CITY OF LONDON LAW SOCIETY

LITIGATION COMMITTEE

MINUTES OF MEETING

Date: 10 January 2017, at 4pm
Location: 4 Coleman Street, London EC2

Present:

Simon James (Chairman)	Clifford Chance LLP
Jan-Jaap Baer	Travers Smith LLP
Tom Coates	Lewis Silkin LLP
Duncan Black	Field Fisher Waterhouse LLP
Andrew Denny	Allen & Overy LLP
Angela Dimsdale Gill	Hogan Lovells LLP
Karen Scott (for Richard Foss)	Kingsley Napley LLP
Gary Milner-Moore	Herbert Smith Freehills LLP

In attendance: David Hobart (City of London Law Society)

Apologies: Patrick Boylan, Jonathan Cotton, Richard Dickman, Geraldine Elliott, Gavin Foggo, Tim Hardy, Iain Mackie, Michael Madden, Hardeep Nahal, Stefan Paciorek, Kevin Perry, and Patrick Swain.

Minutes of previous meeting

1. The minutes of the previous meeting, held on 11 October 2016, were approved.

Matters arising

2. Tom Coates reported that a further meeting had taken place of the group set up by Gloster LJ following the judicial seminar on disclosure held in April 2016. The meeting had discussed the first draft of a proposal, and a second draft was currently awaited. The sense was that the current menu of options for disclosure might remain, but with less ability to default to standard disclosure.

3. The Chairman reported that the Committee's response to the Ministry of Justice's paper on *Modernising Judicial Terms and Conditions* had been sent. The Chairman said that he had also responded to HMCTS on the issues regarding its work on the structure of the courts, in particular an online court, discussed at the last meeting. The Chairman added that the Lord Chief Justice and the Master of the Rolls had issued a joint statement on 6 January 2017 in which they had welcomed the recommendations made by Briggs LJ in his *Civil Courts Structure Review* and said that they would work with HMCTS and the Ministry of Justice to bring those recommendations to fruition.

Electronic filing

4. Gary Milner-Moore noted that it was likely that electronic filing would become mandatory in the courts in the Rolls Building in April 2017. The Committee agreed that there was no objection in principle to electronic filing, but expressed concern as to whether the system was yet sufficiently proved to be the sole method of filing claims. A very small proportion of the claims issued in the Rolls Building currently used the system. The system was thought generally to work satisfactorily, but there were instances of documents being rejected a day or more after their having been filed and it then being impossible to reach anyone on the telephone to discuss the reasons for the rejection. If this happened to a claim filed on the last day of a time limit, it could be very serious.

5. The Committee decided to write to Blair J supporting electronic filing generally but expressing these concerns and recommending that at least one counter be kept open some time yet.

Fixed costs

6. The Committee noted the announcement by the Lord Chief Justice and the Master of the Rolls on 11 November 2016 that Jackson LJ had been appointed to develop proposals for extending the present fixed recoverable costs regime so as to make the costs of going to court more certain, transparent and proportionate for litigants. The Committee decided to respond to the request for written submissions, noting that, while Jackson LJ's comments on the subject (notably his speech of 28 January 2016) did not suggest that fixed costs would be extended to all multi-track cases initially, that could prove to be the ultimate goal.

7. Points made in discussion included:

   (a) It was necessary to consider the underlying reason for costs shifting, namely that a successful party should not be (significantly) worse off through being compelled to litigate in order to vindicate its rights. If recoverable costs bore no relation to actual costs, it could cause injustice. Certainty on recoverable costs was beneficial, but ensuring proper access to justice was more important.

   (b) The implications for the international competitiveness of the English courts needed to be taken into account. In this regard, the US (where there is no costs shifting) was not the appropriate comparator but rather it was fora like the DIFC and Singapore.

   (c) Were major commercial enterprises pursuing multi-million pound claims that sensitive to costs? Some members of the Committee doubted that they were, but others observed that they could at times be more concerned about costs than smaller companies.

   (d) Fixed costs could produce perverse results if there was an inequality of arms. For example, a well-funded party being sued by a financially-stretched party might have an incentive to run the case in as disproportionate a manner as it could in order to render the case prohibitively expensive for the claimant to pursue.

(e) Some members of the Committee were not wholly unsympathetic to the idea of fixed costs. Attempts to control costs (eg Woolf and Jackson) had all failed. Removing one element of litigation (costs budgeting and assessment) would reduce costs to a degree, and certainty as to the recoverable amounts might be welcomed even if it involved an element of rough justice.

(f) Lower value claims tended to be more homogeneous in nature, with the result that costs could be fixed with less risk of injustice. The more was at stake and the more complex a case, the more individual it tended to become, with potentially huge differences in costs.

(g) It had been suggested that judges favoured fixed costs because it meant that they did not have to undertake costs budgeting, which most dislike.

(h) The weighting of costs (eg £5000 for disclosure) at page 13 of the published text of Jackson LJ's speech of 28 January 2016 was unrealistic. Similarly, the "rules" set out on page 14 would still allow considerable scope for argument about costs (eg as to whether a stage had been "completed").

(i) The increase in litigation costs in recent years represented, in part at least, a failure of the judicial reforms to the system. It would reduce costs if judges were more robust in dealing with, for example, applications for summary judgment and strike out, and in dealing with disclosure.

(j) What would the object of fixed recoverable costs be? Would it be to allow recovery of a sum that was an attempt, albeit rough and ready, to determine what the actual costs of litigation might be or was it just a figure that was deemed to be proportionate to the sums at issue regardless of the probable actual costs.

(k) Proportionality in costs was a difficult concept. The prime driver for whether it was worth investing in the pursuit of a claim was the prospect of success of that claim. If the claim had a high prospect of success, it might be proportionate to invest a sum as much as that at stake, perhaps even more.

(l) How would the costs of interim applications be handled?

(m) If fixed costs were to be introduced, there should be a pilot first, perhaps in the Mercantile Court. Any change in the number of cases started in that court would offer an insight into the popularity or otherwise of fixed costs in commercial cases.

Any other business

8. The next meeting of the Committee will take place on a date to be fixed.