INTRODUCTION

The LSLA provides civil and commercial litigators working at the centre of UK and international litigation with an active forum for sharing and exchanging views, networking, learning and influencing legislation.

We have over 3,500 individual members working in major international practices, national law firms or as sole practitioners. The Association has a proud 70-year history of helping to shape civil justice reform and promoting best practice in litigation.

The LSLA does not approach this consultation on behalf of a particular interest. In the time available the LSLA has not been able to survey the views of its entire membership, but has drawn on the views of its committee, which is drawn from a range of law firms (Magic Circle, Silver Circle, US, mid-size and consultant), in-house counsel, GLD and the judiciary. From those different models, all practise commercial litigation in the London courts, particularly those in the Rolls Building. It the voice of commercial litigators which is represented in these submissions.

There is a perception that too often civil justice reforms are driven by considerations arising in particular specialist types of litigation (such as personal injury) or influenced too heavily by one side (such as insurers). The litigators on behalf of which the LSLA speaks act on both sides, claimant and defendant, well-resourced or funded, across the whole range of commercial litigation and the LSLA would encourage the Costs Working Group to draw on the experience of its members.

The consultation paper states at the outset that the Working Group recognises the vital role that access to justice plays, and that affordability is fundamental to such access. However, it is important to remember that costs reforms do not regulate the fees paid by clients to their lawyers; they regulate the amount of those costs which are recoverable from the losing party. In the field of High Court commercial litigation, clients will almost invariably be paying their lawyers more than they recover from the other side. Therefore, any steps that increase the gap between actual and recoverable costs have the effect of impeding access to justice for those who are supposedly the winners. In other words, steps that may be motivated by a belief that controlling recoverable costs will increase access to justice may have the opposite effect to that intended.

THE QUESTIONS

Part 1 – Costs Budgeting

1.1 Is costs budgeting useful?

The exchange of information about costs incurred and costs estimates is useful to allow parties to predict and mitigate risks associated with litigation. Clients will be seeking such information at the outset and throughout a matter so there is scope to update and share this information throughout the proceedings.

However, a clear majority of the LSLA committee are of the view that budgeting itself is not useful – in other words, reliable estimates about the costs of the litigation can be provided other than via a full-blown costs budget.

Cost budgeting does not in practice reduce the costs of litigation; it only impacts on recoverability. Therefore, costs budgeting should not be regarded as a useful tool for reducing the costs of litigation. Whilst there is scope for a client to request that it is charged no more than a Court approved budget, there is nothing in the rules that requires this: and it is not the typical experience of the LSLA.

Nonetheless, particularly where there is inequality of arms between parties, the existence of costs budgeting does allow parties to have a degree of certainty about the other side's costs. The importance of this to funded litigation and insured claims cannot be overstated, in order to ensure that sufficient ATE cover is in place. However, as we have indicated, the same could be achieved through a system of Court-supervised costs estimates rather than budgets.

The current system imposes a costs burden on <u>every</u> case (falling below the £10m threshold) with the objectives of offering a degree of predictability as to the exposure to adverse costs and limiting the scope for argument on detailed assessment. However, in the field of High Court commercial litigation, only a very small proportion of cases go to trial and only a very small proportion of cases that go to trial then go on to detailed assessment. Therefore, the second of these objectives cannot possibly justify the imposition of onerous and costly obligations on all cases. It is accepted that the first objective is important, but we consider that that objective can be achieved in a much more

proportionate manner by the exchange of costs information (with intervention by the court if necessary).

1.2 What if any changes should be made to the existing costs budgeting regime?

Phasing

The phasing used is not necessarily helpful, as there is often work which doesn't neatly fit within a phase or might span more than one phase. It is often difficult to fit certain early stage work into a particular category. The rigidity by which parties are not permitted to transfer under-spend in one phase to another phase where the budget has been exceeded should be removed.

Margin of error for exceeding budget

When budgeting was still a pilot *Henry v News Group* allowed a party to go 5% over budget. There should be an allowance for this without having to come back and re-budget.

This may also obviate the need for parties to come back to Court when they have exceeded a phase of the budget.

