TECHNICAL ASPECTS OF JACKSON IMPLEMENTATION – EXPERTS WORKSHOP ON 31 OCTOBER 2011

Summary of report and feedback from proportionality group including Q&A

OPTIONS

1. Each of the four options were considered:

   A Longstop model.

   B Reversal of *Lownds* model.

   C Hybrid model.

   D Retention and re-enforcement of *Lownds.*

2. There was general agreement that there was more to be done to achieve proportionality across all areas of civil justice which are not covered by a fixed costs regime. There was a general consensus that whichever option was adopted, it was unlikely to achieve the desired objective without greater investment in the management of costs through the litigation process, by building on the system of estimation of costs and judicial commitment to the process at all levels, whether or not this led to formal budgeting systems.

3. Subject to that, views differed as to which of the models were the most appropriate. That said, there was most support for the Hybrid model C and the retention of *Lownds* model D. There was little support for the longstop model A and no discernible support for the simple reversal of *Lownds* model B.

4. Those views, generally against options A and B, and more in support of option C and D, reflected a concern from many members of the group that it was undesirable to address proportionality in a global way at the end of an assessment. This was because for some, the conceptual and/or practical difference between reasonableness and proportionality was far from obvious and clear, where it was addressed during the first stage assessment and proportionality at a second stage. It was noted, for example, that the proposed new test required proportionality to be addressed by reference to the level of costs which bore a reasonable relationship to a number of factors, three of which were at the heart of the existing factors addressed in CPR 44.5 with respect to the test of reasonableness; namely, value, complexity and conduct. Some strong views were expressed as to the difficulty of addressing those factors at stage one, and then addressing them again at stage two, when imposing upon the tribunal the burden of giving "reasons" for why those and other factors produced a different result at stage two than at stage one.

5. That degree of overlap/conceptual difficulty generated additional concerns from many present that there would be uncertainty and satellite litigation over the adequacy, accuracy and cogency of the "reasons" given at the second stage for reaching a different conclusion in relation to proportionality. All of these considerations apply to options A, B and C, and came into acute context in relation to option C (the hybrid model) where both the reasonableness and proportionality would be considered at the same time as the assessment or budgeting exercise, with proportionality then being considered again as a longstop.

6. This led to discussion as to whether the best option would be option C (the hybrid model), but without the longstop reference to proportionality. Some felt that without this longstop option C became the most attractive option by some measure. Those present with experience of carrying out assessments appeared to favour it. In practice some costs

Judges appeared to find it easier to address reasonableness and proportionality at the same time. One costs assessor present said that when a bill for what appeared to be a disproportionate amount was put before him, it was in practice difficult to address defences to the allegation of disproportionality on the grounds of conduct on the part of the paying party. The only way in which he could address such conduct matters was to go through the bill, on an item by item basis, and get "to the bottom of the story". For him, therefore, dealing with proportionality at the outset, or globally at the end in every case was unhelpful.

7. Others felt that such experiences perhaps provided an illustration of what had gone wrong with the *Lownds* test. Some clear views were expressed to the effect that there was nothing wrong with the *Lownds* test. The problem was more that the experience of the one costs assessor referred to above appeared to be part of a wider practice. The solution would be to require plain evidence (from an objective standpoint) that the sum claimed was obviously disproportionate in any case to override "conduct" claims at the first stage, ie that the first stage of *Lownds* should not be "derailed" by reference to a wholly unsubstantiated plea of "conduct" coming from the paying party. That was to take something which was probably obviously wrong in all but the most exceptional cases (a clearly disproportionate sum) and to ignore its consequences by reference to an argument that had yet to be proven (and in the views of some would almost inevitably be raised by a paying party for obvious reasons).

8. Those observations led one or two present to assert that in their view there was nothing wrong with the *Lownds* principal. It was simply a question of how it was applied. That led to a suggestion that if Lord Justice Jackson and the MoJ might be persuaded that *Lownds* was a simple and understandable approach but that its retention should be reinforced by two things: a practice direction which would give guidance as to how and why the Court should reject pleas of "conduct" by paying parties attempting to displace the consequences of an objectively disproportionate claim, and further so as to give guidance as to the test of "necessity" to be applied to adduce clarity as to how that test should operate.

LONG STOP

9. Whether options C or D were adopted, the feeling was that neither should have a longstop test of proportionality added to them, for the reasons stated above. As mentioned, there appeared to be marginally more support for option C without the longstop than option D.

