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The impact of the Jackson reforms on costs and case management

The City of London Law Society ("CLLS") represents approximately 15,000 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.

The CLLS responds to matters of importance to its members through its 19 specialist committees. This paper has been prepared by the CLLS Litigation Committee (the "Committee") in response to the Civil Justice Council's request for written submissions on the practical impact of the reforms in civil procedure introduced in April 2013 (the "Reforms"). This paper is confined to the impact of the Reforms on commercial litigation.

Introduction

1. The Committee is highly concerned about the impact of Reforms on the conduct of commercial litigation in England and Wales. In particular, the Committee considers that the Reforms have increased the cost of litigation, that the Reforms have not improved the efficiency of litigation or the proportionality of litigation costs, that the Reforms have engendered an unduly formalistic approach to compliance, and that there remain major ambiguities in the interpretation and application of the Reforms. Indeed, the Committee is concerned that the Reforms may have an adverse effect on the international perception of litigation in England.

Damages-based Agreements

2. DBAs are little, if at all, used in commercial litigation. This is because, amongst other difficulties, the Damages-Based Agreements Regulations 2013 prevent solicitors from entering into "hybrid" agreements and require solicitors to take the entire risk of the recoverability of damages. For these purposes, "hybrid" agreements are agreements that, rather than being no win, no fee, give the client a reduction in the fees that the solicitor or barrister would otherwise have charged as the case progresses in return for a bonus in the

event of ultimate success. CFAs can be entered into on a hybrid basis (eg 65% of normal fees as the case proceeds, increasing to 135% if the case is successful). Hybrid DBAs are important in commercial litigation because the costs of commercial litigation and the uncertainties of the outcome are commonly such that solicitors are not willing or able to carry the whole risk of the litigation themselves.

3. It is not clear to the Committee why those responsible for the implementation of DBAs chose to prohibit hybrid DBAs or to impose credit risk on lawyers (assuming these to have been deliberate rather than drafting errors). It may be that there are consumer protection reasons where individuals are concerned, but there is no reason why hybrid DBAs should not be available to commercial organisations or why lawyers should necessarily take the risk of a judgment not being honoured.

4. There are other difficulties with the Regulations, such as the anomalous inclusion of VAT in calculations, the position on early termination of a retainer and ambiguity as to whether solicitors and barristers who enter into a DBA can be subject to third party costs orders if the action proves unsuccessful. A thorough review of the Regulations is required in order to render DBAs satisfactory for use in commercial cases.

Conditional fee agreements

5. The principal effect of the Reforms on CFAs is that success fees are no longer recoverable from the losing party. The Committee is not aware of this having had any significant effect on the use of CFAs in commercial litigation. Indeed, the Committee's experience is that commercial organisations with no prior knowledge of CFAs do not generally expect to be able to recover a success fee in the event of the litigation proving successful.

Disclosure statements

6. The preparation of disclosure statements adds to the cost of litigation, but the Committee's experience is that the statements seldom have an impact on the order made with regard to disclosure. Courts tend to be concerned to ensure that the parties have prepared disclosure statements and discussed disclosure in accordance with CPR 31.15 - thereby ticking the relevant box - but statements have little material effect on the disclosure order made by the court (or, indeed, on any agreement the parties may reach on disclosure). In these circumstances, there is no reason to persist with disclosure statements.

Budgets

7. There are major issues for commercial litigation throughout the budgeting process. These include the following.

8. First, it can be unclear whether or not it is necessary for the parties to prepare budgets. For example, the exemption from budgeting in the Chancery Division applies if "the sums in dispute in the proceedings" exceed £2 million. Does this exemption apply only to liquidated claims or does it apply where the claim is unliquidated but the claimant asserts that it will recover over £2 million? What if the claim is for a declaration that there has been no breach of contract, or for an injunction to restrain termination of a contract, where the financial consequences of the action will exceed £2 million? The position is made more difficult because the parties cannot themselves agree not to exchange budgets, while the spectre of *Mitchell* hangs over them if they fail to submit budgets when they should have done so. The obvious course is either to prepare a budget even though it may not be necessary or to apply to the court for directions as to whether budgets are required. Whichever course is adopted adds to the cost of the litigation.