Budget discussion reports

There is a perception that discussions about costs budgeting are a waste of time (and money) as parties rarely see it as in their interests to engage in any serious negotiation over budgets.

1.3 Should costs budgeting be abandoned?

The majority of the LSLA committee is of the view that budgeting should be abandoned, albeit replaced with a system of costs estimates such that some would prefer to say 'radically reformed'.

Budgeting would need to be replaced with a system of costs estimates with a degree of detail that could enable the Court to make observations at the CMC (or the opponent to ask reasonable questions seeking further detail if not sufficient has been provided to explain or justify the estimate). Parties would be expected to update estimates if they changed materially throughout the lifetime of

the case and parties' recoverable costs would be capped at a margin within the estimate unless there was good reason for the estimate to have been exceeded.

1.4 If costs budgeting is retained, should it be on a "default on" or "default off" basis?

The majority of the committee was of the view that if budgeting is retained it should be on a "default off" basis. If both parties want it they can have it. If only one party wants it they should be able to give compelling reasons why justice is served by budgeting.

There is some experience in cases over the £10m threshold and to which costs budgeting does not currently apply by default, of the Court being very ready to accede to a request by one party to apply costs budgeting. We consider that if the default position is to have any real meaning, the threshold for disapplying it ought not to be set too low.

1.5 For cases that continue within the costs budgeting regime, are there any high-level changes to the procedural requirements or general approach that should be made?

Judicial intervention and training

Part of the problem with costs budgeting in the High Court is that it is undertaken on the whole by judges who came from the bar and do not, therefore, have an understanding of how costs are incurred. Separately, there is also a perception that counsel's fees are accepted more readily than solicitors' fees. Counsel's fees should be subject to the same level of scrutiny as solicitors' fees.

It might also be useful if attention could be properly paid to conduct (including pre-action conduct) when considering incurred costs. In practice, there is much reluctance from the judiciary to give any consideration to whether incurred costs have been reasonably or proportionately incurred, either to make observations on them or to have regard to incurred costs when approving estimated costs. This creates a situation where a party can "game" the budgeting process and rack up vast costs with little fear that those costs will be looked at at the CCMC or have any effect on estimated costs. If the costs budgeting process is to work as intended, there needs to be greater judicial consideration of incurred costs. Whereas it might be said that this will increase costs (effectively requiring a mini-assessment at the CCMC stage), the costs of costs budgeting are so significant already, particularly for complex

cases, that it is doubtful that scrutiny of incurred costs will add much to the costs of the budgeting process.

Assessment

If a claim is budgeted, when it comes to assessment the Costs Judge will quite often award the amount claimed provided the budget has not been exceeded, and does not particularly explore whether those costs are reasonable and proportionate. So litigants face a scenario where estimated costs are not really considered at a CCMC beyond a cursory look, and are not looked at upon assessment unless there is "good reason" (i.e. unless they have been exceeded): *Harrison v University Hospitals Coventry & Warwickshire NHS Trust* [2017] EWCA Civ 792.

Timing

At present costs budgets are usually dealt with at the end of the CCMC after all other arguments have been dealt with. It can therefore sometimes be a bit of an after-thought and is something parties (and often the judiciary) approach with some weariness and a distinct lack of enthusiasm when everything else has been exhausted.

That also means that budgets are drawn before directions have necessarily been agreed, meaning more assumptions are made and before you have heard the other side's thoughts about directions and the steps to trial.

One suggestion would be to change the point at which budgets are prepared: moving it to (say) 21 days after the last day of the CMC, when the parties know what the directions are. Budgeting could be dealt with on paper with all submissions made in writing unless the judge considers it necessary to have a further hearing. Costs incurred up to and including the CMC would be submitted, but otherwise timing after the CMC should result in more effective budgets. It is often said that the costs budget information is required to inform decisions about directions. We think this overstates the value of the detail in the budget – decisions about directions can be made on the basis of a broad brush understanding as to the likely costs consequences of particular directions, without requiring the detail of a costs budget.

