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LITIGATION COMMITTEE response to the Civil Justice Council's Costs Working Group Consultation Paper dated June 2022

The City of London Law Society ("CLLS") represents approximately 17,000 City lawyers through individual and corporate membership including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multi-jurisdictional legal issues.

The CLLS responds to a variety of consultations on issues of importance to its members through its 19 specialist committees. This response has been prepared by the CLLS Litigation Committee.

Introductory Comments

1. The Committee welcomes any reform which would have the effect of enabling disputes to be resolved as reasonably and proportionately as possible, including at proportionate cost. However, any reform needs to be tailored to meet the needs of the users in question. The users of civil litigation in England and Wales range (at the one extreme) from vulnerable, inexperienced and poorly resourced consumers to (at the other extreme) highly sophisticated, experienced and deep-pocketed global corporates and financial institutions. The Committee supports the objective of increasing access to justice for all, but it is important that this is considered in the round, for all types of litigant. It should apply not just to claimants in the field of personal injury, but also to business litigants of all sizes, including small businesses for whom being able to recover costs in pursuing a meritorious claim or defending an unmeritorious claim is important.

2. It follows that a 'one size fits all' approach to reform on civil litigation costs is rarely appropriate, and the Committee respectfully suggests that this must be the starting point for any reform to the rules on Cost Budgeting. Whilst the Committee does not oppose the use of cost budgeting *per se*, as explained below, its members' experience of the existing regime in the context of heavy or complex disputes is (at best) mixed. Many such cases simply do not require cost budgeting, and the burdens placed on parties in such cases often greatly outweigh the perceived benefits. In some cases it

is used tactically to no obvious gain. The Committee therefore favours a more flexible and tailored approach.

3. As regards the second area of the Working Group's focus (Guideline Hourly Rates), the Committee continues to believe that GHRs ought to fulfil an important role in providing the court (and its users) with as accurate a picture as possible of the hourly rates which are in fact charged by solicitors for certain types of legal work. The Committee supports their continued use, provided that they are regularly updated and are used only as a starting point for the summary (and detailed) assessments of costs, and not as a limit on what a reasonable and proportionate hourly rate could be.

4. The Committee also comments, albeit more briefly, on the Working Group's third and fourth areas of focus, namely costs under pre-action protocols and the consequences of extending the Fixed Recoverable Costs (FRC) regime.

Part 1 – Costs Budgeting

5. ***Q1.1 Is costs budgeting useful?***

The Committee considers that in certain cases costs budgeting is useful and appropriate. For example, in cases where the parties' costs are clearly disproportionate to the amounts in dispute, or those cases where a well-resourced party is seeking, inappropriately, to exert pressure on a poorly resourced or vulnerable party by loading the litigation with an unnecessary and unreasonable scope of work and thereby costs.

Overall, however, members of the Committee have not found cost budgeting to be a useful exercise for the following reasons.

(i) The rules require parties to provide very granular information about future costs very early on in the case when (particularly in heavy or complex cases) it is difficult if not impossible to predict in a meaningful way what future costs will need to be incurred and in respect of what tasks.

(ii) The exercise of preparing a budget in the prescribed form is a time-consuming one, and often front loads costs to no obvious advantage.

(iii) One of the main benefits of costs budgeting, at least in theory, is to streamline detailed costs assessments or obviate the need for them at all. But since the vast majority of cases settle at some stage before trial, far more cases require the parties to prepare costs budgets (which happens at a relatively early stage of a case), whereas very few cases get to the stage after trial of a detailed assessment of costs. Accordingly, whilst a costs budget can help to streamline a detailed costs assessment, the benefit only accrues to the parties and the court in a tiny proportion of cases.

(iv) Several members of the Committee reported some parties using, or attempting to use, the cost budgeting regime for tactical purposes, for example to seek to require budgets to be prepared so as to put a party to more work but where there is no obvious advantage or need for cost budgeting to be in place.

