessary costs.

13. The ability of parties to choose where to litigate is of particular importance in the Commercial Court, where many parties are from outside England and Wales. These parties have a choice not only between different parts of the English court system but between the English courts and foreign courts or arbitration. Introducing automatic costs budgeting therefore potentially poses a risk to the international business of the Commercial Court. It is necessarily hard to quantify this risk in advance but, in view of the Chancery Division's own concerns about its business and the clear evidence that automatic costs budgeting is not wanted by commercial parties, it is not a risk that the Civil Procedure Rules Committee should take. A precautionary approach is necessary. Any change would, indeed, potentially undermine the Ministry of Justice's aim of promoting the UK's legal services sector.[2]

14. The CLLS accepts that, within the current court structure, the Chancery Division, the TCC and the Mercantile Courts have genuine concerns about future high value commercial business in their courts as a result of the likely consequences of CPR 3.12 if the Practice Direction were to be revoked (the Commercial Court might itself be concerned about the potential increase in its business). However, the CLLS does not consider that the response to this concern should be to impose automatic costs budgeting on the Commercial

[2] See *Plan for Growth: Promoting the UK's Legal Services Sector* published by the Ministry of Justice and UK Trade & Investments

Court when the evidence shows that automatic costs budgeting is neither wanted nor needed in the Commercial Court. Any response should be directed to the other courts.

15. Automatic costs budgeting is neither wanted nor needed in the Commercial Court not because a case is in the Commercial Court but because of the nature of the cases that tend to be heard in the Commercial Court. The distinction is between complex commercial and inherently unpredictable litigation of the sort commonly, but not exclusively, found in the Commercial Court, for which automatic costs budgeting is inappropriate, and other cases for which automatic costs budgeting may be appropriate. If budgets are to be provided before the first case management conference as required by CPR 3.13, what is needed is a rule that attempts to divide cases between those where costs management is unlikely to be necessary and those where it is more likely to be appropriate. For these purposes, exempting from automatic costs management cases in which over £2 million is claimed represents a reasonable rule for these purposes (though the CLLS favours a lower threshold of £1 million). The absence of an automatic requirement to submit a budget automatically does not mean that the court cannot or should not manage costs. The court can always apply costs management if it is appropriate to the needs of the case, but an initial exemption for cases of over £2 million represents a realistic attempt to try to avoid imposing the additional costs of budgeting on all cases when, for most of them, costs management is unlikely to be appropriate.

Timing

16. Costs management is a new feature in English litigation. The Report recommended costs management as a means to seek to ensure that costs were proportionate, but the Report did not consider costs management to be appropriate for cases in the Commercial Court. Costs management was tested in a small pilot from which few, if any, conclusions can be drawn, particularly as to the impact of automatic costs budgeting in high value cases. This has been followed by a little over three months of the more widespread use of costs budgeting in the court system. No study has been undertaken to assess the impact of costs management following the implementation of the Jackson reforms. It is clearly much too early to do so.

17. In the view of the CLLS, it would be premature to revise still further the Jackson reforms by imposing automatic costs budgeting in the Commercial Court following a last-minute change to the Jackson reforms because of concern that high value commercial business would move from the Chancery Division to the Commercial Court. As we have said above, changes to the Court's rules should be based on evidence. The appropriate course is to give the Jackson reforms time to operate in practice - including the Practice Direction made under CPR 3.12 and the revised definition of proportionality - and then to assess how each element of the reforms has worked. In the light of that experience, a decision can be taken as to whether automatic costs budgeting should be extended to complex commercial litigation. A premature

response following a last-minute change to the implementation of the Jackson reforms is not a satisfactory way to proceed.

Practical issues

18. The CLLS considers that practical issues render costs management inappropriate for complex commercial litigation of the type typically found in the Commercial Court and that it would impose considerable strain on judicial time and resources.

19. It is often difficult to predict at the outset what shape complex commercial litigation will take. What may start as an apparently straightforward case suitable for an application for summary judgment can turn into a far more significant battle. It is, for example, common for pleadings to be amended on numerous occasions between the commencement of the action and a trial, changes that often affect the disclosure required, the witnesses to call, the experts required and so on. At an early stage in proceedings, parties may have a limited idea as to the volume of documentation that might need to be sifted in order to identify relevant documents. This type of litigation is very different from, for example, the more homogeneous lower value litigation that was the subject of the King's College study.

20. The uncertainties are made worse by the fact that costs management is, it seems, focused on individual items rather than on the overall total. Lawyers in commercial actions may be able in broad terms to estimate for their clients that an action likely to culminate in a trial of, say, three weeks will cost a certain amount or that the costs are likely to fall within a certain range. It is, however, significantly more difficult to estimate what the individual elements - pleadings, disclosure, witnesses, experts etc - will cost. Clients will likewise generally be concerned more with overall costs rather than with the components making up the total. However, it appears that costs management does not allow an underspend in, say, dealing with witnesses to be applied to an overspend on disclosure. An underspend will benefit the payer; an overspend will penalise the payee. It will therefore be necessary to apply for a variation to a budget because one element has increased even if the total has decreased.