Part 2 – Guideline Hourly Rates

2.1 What is or should be the purpose of GHRs?

GHRs are a useful tool to assist solicitors in the preparation of their own costs estimates and budgets as well as analysing costs estimates and budgets proposed by an opponent.

While GHRs are very unlikely to form any part of the setting of the hourly rate that solicitors charge their own clients, they provide a yardstick to help calculate the likely shortfall between the costs that the client will ultimately pay, and the amount that the solicitor can reasonably expect to recover on a summary (and to a lesser degree, detailed) assessment.

They provide a useful starting point for the Court and, provided they are used as guidelines and not as tramlines, they have a use in both summary and detailed assessment. The qualification bands are also useful for the guidance purposes outlined above.

We anticipate that greater attention will be focussed on the London 1 rates, because in our experience higher value contested claims tend to be more complex.

However, while we think it likely that they will be used less, we do not consider that the National bands will become redundant, so they should be retained.

We do not see any benefit in restricting the use of GHRs to certain types of litigation. It seems likely that a large number of certain types of claims, including personal injury and RTA claims, will fall under the FRC regime. The higher value claims in those categories should still benefit from the use of GHRs.

It is noticeable that despite very extensive analysis and precedent on the approach to assessing "reasonable and proportionate" costs of solicitors, there is almost no guidance on or (in the majority of costs assessments) criticism or reduction of counsel's fees. Given that counsel's fees typically form a substantial proportion of overall costs, this asymmetrical approach by the Court is both puzzling and concerning. GHRs could therefore be extended to barristers' fees.

2.2 Do or should GHRs have a broader role than their current role as a starting point in costs assessments?

Recent cases indicate that the Court is now treating the GHR as an effective ceiling rather than starting point. Males LJ stated that "if a rate in excess of the guideline rate is to be charged to the paying party, a clear and compelling justification must be provided". This marks a radical departure from the previous approach to the use of GHRs, and is a significant concern. It allows very little flexibility for the Court on summary assessment.

The previous Guide to Summary Assessment included a note stating:

"An hourly rate in excess of the guideline figures may be appropriate for Grade A fee earners in substantial or complex litigation where other factors, including the value of the litigation, the level of complexity, the urgency or importance of the matter as well as any international element would justify a significantly higher rate to reflect higher average costs."

This allowed the Court to take a more flexible approach on summary assessment. The introduction of the distinction between London 1 and London 2 does not mean that there should be no flexibility to depart from London 1. If GHRs continue to play a pivotal role in both summary and detailed assessment, then such flexibility needs to be reintroduced as a priority.

We do not believe that GHRs have any wider role in consumer and small business protection in the purchasing of legal services, or in the protection of litigants in person.

2.3 What would be the wider impact of abandoning GHRs?

Assuming that both summary and detailed costs assessments are likely to continue with a remit to control the level of recoverable costs, the abandoning of GHRs would create considerable uncertainty and unpredictability, not only for judges, but also for law firms in advising their clients.

2.4 Should GHRs be adjusted over time and if so how?

As the experience of the failure to adjust them between 2011 and 2021 clearly shows, if they are not adjusted on a regular basis they very quickly become worthless as a guideline.

It should be emphasised that even the 2021 adjusted rates are no more than an indication of fees charged by solicitors for various categories of work in different parts of the country. Large City law firms charge considerably higher hourly rates (more than double in some cases) than London 1 rates.

Attempts to review rates on a detailed evidence-based analysis have failed time and again and we do not recommend pursuing this route. The data that is used for such analyses is (by definition) historical and in recent times appears to be based on actual rates allowed by costs assessors rather than costs charged and claimed by solicitors. Actually assessed costs are case and fact specific so their value as a guide for a wider costs yardstick is limited, and potentially misleading.

Any evidence-based approach assumes that there is a "market rate" for solicitors' costs. In highly competitive commoditised areas of practice such as personal injury and RTA claims, something approaching a market rate may be discernible, but outside such competitive areas, there is such a wide disparity that an attempt to fix a rate will never be anything more than a policy-led mean assessment.

But while the accuracy of GHRs, including the most recent rates, may be disputed as a genuine assessment of the "going rate" they have the benefit of providing certainty as to the Court's starting point in an assessment.