(v) The costs management process has often proved to be time consuming and unwieldy in practice. Parties have to prepare their budgets before the court has given directions, which can lead to the parties preparing budgets on differing proposed directions and assumptions. In that situation, the parties will often need to prepare alternative budgets to cover their opponent's proposal. There are also often substantial delays in the listing of separate costs case management conferences.

(vi) It remains the case that many judges and barristers are ill-equipped to deal with costs management, particularly in the detail required under the cost budgeting regime. Often, therefore, the result is a mismatch between what costs the court permits and what costs in fact need to be incurred to complete the case or a particular workstream.

(vii) The Committee has seen no evidence of cost budgeting reducing the small number of cases going to detailed assessment. It remains the case that the vast majority of costs issues are settled between the parties.

It follows that the Committee would certainly not be supportive of any reform which would mandate the use of cost budgets more widely, particularly in heavy or complex cases where the amounts in dispute exceed £10 million.

However, the Committee does consider that a form of costs budgeting can usefully focus attention at an early stage on costs and, in appropriate cases, provide a mechanism for the court to intervene so as to control excessive costs. The Committee would therefore be supportive in principle of an approach to cost budgeting which is flexible, can be tailored to the specific features of a case, and does not require parties to provide detailed information at a stage in the case when future workstreams and workloads cannot reliably be predicted. Costs budgeting should also not be used as an inflexible tool to allow or disallow costs being assessed subsequently.

The Committee respectfully suggests that these objectives can be achieved through a number of means, and certainly do not require a 'one size fits all' approach whereby cost budgeting is the default rule in all cases. For example, in certain cases it might be appropriate for parties to file short-version costs budgets which contain an overall estimate, with estimates for each known stage of the case, but without each stage being further broken down and each activity being individually itemised by lawyer (as was the case pre-Jackson reforms). That would allow early disclosure and judicial scrutiny of parties' anticipated costs, but without the upfront burden of having to prepare very detailed breakdowns with a paucity of information about future workstreams (because, for example, the issues have not yet been fully distilled) and based on assumptions which may prove to be incorrect.

The Committee also notes that the court has inherently wide case management powers, as well as a broad discretion as to costs. In appropriate cases (such as where there is a clear inequality of arms) the court might, for example, order parties to provide regular updates of costs incurred during the currency of the case and, should it determine that the costs are excessive, order the parties to file budgets and potentially even impose cost caps. This will, however, require further training of judges, whose experience of and familiarity with costs matters varies substantially.

In many other cases, however, there will (in the Committee's experience) be little or no utility in cost budgeting in any form at all, beyond a simple exchange of overall totals, and sub-totals for the known stages of the case. These could be exchanged and filed with the court with each party's proposed directions at the case management

conference. But there should be no requirement for there to be discussions between the parties as to whether or not the budgets are agreed, and no default costs management orders. It should only be in a rare large commercial case that the judge considers it necessary to order a separate costs management hearing.

In the Committee's view, therefore, any reform to the cost budgeting rules should prefer flexibility over prescription, and the Committee would certainly be concerned about any reform which straitjackets parties by requiring cost budgeting in all cases.

6. ***Q1.2. What if any changes should be made to the existing costs budgeting regime?***

As explained above, the Committee would prefer a more flexible and less prescriptive approach to cost budgeting. It follows that the Committee sees no need to abandon completely the use of costs budgeting in civil litigation, but rather to limit its use to those cases where it is obviously needed.

7. **Q1.3.** ***Should costs budgeting be abandoned?***

See the answers to Q 1.1 and Q1.2 above.

8. ***Q1.4. If costs budgeting is retained, should it be on a "default on" or "default off" basis?***

As explained above, if costs budgeting in its present format is retained, the Committee strongly advocates a more limited, "default off" approach to costs budgeting, where it becomes the exception rather than the norm in cases above the fixed costs threshold. If, however, costs budgeting were to be revised along the lines suggested, then the Committee would favour a "default on" approach (other than for cases where the amounts in dispute exceed £10 million, in respect of which we are not in favour of changes that would require the use of costs budgeting more widely).