21. A budget prepared for the court differs from one prepared for a client not only because the former focuses on individual items rather than the total but because the former is both formal and binding. The court will not allow departure from a budget unless there is good reason to do so, and merely having made a mistake is not a good reason.[3] Lawyers will therefore inevitably spend considerably more time in preparing a court budget than a budget for a client, and clients will expect this to be the case since every pound missed off or knocked off a budget is potentially a pound lower recovery for the client. A budget for a client and for the court will also be prepared on different bases. A budget for a client will be prepared on the

[3] CPR 3.18 and *Elvanite Full Circle Ltd v AMEC Earth & Environmental (UK) Ltd* [2013] EWHC 1643 (TCC) at [43] and [49].

indemnity (solicitor and own client) basis and, although not entirely clear, since the court's budgets are concerned with recoverable costs, a court budget should presumably be prepared on the standard basis.

22. As a result of the uncertainties in the future conduct of commercial litigation and the binding nature of a court budget, parties will either submit budgets as high as possible - potentially in itself inflating costs - or include an extensive list of assumptions on which the budget is based in order to ensure that there are grounds for amending the budget in the future. For example, the parties will have to make assumptions as to what form of disclosure the court will order under CPR 31.5 if they have not been able to agree on the scope of disclosure. A party may also assume that initial electronic word searches will reveal 15,000 documents of which 5,000 turn out to be relevant and that no applications relating to disclosure will be made by either party.

23. If the court is to approve in any meaningful manner the budget for each phase, it will have to consider whether the assumptions are justified as well as whether the rates charged are reasonable. This will take up considerable time at the case management conference if the task is carried out in a proper judicial manner, and may require the parties to submit significant volumes of evidence explaining how they propose to conduct the litigation and why the costs will be as set out in the budget. This requirement may pose difficult tactical questions for the parties and their lawyers, who may not wish to reveal these details to the other side or at that stage in the proceedings but who will be conscious that every pound knocked off a budget could mean a pound less recovered in costs.

24. It is also questionable whether judges are better able than commercial clients to determine, say, appropriate rates for lawyers, fees for experts, let alone what is an appropriate cost for an initial review for disclosure purposes, how long it will take to interview a witness, what level of lawyer should undertaken that task, and so on. As we have said, commercial clients are highly concerned about the level of their costs, and the market in legal services is highly competitive. Commercial clients are likely to be in a far better position than judges to determine an appropriate level of fees.

25. Further, the parties will need to monitor their budgets on a regular basis in order to decide whether they need to propose changes to their budgets. As a case develops, any budget in the form required by the court will require numerous amendments. This is in itself costly and time-consuming, and is likely to lead to extra court applications (eg if the court's order as to disclosure is not in the form a party anticipated, it will need to amend its budget), which may become more contentious as the action progresses. For example, if a party becomes less confident of its prospects of success as the action proceeds, it may focus more on trying to ensure that the other party's budget is as low as possible. Budgets may even change for reasons as simple as changes in the rates of lawyers engaged in a long-running action, perhaps requiring the court to consider whether any resulting increase in the budget is appropriate.

26. This is will prove expensive. Even if it costs no more than the 3% of the budget that is recoverable by the successful party, this will still represent a significant sum of money in absolute terms in high cost litigation (and the unsuccessful party will pay not only the successful party's budgeting costs but its own too). Budgeting will consume a considerable amount of judicial time. Lengthening existing hearings and listing extra hearings to deal with budgeting, without additional judicial resources, will extend lead times for trials and other hearing dates. This extra workload will risk adversely affecting the ability of the Commercial Court to docket cases at current levels, a facility considered desirable by Commercial Court users.

27. In the CLLS's view, in a court in which costs are already usually proportionate, there is no justification for imposing these additional costs on the parties and demands on the judiciary unless required by the particular needs of a specific case. Practicalities dictate that the default position in the Commercial Court should be that there is no costs management unless the court considers it necessary in order to ensure that costs are proportionate. It would be an unnecessary burden to impose costs management issues at the outset of all Commercial Court claims.

Part 8 Claims

28. The Committee has no objection to Part 8 claims falling outside the automatic costs management regime as described in the Consultation Paper. However, in the experience of the CLLS's Litigation Committee, Part 8 claims can prove as costly and complex as many Part 7 claims. The real distinction is between complex, high value commercial litigation, where costs are generally proportionate, and other cases where costs management may be more appropriate. This is not dictated by the manner in which proceedings are commenced.

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THE CITY OF LONDON LAW SOCIETY
LITIGATION COMMITTEE

Individuals and firms represented on this Committee are as follows:

Simon James (Chairman)	Clifford Chance LLP
Duncan Black	Field Fisher Waterhouse LLP
Tom Coates	Lewis Silkin LLP
Jonathan Cotton	Slaughter & May LLP
Andrew Denny	Allen & Overy LLP
Angela Dimsdale-Gill	Hogan Lovells International LLP
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