As with fixed rates, a mechanism to update GHRs is essential. Given the perceived inadequacies of evidence-based reviews, we would recommend an annual automatic uprating with reference to a recognised and accepted index such as the SPPI. Periodically, say every 5 years, a more thorough reassessment of the role and amount of GHRs should be undertaken.

2.5 Are there alternatives to the current GHR methodology?

The methodology used by the Stewart committee was, whilst flawed, an acceptable basis for assisting that committee in selecting the rates which, as a matter of policy, were to be adopted. They received a degree of 'buy-in' from practitioners, but this was on two conditions: first, that the GHRs are applied flexibly, as a starting point and not a ceiling; and, secondly, that the GHRs are uprated annually by reference to an index. Neither of those conditions are being fulfilled and action should

be taken to correct this as a matter of urgency because there is no feasible alternative if GHRs are to continue to be useful.

Part 3 – Costs under pre-action protocols/portals and the digital justice system

The matters raised in this section of the Consultation cover a number of wide-ranging issues. Whereas those issues are, to some extent, interlinked, they are not obviously so, and each themselves would ordinarily warrant detailed analysis. Further the issues are the subject of current ongoing development: the CJC is separately reviewing how to make pre-action protocols more effective and streamlined; the Online Procedure Rules Committee is still in the early stages of existence and has yet to publish detailed proposals in respect of online pre-action processes; and at the time of writing, the decision in *Belsner* is still awaited.

3.1 What are the implications for costs associated with civil justice of the digitisation of dispute resolution?

The civil courts and tribunals in England and Wales comprise one of the foremost legal systems in the world. It is undoubtedly the case that in order to maintain that position, the courts must continue to evolve, and to that end require significant overhaul to continue to operate effectively in a modern day, and increasingly digital society.

The move towards increasing digitisation of the justice system clearly has the potential to streamline the litigation process (at least in respect of certain types of dispute), and manage the pressures on the courts. It may also be developed in such a manner that facilitates and encourages early dispute resolution. Both the streamlining of proceedings and encouraging resolution would have the consequential effect of reducing costs.

Taken collectively, one can see the benefits of a streamlined pre-action protocol process, combined with a process for commencing and managing proceedings through to, at least, the first case management hearing. This, to an extent, is a system that is already developing with the CE-Filing system. It may also be combined with a process for encouraging settlement, perhaps by directing parties to appropriate means of resolution, perhaps even directing them to suitable bodies to mediate a dispute.

However, there can be no "one-size fits all" approach to any digital dispute resolution process. Whereas it may be the case that multiple portals can sit behind a single "front door", disputes govern a very wide variety of issues, costs will vary in reasonableness and proportionality, as will the appropriate timing of settlement discussions. Any digitisation of dispute resolution must therefore be appropriately delineated between the types of dispute, and full consultation and buy-in necessary

from a large number of stakeholders. Absent such "buy-in" costs would be wasted establishing a system that is not fit for purpose, or not properly used: in either event having an increase in costs.

With reference to a need for delineation, it should be made clear where any digital process is required to be used, and where not. It would be important to ensure there were not dual approaches, which could increase costs.

There is nevertheless a risk that the introduction of digital systems will add a layer of complexity / specialist advice which could increase costs. Any systems so introduced must be as simple and straight-forward as possible.

Digitisation needs to offer flexibility and sufficient exits from the system for cases that are not suitable (eg larger and more complex cases). The pressure to digitise to address large number of low value claims ought not to be allowed to drive costs considerations applied to complex and high value cases. Otherwise the results are likely to damaging and unsuitable.

Finally, and importantly, one of the key features of the English legal system, and why it is attractive to the world at large, is the knowledge and experience of the judiciary. Whereas it is obviously not intended that digitisation will replace or reduce judicial involvement in disputes, care should be taken to ensure it is made clear that judges are involved in all key aspects of a case.

3.2 What is the impact on costs of pre-action protocols and portals?

The LSLA shares the CJC's view that litigation should be a last resort, and that the PAPs can, in some instances, facilitate the resolution of disputes prior to Court proceedings, or at least narrow the issues prior to an expensive pleading exercise.