9. ***Q1.5. 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?***

See the answer to Q1.1 above. In the Committee's view, there may be cases where a short-form costs budget is appropriate, or parties are ordered to provide regular costs estimates to the court.

Part 2 – Guideline Hourly Rates

10. ***Q2.1. What is or should be the purpose of GHRs?***

The purpose of GHRs is, and should be, to provide parties, their legal teams and (most importantly) the court with an accurate, real-world picture of the average hourly rates which are actually charged by solicitors in different parts of the jurisdiction for certain types of legal work. This in turn should provide a starting point for summary (and

detailed) costs assessments (though Costs Judges are well placed to determine the appropriate rate in the particular circumstances of the detailed assessment before them). GHR which more accurately reflect actual market rates would be particularly helpful in heavy or complex commercial disputes where, currently, the discrepancy between existing GHRs and current actual market rates is the greatest. However, the Committee believes that GHRs should remain as guideline rates only, and that flexibility and discretion should be exercised when required. That should operate to avoid (the perception of) a two-tier system, with High Court judges (treating the GHRs as an upper limit) allowing lower hourly rates than Costs Judges using their discretion (and experience) on a detailed assessment.

11. ***Q2.2. Do or should GHRs have a broader role than their current role as a starting point in costs assessments?***

No. Our view is that the role of GHRs should be limited to reflecting the reality of the rates that are being charged for certain types of legal work, which in turn is determined by market forces. That provides a useful guide (but no more than that) of prevailing rates in summary costs assessments.

In response to the points raised on page 13 of the Consultation Paper, we see no obvious need to introduce further regulation in this area. The market for legal services is already highly regulated, and is very competitive, with numerous solicitors' firms providing genuine choice to clients. Moreover, the court has an overall supervisory and protective function, including for solicitor and own client costs. Further, the Committee considers that the existing rules and practice on cost recovery are effective in ensuring that, in practice, excessive costs in heavy or complex cases are rarely recovered from opponents and are instead borne by the party who has chosen to incur them.

12. ***Q2.3. What would be the wider impact of abandoning GHRs?***

The Committee opposes abandoning GHRs, for the reasons given in answer to Q.2.1 above and in the Committee's response dated 31 March 2021 to the CJC's Working Group Report for Consultation on GHRs dated January 2021 (the "**Committee's 2021 Response**").

Given the expertise of its members, the Committee is unable to comment on the wider impact of abandoning GHRs on family proceedings or proceedings in the Court of Protection. The Committee does not believe, however, that there would be any meaningful impact on litigation funding or costs insurance protection in the context of City of London litigation, since the participants in those markets tend to be very sophisticated, are already well versed in predicting litigation costs, and do not therefore tend to rely on GHRs in modelling cost outcomes.

13. ***Q2.4. Should GHRs be adjusted over time and if so how?***

Yes. In summary, the Committee strongly supports there being an evidence-based review of the basis and amount of the GHRs, and believes that GHRs should be set against actual rates charged to litigants (rather than seeking to impose a set of lower guideline rates). The Committee continues to believe that a better source of data for such rates would be the hourly rate information contained within cost budgets, certified

cost schedules and rates claimed on assessment (which data the courts already have and which is public), rather than those rates which are awarded (or using data voluntarily provided by firms, which has proved problematic in the past). When claiming rates, the partner signing the costs schedule has to certify that at least that rate is being charged. Accordingly, the rates claimed will be an accurate reflection of the rates that are (at least) actually being charged to clients. However, the same is not true of the rates that are allowed / awarded by the court. These will often be lower than the rates claimed (and actually charged); in addition, on summary assessments the court frequently awards a single total figure, without specifying the rates or hours allowed. It should also be noted that there will be appreciably more data available in relation to costs claimed than for those awarded, as almost all detailed assessments are settled before a formal assessment is made by the court.