9. The Committee also has experience of standard directions being sent out by the court that require the parties to file budgets even though the claim exceeds £2 million. Parties are faced with the choice of ignoring a direction that is plainly wrong, again threatened with *Mitchell* if the court should disagree, or of incurring the costs of applying to the court for a correction to the original directions.

10. Secondly, the cost of preparing a budget commonly exceeds the recoverable allowance for doing so, often by a large margin. This is not surprising. Budgets potentially cap a party's recoverable costs, and solicitors will therefore inevitably take time and care in their preparation – indeed, solicitors would be failing in their duty to their clients if they did not do so. Budgets also require a statement of truth from a "senior legal representative", which again necessitates diligence in their preparation and high level involvement.

11. This additional and often irrecoverable expense for solicitors' clients does not even take into account the cost of subsequently monitoring the budget against actual costs and of considering the other parties' budgets. Even if there is only one defendant, this latter cost can be significant; for a claimant suing, say, three separately represented defendants, the additional cost could be huge.

12. Thirdly, the approach of the court to budgets is uncertain and inconsistent. In some cases, judges ignore the budgets without comment. In other cases, judges adjourn consideration of the budgets to a further hearing, which again increases the cost of the litigation.

13. In other cases still, judges have simply instructed solicitors to produce lower budgets, perhaps by agreement (which itself may not be achievable or only achievable after extensive and expensive negotiation). This is an unacceptable approach given that the solicitor has already provided a statement of truth that the original budget represents "a proper estimate of the

reasonable and proportionate costs which my client will incur in this litigation." If a judge considers that the costs shown in a budget are disproportionate or otherwise too high, he or she should revise the budget accordingly, giving reasons for doing so.

14. This is linked to the effect of budgets on the conduct of litigation. If judges consider that budgeted costs are too high, the starting point should be to seek to reduce those costs by cutting down the steps required to take the case to trial (eg reduce the scope of disclosure or the number of witnesses each party can call). This seldom happens. If it is not practicable to reduce the steps required to take the case to trial, a judge may rule that, despite being necessary, the costs are disproportionate and therefore irrecoverable. Too frequently, however, consideration of the budgets is divorced from consideration of the procedure to be adopted in the case, the level of the budget merely reflecting the judge's underlying but largely unexplained view of what aggregate figure the losing party should pay in costs.

15. The Committee is also concerned that some judges have a limited understanding of what is required to run a major commercial case. Conducting large scale litigation is a significant exercise in project management, an exercise that many judges will never have undertaken. A judge will seldom, for example, be in a position to say what the reasonable cost of expert evidence might be, what is involved in disclosure in a digital environment and what the practicalities of preparing witness statements are. It may be a recognition of this lack of experience and expertise in budgeting that leads some judges to ignore the budgets filed by the parties or to seek to throw the burden of amendment on the solicitors. In other instances, it may be that the judge is simply uninterested in budgetary mechanics.

16. Fourthly, the criteria for determining whether costs are disproportionate are obscure and, in practice, are likely to depend upon the predilections of the individual judge. The Committee is aware, for example, of judges changing the rates and hours permitted for each step seemingly in order to ensure that the total came to a particular percentage of the sum in dispute but without apparently considering whether or how the tasks could be achieved within those revised times or recognising that the rates in the original budget were what the relevant party had, in a highly competitive market, agreed to pay and would in any event pay.

17. Fifthly, it is unclear when it is permissible to alter budgets. The fear that a budget's turning out to be wrong – and the one certainty is that all budgets will be wrong in some respects – will not be a sufficient reason on its own to amend the budget focuses attention, and therefore time and cost, on the assumptions, contingencies and reservations that provide the basis upon which the budget was made. If the court approves a budget on a particular

basis, it should permit amendment of the budget if the assumptions behind that budget are not met.

18. Sixthly, the overall effect of court budgeting is to increase the cost of litigation while at the same time reducing the successful party's recoverable costs. This will usually be so even if the total figure given by the budget proves to be accurate because an over-estimate with regard, for example, to disclosure cannot be set against an under-estimate with regard to witness statements. The successful party will only recover the actual cost of disclosure and the budgeted cost of witness statements. The fact is, as we have said, that all budgets will be wrong in some respects. It is unrealistic and uncommercial to expect total accuracy in every element of a budget and then to penalise a party for failing to achieve the unachievable. Most parties are concerned about the overall cost of litigation, not about the individual elements that might have gone to make up the total.