However, it is often the experience of the committee that in High Court commercial litigation engagement with a relevant pre-action protocol is limited, in the sense that whether a dispute is resolved pre-action is dependent on the circumstances of the particular case and not because of the operation of the protocol. In some cases, there is a view that the PAPs only serve to delay resolution of a dispute. It is certainly the case that the limited desire by the Court to impose sanctions on a party for failing to follow the relevant PAP, and thus no risk to a party who ignores the PAPs, leads to the result that often parties either engage with the PAPs in a relatively cursory fashion, thus incurring costs for no benefit, or engage to only a limited extent such that formal proceedings are inevitable.

However, it is the LSLA's view that it would be unduly optimistic to think that stricter enforcement of PAPs would lead to less cases being litigated, cases resolving (or at least narrowing) sooner and consequently a reduction in the costs of litigation.

The CJC is separately consulting and considering such matters and what might be done to strengthen the PAPs. The costs benefit of ensuring the PAPs are still "fit of purpose" are, as noted, clear. However, great care needs to be taken with ensuring that adherence with the PAPs is not so complex or costly that litigants in person are capable of engaging without requiring legal advice, and that there is no further increase in significant front-loading of costs such that those costs themselves become a barrier to pre-action resolution of a dispute.

This might be achieved by the PAPs requiring that the costs incurred in compliance with the same should be proportionate to the dispute. The Court making a determination as to whether pre-action costs are disproportionate, however, is unlikely to be possible until a formal detailed assessment, whether upon a settlement of the principal dispute, or the conclusion of proceedings. However, the Court should be more willing to comment on incurred costs for the pre-action phase, per its discretion under CPR 3.15. Whereas we have regard to Chief Master Marsh's comments in *Richard v The British Broadcasting Corporation (BBC) & Anor* [2017] EWHC 1666, if the Court feels sufficiently comfortable to record whether a party's pre-action costs have the appearance of being disproportionate, such a determination may facilitate settlement (particularly where costs are the "sticking point").

We have considered whether the PAPs might incorporate guidance as to party to party costs, particularly what may or may not be recoverable on assessment. However, whereas we can see the benefits of such an approach, we do not consider the courts could appropriately apply a "one-size fits all" / "one-size fits all for a particular type of dispute" governing what steps a party to litigation may take. Doing so may also have the unintentional consequence of discouraging parties from engaging in steps which might ultimately prove fruitful to narrowing the issues or facilitating settlement out of concern that the costs of so doing would not be recoverable.

3.3 Is there a need to reform the processes of assessing costs when a claim settles before issue, including both solicitor own client costs, and party and party costs?

The CJC's separate consultation on pre-action protocols includes the suggestion of a summary costs procedure which would see courts make determinations of costs disputes for claims which are

resolved at the pre-action stage. It is unclear whether this is indeed necessary in the general run of cases. If issues of liability and quantum have been capable of settlement, then the parties can generally settle costs at the same time.

Introducing mandatory pre action conduct and costs recovery, is simply turning pre-action conduct into litigation, which defeats the object of pre-action conduct as means of avoiding litigation.

It is accepted, however, there are cases where significant work is done at an early stage to settle pre-action. In high value, complex clinical negligence matters for example, generally a great deal of work is carried out at an early stage, obtaining expert evidence and undertaking disclosure. Such specialist areas should have their own regime. What is appropriate for them should not be applied to all cases.

Any pre-action costs assessment that was introduced should be based on the current provisional assessment procedure or where costs are (say) £25,000 or less, a simple application could be made accompanied by written submissions limited to two sides of A4.

3.4 What purpose(s) does the current distinction between contentious business and non-contentious business serve? Should it be retained?

This distinction appears increasingly irrelevant and is apt to be reformed. However, the replacement of the Solicitors Act 1974 is a major reform requiring primary legislation, which ought to be the subject of a separate consultation. There is some concern that the Court of Appeal in *Belsner* is shaping up to make a judgment based on a very specific type of litigation which would have unwelcome and wholly unnecessary consequences for all types of litigation.

