APPENDIX 13: NOTE PREPARED BY A SENIOR QC, SPECIALISING IN CLINICAL NEGLIGENCE WORK FOR BOTH CLAIMANTS AND DEFENDANTS, IN RELATION TO THE NATIONAL HEALTH SERVICE LITIGATION AUTHORITY (NOW NHS RESOLUTION)

NOTE RE NHS LA

The case examples attached come from the only 2 sets of chambers in the North that were emailed once to provide examples of the NHS LA increasing the costs of litigation. They are largely un-amended and all counsel wished to remain anonymous to avoid affecting their work for and against the NHS LA and their solicitors.

There was an expressed reluctance from barristers working for the NHSLA to involve themselves at all. One response, a common theme, was: *"I have, certainly, a number of examples where I have been instructed for the NHSLA where the way in which they have conducted matters has resulted in costs increasing – I don't, though, feel comfortable recounting them for your purposes"*

Further, a number of barristers working for Claimant's were equally reluctant, as they felt the current practices of the NHSLA provided more work for them at the Bar without the constraints placed on them in cases involving insurers.

Below are set out some basic points that arose from conversations and emails received, containing, in fairness to the NHSLA, possible justifications for their conduct:

- Much depends on (a) the case handler at the NHSLA – some are, in fairness, excellent; and (b) the solicitor that is dealing with the case. Certain firms / fee earners are excellent and appear to be able to obtain the necessary instructions.

- Generally speaking, with a high value case handled at partner level, the NHSLA are slow, but get there in the end. Obviously, the quicker the right result is achieved the cheaper it will be.

- It is the lower value cases (by which I mean those worth up to maybe £250,000 – so not low in any ordinary sense!) where there seems often to be difficulty in getting sensible instructions.

- There are practical problems attending and getting individual Doctors and Trusts to agree to the handling of a case.

- The real difference between the NHS LA and a general insurer is that it does everything by the book and lacks any imagination to make things happen or to take an early view. This may be a necessary function of accountability for public money so that no one can be given responsibility to take decisions that are incapable of audit. However, the unwillingness to consider the economics of litigation, as insurers do, is costing the NHS LA dearly.

- C's appreciate the fact that they can prepare a whole case without ever having

any threat of P.36 or P.44 costs' consequences. An insurer would regard this as an open chequebook to incur costs.

- The NHS LA used to settle at first JSM on quantum at the right figure, but now, routinely, come with too little authority on the lump sum albeit often with realistic PPOs. So the JSM regularly ends without agreement, when it should in the vast majority of cases. By the time realistic proposals are forthcoming, the case is so close to trial that the NHS LA only puts itself under pressure and runs out of time to make effective offers with any costs' protection. I have experienced and had numerous examples cited of substantial settlements in the week or 2 before trial – this should never happen with proper early preparation and entering ADR constructively with a willingness to pay a proper settlement.

EXAMPLE 1

A child brain damaged and deaf from negligence at birth. Judgment on liability entered in 2012. C family keenness to settle asap expressed to D. 3 x JSM's cancelled by the D for various reasons. All add to cost. The JSM for March 2015 was canceled as the family were moving from Guernsey back to the UK and D insisted that they resettle in the UK and experts all reassess, rather than try and do a cheaper paper exercise of inserting English costs into existing and up to date reports. Dec 2016 JSM cancelled to push the directions back as D had delayed in compliance. Feb 2017 cancelled due to last minute disclosure request, of no real consequence to the value of the case. They now face a JSM with a -0.75% discount rate.

EXAMPLE 2

Conference with experts where advice on quantum provided and Ctr-sch drafted. JSM fixed. NHSLA sent Counsel, to embarrassment of D sol, to JSM with instructions to settle up to the figure contained in the Ctr-sch and not in accordance with counsel's previous advice. Counsel only advised on the day of the JSM. Caused uncomfortable day, unnecessary costs and break down in trust between litigators. Counsel then provided written advice on Q giving same advise as previously. Instructions not obtained until after the next CMC. Case subsequently settled following offer at the figure advised by D's Counsel originally. If authority to settle up to that figure had been given for the JSM then lower settlement may have been achieved and costs saved.

EXAMPLE 3

Doctor employed by NHS claiming 'stress at work'. Counsel advised NHS LA in Conference, then a few days later was asked to provide the same advise in writing and then again in conference with the Trust. 3 fees charged to receive the same advice 3 times.

EXAMPLE 4

Claim on behalf of elderly lady injured in a fall in hospital and injury not treated properly. Breach of duty and causation of the broken bone entirely clear. Value of the claim not

high, though, as Claimant developed unrelated co-morbidities which significantly impacted on quality of life and reduced life expectancy in any event. An invitation to admit liability met with no response, nor was any indication given as to the case D would advance. A sensible C Part 36 offer was put forward prior to issue. Rejected. Letter warning that proceedings would have to be issued and of the costs consequences of that were sent, with repetition of the Part 36 offer. No response. C had to issue proceedings, with the court fee and the insurance premium. As soon as D had solicitors, they accepted the Part 36 offer. The NHSLA built all the costs, really, in that case.

