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19 January 2022

Consultation on Pre-Action Protocols, Interim Report (the "Report")

We write to comment briefly on the Report.

This Firm's experience is largely confined to the commercial sphere and, as a result, our comments are limited to that area of practice. Within that sphere, we have grave concerns about the proposals in the Report which, in our view, are likely only to increase the cost of litigation with no material benefit to the parties within the litigation process or otherwise.

Our brief comments are as follows.

1. One of the most significant, and persistent, issues in commercial litigation is its cost to the parties (not merely recoverable costs). Costs arise because of the steps the rules require lawyers to take in order to bring a case to trial; the more steps, the higher the cost. For example, the Woolf reforms resulted in increased costs because, amongst other matters, of the additional case management required. This led in time to the Jackson review. The Jackson review introduced new budgeting requirements, again necessarily increasing costs because of the extra steps required. The recent reforms to disclosure in the Business and Property Courts have imposed additional steps and, again, have resulted in increased costs. The aspiration behind reforms of these sorts has often been that more expenditure at an early stage in proceedings would result in savings later on, but there is no evidence that this aspiration has ever been achieved; the evidence points in the opposite direction. The reforms proposed in the Report would impose additional steps, and therefore costs, on the parties. There is no reason to believe that the outcome would be any different from previous reforms.
2. We are particularly concerned at the proposal for a list of issues, or "formal stocktake", prior to the issue of proceedings, particularly if it must be filed at court with the claim

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form. Not only is this duplicative (for example, paragraph D6 of the Commercial Court Guide (2017) requires a list of issues after statements of case have been filed, and PD51U, §7 requires a further list of issues for disclosure purposes), but it is naïve to think that it will be anything other than a highly contentious document over which the parties, and their lawyers, will, and must, fight if it is to be a document of any consequence (if it is not a document of consequence, there is no need for it). Pre-action correspondence will, or at least should, demonstrate what the issues between the parties are, which will then be more formally set out in the pleadings. An additional document to the same effect will serve no useful purpose but it will increase the costs of the litigation.

3. We are also concerned about the proposal for a good faith obligation to resolve or narrow a dispute before proceedings are commenced, including by offering compromise, entering mediation or some other similar process. Particularly if coupled with sanctions for supposed non-compliance, this will offer further opportunities for interim and other squabbling about costs which will add to the overall costs as well as being hard for the court to resolve (at least, without overriding the sanctity of without prejudice communications). It will lead many parties to go through the motions, whether in mediation or elsewhere, multiplying costs and causing delay but with no benefit.
4. The implication of this proposed good faith obligation is that it will constitute bad faith for a party to insist upon what it sees as its legal rights, whether that be payment of a sum of money or something else. We do not agree. Parties may choose to compromise what they see as their rights because of the uncertainties inherent in the litigation process or for other reasons, but that is a matter for them to decide. Courts exist to enforce parties' rights, not to force parties to sacrifice some or all of those rights by way of compromise. In this context, "good faith" is an unhelpful concept, and fighting over its meaning and whether a party has displayed it will increase costs.
5. The proposals in the Report will also increase delays in litigation by expanding the pre-actions steps required. If there is a genuine dispute between the parties, there may perhaps be some advantage in requiring a letter before action and a reply, but often there is no real dispute and all the prospective defendant wants to achieve is delay. Building additional delays into the litigation process by increasing the pre-action steps is potentially unfair on claimants, depriving them of the ability to enforce their rights. If a claimant has behaved unreasonably, a court is quite able to take appropriate measures in the course of or at the end of the proceedings.

In general terms, we are not aware of a problem in commercial litigation that the proposals in the Report would address (which is not to say that there are no problems in commercial litigation). The Report contemplates that the parties will go through a process of defining the

issues between them prior to the issue of litigation, even having disclosure, and will then go through the same processes again more formally after issue of the claim form (in some cases more than once). This duplication will only increase the costs of litigation, to the detriment of the English legal system and, in particular, of its global standing. The focus should be on ensuring litigation processes – pleadings, disclosure etc – achieve their objectives as efficiently as practicable, not on adding ever more steps that will increase litigation costs and that will delay, even impede, access to the courts and to justice.

Yours faithfully

A handwritten signature in blue ink that reads "Clifford Chance". The signature is written in a cursive, flowing style.

Clifford Chance LLP