TECBAR response to the Civil Justice Council's invitation for Position Papers on the impact of the 'Jackson Reforms'

1. TECBAR (the Technology & Construction Bar Association) set out, in brief, their response to the Jackson Reforms below, by reference to the key changes made.

2. **Cost Management** – The TCC Courts were, since 2011, already subject to a pilot cost management procedure in much the same form as that introduced in April 2013. In addition, the new regime (to date) only applies to cases in the TCC of under £2 million. Consequently, the introduction of formal cost management was less of a culture shock than elsewhere. That said, the pilot scheme empowered judges to make cost management orders only where it was "appropriate" and, whilst CPR 3.15 retains the court's discretion, our experience is that since April 2013 the TCC judges, in line with other courts, have generally made cost management orders where possible. That was not the case pre-April 2013.

3. TECBAR retains a concern that the cost management regime was imposed upon the TCC courts in circumstances where the Jackson report held up the TCC procedures as an example of how good case management could control costs and succeed in keeping them proportionate. Not for the first time, problems identified in other jurisdictions have led to solutions being applied in the TCC where no such problems existed. The current proposal to increase the scope of cost management orders to all cases under £10 million compounds this problem.

4. There is clearly a time and cost implication in having to prepare Precedent H and to debate the respective cost orders at and in advance of the CMC. It is probably too early to assess the accuracy of such early cost budgets, but our experience is that parties have generally been reluctant to come back to the Court to try and revise such budgets. In such circumstances, there is obviously an in-built incentive to over-estimate costs.

5. That said, firms and barristers have become increasingly proficient at producing cost budgets and judges appear to be increasingly comfortable considering them. There is a benefit in greater cost certainty for the client. Notwithstanding our concern over the extension of the scheme to £10 million cases, it is clearly preferable for all the Rolls Building divisions to have the same cost rules applying, so as to avoid forum shopping.

6. **Disclosure** – The TCC has embraced the flexibility introduced by the 'disclosure menu' in amended CPR 31.5 and many cases are now adopting a more focussed and cost effective disclosure regime. The requirement to serve a disclosure report and to seek to narrow the issues in relation to disclosure are all to be welcomed and, in general, the process has worked well in the TCC.

7. There is time and money involved in producing the disclosure report, negotiating with the other parties and, if necessary, debating the issue at the CMC, but such costs are likely to be outweighed by the potential reduction in the scope of disclosure. In our experience, lawyers and clients have found this to be a useful change in the rules.

8. **CFA's** – The TCC was not a fertile ground for CFA's prior to April 2013 and TECBAR are not aware of any drop in cases connected to the change in funding arrangements.

9. **Amendments to Overriding Objective and CPR 3.9** – In principle, there was nothing in the new rules which was contrary to the manner in which TCC cases were being managed pre-April 2013, but we are very concerned by how these rules are now being applied (and the confusion resulting) following the *Mitchell v News Group* decision and, in particular, its impact on TCC work.

10. Partly as a result of the 'docketed judge' system (and the quality of the judges) TCC cases had been robustly and efficiently case managed for some considerable time prior to the Jackson reforms. There was no significant concern being expressed as to disproportionate costs or in relation to habitual disregard for court rules or directions.

11. There was in place already an effective case management approach which encouraged cooperation between the parties and, where that proved insufficient, the TCC judges were more than able to ensure cases were managed efficiently and proportionately through to trial. Standard directions would often include a provision that parties could agree an extension of time in relation any direction – other than the trial date and PTR – up to 14 days and otherwise they had to apply to the court. The procedure was working well and avoided the expenditure of needless costs. In large part, therefore, the amendments to CPR 1.1 and CPR 3.9 reflected the practice in the TCC.

12. Following the *Mitchell* decision it now seems that the new rules are to be interpreted such that any failure to comply with a direction requires an application for relief from sanctions, which will only succeed if the failure was trivial and there was good reason for it. If that is how the new rules are to be applied (and it is not for this paper to debate the wisdom of *Mitchell*), then it risks significantly undermining cooperation between the parties and will lead to increased costs.

13. For example, whereas previously parties would often agree extensions of time for compliance with directions, that is now very difficult to obtain because the opposing side know that the court might not permit such an extension – even if there is no prejudice and the trial timetable is not affected – and if the party cannot comply with the current timetable they might find themselves struck out. Judicial time is being wasted on opportunistic applications which do not obviously reflect the Overriding Objective.

14. The nature of TCC cases are such that it is often very difficult to predict accurately the time required to complete various steps in trial preparation. Expert evidence is usually required, and is not within the control of the lawyers or the client. To date, parties were able to agree sensible but ambitious timetables in the knowledge that the other side or, if necessary, the court, would be sympathetic to an extension of time where appropriate. The *Mitchell* approach risks the unintended consequences of (i) the parties reasonably seeking the longest rather than shortest realistic trial preparation timetables so as to avoid the need to apply for an extension, and (ii) additional cost resulting from the (inevitably contested) applications for extensions of time/relief from sanctions.

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