EXAMPLE 5

Claim in relation to negligent joint replacement surgery. A really clear case re breach of duty, which was obvious from looking at the x-ray. NHSLA made admissions of breach of duty – but not the breaches C had alleged, and would not say what their position was in relation to the breaches alleged. Resulted in wild geese being chased and an early conference that should not have been necessary. C offer to exchange expert evidence on a without prejudice basis was rejected. C had to issue and serve. Breach of duty was then admitted but a causation case advanced. It all settled but much further down the line than should have been the case, and for a sum that was acceptable throughout.

EXAMPLE 6

Claim in relation to failure to treat properly pre-cancerous changes resulting in the development of cancer and a need for radical surgery, which went (non-negligently) badly wrong. In fairness this was a difficult case but it was made more difficult by the way in which it was dealt with by the NHSLA or their solicitors, who seemed to treat the claim like it was a dodgy whiplash one. This case was fought at every possible stage until the last minute, and resulted in the very competent C solicitor having the largest correspondence file she had ever had. Only one Defendant was sued. It later emerged that the Defendant had failed to disclose documents they should have disclosed pre-action, resulting in the need to join a second Defendant (also NHSLA). The First Defendant opposed them being joined, though I never actually understood why. The application to join D2 was successful, and the 2 ended up both represented by the same solicitors. Large amounts of breach of duty and causation evidence required. The day before exchange of liability evidence, D1 admitted breach and causation on condition C discontinued against D2, but accepted D1 should have to pay the costs of suing D2. We then started on quantum evidence, which I think necessitated 5 or 6 experts – D refused suggestions for joint experts and insisted on their own for everything. Then didn't disclose some of them. They invited C to prepare the agendas for the remaining experts' discussions, which I did – and then objected to 2 of them on the basis that they were by then of the view that those experts did not need an agenda. They had to be pushed into a JSM, where it settled (or shortly afterwards) for a sum that could have been achieved without the JSM.

EXAMPLE 7

Claim for modest damages arising out of what the Claimant contended was an

unnecessary hysterectomy. This isn't a great example because the claim was weak and failed at trial. However, D insisted on a JSM – and came with no offers to make, really just to tell C how weak her claim was. The JSM was completely unnecessary.

EXAMPLE 8

Birth Injury claim with liability in dispute. Proper dispute on liability. On-going for many years. Liability to be tried first. Value of the claim pretty clear – somewhere around £3.2m. C has public funding. D insists on JSM. C makes good offer at JSM to accept, effectively, 2/3rds of the value of the claim. Rejected, no counter offers, we're going to trial. This was a complete and utter waste of public money. Had D simply said they had no offers to make and intended to fight liability, JSM could have been avoided.

EXAMPLE 9

Case recently settled at JSM on the 3rd February 2017. The Defendant NHS Trust refused to comply with several court orders to permit inspection of the originals of previously disclosed documents. Not a difficult matter just plain and obvious unreasonable behaviour, obstruction causing further and unnecessary costs. Their obstruction necessitated several applications and hearings all of which resulted in cost orders against them which are now claimed for this issue alone at well over £100,000. Had they not made a very sensible offer at the JSM (£410,000) then merely days later the C application to debar them from defending this matter further or, in the alternative, an independent solicitor (with assistants) be appointed to undertake the disclosure process for them, was to be heard. The grounds for such a draconian order were the defendants contumelious disregard for court orders and their failure to disclose the most straightforward of documents that we knew (from other disclosed documents) that they possessed i.e. a RIDDOR report and the minutes of a clinical governance meeting where they discussed what went wrong with our client. - *["At this point I have provided merely very basic details because I am conscious of the fact that costs arising from interlocutory hearings are in addition to any budgeted costs but I do think it illustrates how the NHSLA etc can, and do, adopt a strategy of trying to utilise a Claimant's budget/fixed costs on straightforward issues (i.e. the compliance with a straightforward court order) so that the 'fighting fund' is diminished for more important and helpful matters. The NHSLA with relatively very low costs per hour can afford to use such tactics far more than a Claimant's legal representatives who probably need their £201/217 per hour from their budget in order to remain profitable. Restraining Claimant's to 'Fixed Costs' in such matters does run the risk of causing severe inequality of arms in terms of financial funding of a case when the NHSLA may not be as concerned with the recovery of all of their expended 'legal' costs if such behaviour leads to a more significant reduction of damages to be paid to the client. The same does not apply to a Claimant"]*

17 April 2017