Part 4 – Consequences of the extension of Fixed Recoverable Costs

Progress towards implementing Lord Justice Jackson's recommendations (as amended by the MoJ) has been slow and the rules are still awaited. Until they emerge, practitioners are reserving judgement on the topic generally and it is difficult to consider the consequences. It is often said that extension of the FRC regime to cover cases up to £250,000 in value is inevitable and will follow swiftly afterwards. We think it is wrong to pre-judge that question and say that the focus should be on implementing the changes and assessing the consequences before considering further reforms or extensions.

There will inevitably be 'gaming' to try and engineer cases into a particular complexity band or out of FRC altogether. This sort of behaviour should not be seen as improper but is instead the inevitable consequence of an adversarial system in which lawyers seek to promote their client's interests to the fullest extent possible within the rules of the game.

It is imperative that the FRC as introduced are uprated from those first proposed by Lord Justice Jackson and annually thereafter, preferably in line with the SPPI index. Otherwise, support for the regime will drain away, quality standards within the regime will fall and competent providers of legal services will gradually withdraw from the market.

4.1 To the extent you have not already commented on this point, what impact do the changes to fixed recoverable costs have on the issues raised in parts 1 to 3 above?

Costs budgeting

The extension of FRC to cases up to £100,000 in value will further undermine any remaining benefits of costs budgeting in cases valued between £100,000 and £10 million, especially for those cases just beyond the new fast track limit. The time and expense of the costs budgeting regime will be starkly contrasted with the absence of any such delay and costs for cases with FRC. If costs budgeting is to be preserved then its burdens should be reduced in the lower value claims subject to budgeting and replaced with a more summary procedure that allows for broad brush estimates. In other words, the burdens of costs budgeting should be proportionate to the value of the claim and therefore the step up from out of the FRC regime and into the lower value of the multi-track must be minimised.

GHRs

Just as FRC reflects a policy decision as to the amount of costs that it is reasonable to expect a losing party to pay the winner, so are GHRs in reality a policy decision as to the rate that should be recoverable. The Stewart committee went a long way to recognising this by replacing the attempt to build an evidence base of solicitors' overheads with an evidence base of actual rates. The introduction of FRC further weakens the historic linkage between GHRs and the location of the solicitors (albeit the LSLA's view is that the location of the solicitors' main office is still the least inefficient means of fairly reflecting the likely costs that winning parties are likely to have to pay their lawyers). Just as it will be imperative for FRC to be uprated automatically every year, so should GHRs.

PAPs, portals and digital justice

If a system of pre-action costs recovery is introduced, it would be somewhat incongruous if that did not involve fixed costs in claims that are of a value that, if issued, would fall within the FRC regime. This is one reason why the creation of an elaborate pre-action regime (so elaborate that it would be unfair not to introduce some form of pre-action costs recovery) is undesirable.

The experience to date in terms of the introduction of portals and electronic working does not instil confidence that a truly digital justice system will be implemented in the reasonably foreseeable future. If and when that happens, it is possible to envisage a more sophisticated FRC regime if the system is able to ascertain different degrees of complexity and learn from the experience of similar cases. We think it is too early to comment sensibly on this prospect.

4.2 Are there any other costs issues arising from the extension of fixed recoverable costs, including any other areas in which some form of fixed costs or cost capping scheme may be worthy of consideration? If so, please give details.

We think developments in this area should be incremental. The long heralded introduction of FRC in lower value claims should be implemented first so that the unintended consequences are identified and, if need be, corrected, before extending to higher value claims.

4.3 Should an extended form of costs capping arrangement be introduced for particular specialist areas (such as patent cases or the Shorter Trials Scheme more generally)? If so, please give details.

Generally, no. We think the costs estimate/summary assessment procedure in the Shorter Trials Scheme is appropriate and strikes the right balance between ensuring parties have visibility regarding the adverse costs risk, avoiding disproportionate costs regarding costs, and providing the flexibility to tailor the outcome to actual circumstances of the case.

If costs capping is appropriate in a particular specialist area, that should be proposed by practitioners in that specialist area, and not imposed from above.

London Solicitors Litigation Association

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