19. Indeed, it is difficult to see why the philosophy of the Reforms should be to target recoverable costs in this way. It is one thing to argue that no more than proportionate costs should ever be recovered regardless of the actual cost of conducting litigation; it is another to increase the costs of litigation through the budgeting process while at the same time artificially reducing recoverable costs.

20. In general terms, the introduction of budgeting has imposed significant additional upfront costs on the parties involved in any litigation that falls within the scope of the relevant rules and directions, with no evidence that budgeting will or can produce subsequent savings in most cases. This is especially so in commercial cases since most settle on a basis that renders the budgets immaterial. Budgeting may be suitable for some cases, but the practical uncertainties, difficulties and consequences that have arisen in its implementation indicate strongly that budgeting should only be required if a judge has made an order to that effect in a particular case. Budgeting should not apply indiscriminately to all cases regardless of whether it is likely to be advantageous.

Compliance with rules, practice directions and orders

21. The problems with budgeting are exacerbated by the approach laid down in *Mitchell*. The Committee is concerned that this represents a punitive and formalistic - even anachronistic - approach to litigation that is out of kilter with the pre-eminent need for justice to be both done and seen to be done.

22. In *Mitchell* itself, the solicitors involved undoubtedly made mistakes (as did the court service). CPR 3.14 and the Court of Appeal's order penalised the solicitors for their mistakes by effectively fining them the total costs of the action in the event that their client proves successful. In the Committee's view, this represented a disproportionate response to the breach of a

procedural rule. Arrangements could surely have been made, with suitable orders as to costs, that would have enabled the court, to the extent necessary, to consider the budgets at a later date without adversely affecting other court users or the progress of the case to trial.

23. The approach laid down in *Mitchell,* and, in particular, its extension beyond the field of budgeting, and even beyond situations where there is a sanction for breach of a rule or order, does nothing to improve the efficiency of litigation. The potentially penal sanctions for breach of a rule will increase compliance costs for solicitors and, as a result, for their clients. Further if, for example, it becomes clear late in the day that a party might be a little delayed in, say, serving witness statements, the natural step will now be to apply to the court for an extension of time if the other party cannot immediately agree to an extension. Waiting until after the time for service has passed in order to seek an extension from the court is now fraught with risk, especially as the other side might understandably consider that it has been offered an incentive to refuse an extension that in earlier times it would have granted. The courts therefore face being burdened with additional applications for time.

24. *Associated Electrical Industries Ltd v Alsthom UK* [2014] EWHC 430 (Comm) illustrates these problems. The judge felt constrained to strike out a claim for a failure to apply in advance for an extension of time to serve Particulars of Claim even though an extension would almost certainly have been granted if the application had been made before expiry of the time limit, even though it was fair and just as between the parties to grant the retrospective extension and even though it was likely that another claim could still be brought after strike out. It is difficult to see why the policy of the courts should be to discourage sensible discussions between the parties aimed at advancing the case but instead to encourage formalistic and time-consuming (for the parties and the court) applications of this sort.

25. There have been suggestions that the judiciary was aware that the approach laid down in *Mitchell* would create injustice in individual cases but considered that this was necessary in order to create a climate of greater compliance in the longer term. If so, the Committee considers this approach to be misguided. Courts should never disregard the consequences of their actions for individual parties (or, for that matter, their lawyers). Indeed, this approach is especially galling given consistent failings by the court service (eg in both *Mitchell* and *Associated Electrical Industries*) and the lack of investment in the courts.

26. This is not to say that courts should never be strict with time limits. It may be, for example, that unless orders should be enforced more strictly than has traditionally been the case. But what might have been undue leniency in the past risks turning into undue rigidity now. Courts should be able to recognise

when a party is genuinely trying to progress a case to trial and when it is stalling unnecessarily or jeopardising a trial date, and act accordingly.

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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
Patrick Boylan	Simmons & Simmons LLP
Tom Coates	Lewis Silkin LLP
Jonathan Cotton	Slaughter & May LLP
Andrew Denny	Allen & Overy LLP
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