The Committee would also encourage regular monitoring of and updates to the GHRs in order to reflect rapidly-changing market conditions, for example increases in hourly rates to reflect inflation and increasing cost pressures faced by City law firms in particular. The Legal sub-set of the Services Producer Price Index would be a better yardstick for updating the GHRs annually than the Retail Price Index.

Please also see the detailed responses given in the Committee's 2021 Response.

14. **Q2.5.** ***Are there alternatives to the current GHR methodology?***

In the Committee's view, the only viable alternative to GHRs as a means of providing an accurate benchmark to solicitors' charging rates would be to collate and publish on a regular basis hourly rate details from cost budgets, certified cost schedules and rates claimed on assessment. We anticipate that this would be an onerous exercise, and unless an exercise is carried out in averaging the rates then the data generated has the obvious potential to generate uncertainty as to prevailing rates, and thus satellite disputes in cost matters.

The Committee continues to believe, therefore, that the use of GHRs is the most appropriate and workable means by which to provide the benchmark needed by the court and its users.

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

15. ***Q3.1. What are the implications for costs associated with civil justice of the digitisation of dispute resolution?***

The Committee does not have any comments in response to this question, since its members are not involved in digitalised litigation.

16. ***Q3.2. What is the impact on costs of pre-action protocols and portals?***

Whilst the Committee agrees that the pre-action protocols are an integral and important part of the litigation landscape, we do not consider that the protocols should include self-contained rules on costs, whether to address solicitor and own client costs or party and party costs. Many disputes are resolved without the need for proceedings to be

issued; it is not in our view desirable to increase the complexity of the protocols by adding costs rules to them. See further the answer to Q3.3 below.

17. ***Q3.3. 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?***

No. The protocols already state that cost consequences and other sanctions may be imposed by the court after proceedings are issued if a party fails to engage fully in pre-action processes. Further, the Court has an inherent and wide discretion when determining issues as to costs. The Committee considers that these are adequate means of encouraging good pre-action behaviour, and that no further reform is needed.

18. ***Q3.4. What purpose(s) does the current distinction between contentious business and non-contentious business serve? Should it be retained?***

We do not have any observations in this regard.

Part 4 – Consequences of the extension of Fixed Recoverable Costs

19. Practitioners on the Committee are not experienced in the type of litigation in which Fixed Recoverable Costs (FRC) are typically awarded, and very rarely encounter those cases under £100,000 in value to which the FRC regime is in the process of being extended.

However, the Committee notes the suggestion at paragraph 48 that "*there may be other areas in which some form of fixed costs or cost capping scheme may be worthy of consideration. A possible example could be certain kinds of high value specialist litigation*." Paragraph 48 goes on to state that a recently mooted idea has been to set up an extended form of costs capping arrangement for patent cases in the Short Trials Scheme.

Whilst no members of the Committee are personally experienced in patent cases, some Committee members do manage litigation which is subject to the Shorter Trials Scheme. Broadly, the Committee believes that the existing rules on costs are perfectly adequate in meeting the stated objectives of the Shorter Trial Scheme, namely to achieve shorter and earlier trials for business related litigation, at a reasonable and proportionate cost. The Committee would not, therefore, be in favour of the introduction of a fixed costs or cost capping scheme to trials in the Shorter Trials Scheme in general, except for certain kinds of specialist litigation such as patent cases if those with specialist knowledge would welcome this.

If the CJC have any comments or further questions please contact the Chair of the Litigation Committee, Gavin Foggo, at gfoggo@foxwilliams.com.

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THE CITY OF LONDON LAW SOCIETY
LITIGATION COMMITTEE

Individuals and firms represented on this Committee are as follows:

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Patrick Boylan	Simmons & Simmons LLP
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