10. There was some discussion as to whether having a longstop for truly exceptional cases was really felt to be a problem. Those who spoke on this subject felt that when it suited parties to do so they would always argue that their cases were exceptional. It was therefore felt better to remove the longstop, create certainty and avoid double jeopardy and possible satellite litigation.

PRACTICE DIRECTION

11. As to whether there should be a PD, most of the views expressed were in support of guidance being given to the Courts. It was felt by practitioners that this was always helpful to them and to clients. There was considerable support for the notion that the guidance should preferably be contained within the Rules. However, if this was not possible in the short-term then it might be more sensible to proceed with the PD, allowing for some flexibility to see how the guidance works in practice, and then at the appropriate time reduce the resulting guidance into a rule.

12. There was no discernible support for the suggestion that the guidance should contain examples of specific circumstances in which it would never be appropriate to apply a proportionality longstop or when a bill would always be deemed to be disproportionate. Instead the consensus was around the principle in paragraph 93 of the CJC Working Group Paper on Proportionality; namely that the PD should contain a non-exhaustive list of examples collectively providing broad indicators that gave a tolerable measure of clarity to practitioners and client as well as guidance to the Court when having regard to all the circumstances.

13. That said, some present wished to reinforce, at this point, the important linkage of the proportionality issue at the assessment stage with the process of costs management and the reliance on estimates and especially the judicial approval of estimates (and perhaps in due course budgeting). Thus, whilst it might never be appropriate to prescribe that a claim for an amount within prior estimates would always be proportionate, or that a claim for a sum materially in excess of prior estimates on the same basis would be considered to be disproportionate, these ought to be among a list of clear enough factors and principles leading to those results in most cases, whilst leaving the Courts the flexibility to depart from those conclusions in appropriately few cases. Some present felt that rebuttable presumptions could be included in the PD to assist the Courts when looking at proportionality.

JACKSON LJ'S THIRD LECTURE

14. The discussion turned to the comments from Lord Justice Jackson in this "Third Lecture In The Implementation Programme" dated 31 October 2011. Insofar as Lord Justice Jackson appeared to be saying that there was no need for or utility in guidance, whether in a PD or in amplification to the rule providing factors to be taken into account etc, this met with a general concern particularly from practitioners. It was felt strongly by some and generally by a number of others that Judge created rules were generally far more difficult for practitioners and clients alike to adopt. Decisions tended to turn on their facts and were always open to being distinguished. Most decisions did not have within them the quality of a succinct rule or note of guidance which would be of practical assistance to parties and advisers who would often have to accept, particularly in the adversarial system, that there was more than view to be taken as to the meaning and practical application of a judicial ruling on a particular issue. The suggestion that "a few robust Court of Appeal decisions" would solve the problem did not meet with general support from practitioners and was said that this may lead to confusion about the ambit of the new rule.

15. With respect to Lord Justice Jackson's other comments, there was a widespread agreement with his observation that any proportionality rule will only work as part of an holistic package of reforms, in particular in line with effective cost management in the multi-track.

16. The suggestion that the reasonable bystander test in *Musa King v Telegraph* might be a helpful factor; did not receive much support from the group. It was felt by those who spoke to suffer from an element of retrospectivity which was unfair and unhelpful when assessing costs, particularly given the propensity for paying parties to refer to the other side's "conduct" at the time which was something which was only fairly addressed in the circumstances prevailing rather than by reference to the notional retrospective test of what a hypothetical litigant would have done.

Q&A SESSION

In the Q&A session further support was expressed for the Hybrid model C but without the longstop option.

On a show of hands, the vast majority supported the inclusion of a PD and some strong views were expressed against the notion put forward by Jackson LJ that "a few robust Court of Appeal decisions" would sufficiently set the ambit of the new proportionality rule. It was highlighted that Judge created rules tended to cause uncertainty and could well give rise to satellite litigation in this area. Some speakers felt that such an approach may act as a barrier to Access to Justice because ATE insurance may not be readily available for litigants due to the uncertainty surrounding the operation of the new rule. Therefore, it was felt by a number of the insurance market representatives that inclusion of a PD would provide some guidance and may reduce the uncertainty about the application of the new rule. One query raised was whether factors or guidance in a PD would in practice assist the Court when summarily assessing costs.

Finally, there was a general consensus that judicial education and training was required so that any new proportionality rule is applied properly to achieve the objectives of the reform. Moreover, it was emphasised that lawyers need to grapple with the proportionality aspect of costs at the outset and throughout the case and not just at the end of a trial.