CHANCERY BAR

COSTS BUDGETING & COSTS MANAGEMENT CONSULTATION
- RESPONSE OF THE CHANCERY BAR ASSOCIATION

1. The Chancery Bar Association is one of the longest established Bar Associations and represents the interests of over 1,100 members handling the full breadth of Chancery work at all levels of seniority, both in London and throughout England and Wales. It is recognised by the Bar Council as a Specialist Bar Association. Full membership of the Association is restricted to those barristers whose practice consists primarily of Chancery work, but there are also academic and overseas members whose teaching, research or practice consists primarily of Chancery work.

2. Chancery work is that which is traditionally dealt with by the Chancery Division of the High Court of Justice, which sits in London and in regional centres outside London. The Chancery Division attracts high profile, complex and, increasingly, international disputes. In London alone it has a workload of some 4,000 issued claims a year, in addition to the workload of the Bankruptcy Court and the Companies Court. The Companies Court itself deals with some 12,000 cases each year and the Bankruptcy Court some 17,000.

3. Our members offer specialist expertise in advocacy, mediation and advisory work across the whole spectrum of finance, property, and business law. As advocates they litigate in all courts in England and Wales, as well as abroad.

This response is the official response of the Association to the Civil Procedure Rules Committee's ("**CPRC**") Costs Budgeting & Costs Management consultation paper dated 14th June 2013. It has been written by David Holland QC and Fenner Moeran.

4. There are 3 questions raised in the consultation:

"*a) the desirability of retaining the Admiralty and Commercial Courts' blanket exception to the mandatory requirement to produce costs budgets at CPR Part 3.12(1)*
"b) the current value-based exception for the TCC, the Chancery Division and the Mercantile Courts and
"c) whether or to what extent Part 8 claims (including Judicial Review) should be excluded from the mandatory costs budgeting regime."

5. There is a also a more general question raised at paragraph 7 of the consultation paper:

"*…the sub-committee would also be interested to know if there are any other areas where unforeseen difficulties in relation to mandatory costs budgeting and the costs management regime have arisen.*"

6. The ChBA's opinion on these questions has been guided in particular by the background to the costs budgeting regime - namely, the more general Jackson costs reforms. As the CPRC is no doubt fully aware, the remit of Lord Justice Jackson's review was:

"to review the rules and principles governing the costs of civil litigation and to make recommendations in order to promote access to justice ***at proportionate cost****"* (Emphasis added.)

7. The overarching design of Lord Justice Jackson's reforms is to allow the courts to have better control over costs, through active and effective case management with the issue of costs at the heart of its deliberations.

8. With this in mind the reforms Lord Justice Jackson recommended, and which have been implemented wholesale, were specifically designed to be put into effect as a coherent package. For example, the 'proportionality' amendments to the overriding objective (CPR r.1.1), the standard basis of costs assessment (CPR r.44.3), and relief from sanctions (CPR r.3.9), as well as the new direction to the courts to take account of costs in case management decisions under CPR r.3.17, are clearly structured to operate together. At the heart of those reforms is the costs budgeting regime - which has **two** objectives:

First - to simply reduce costs by means of forcing the parties to consider costs in advance; and
Secondly - to provide the courts with a tool to assist them in the new, costs-aware case management process.

9. The second objective has not, we feel, been well understood by practitioners. It is, however, a clearly enunciated objective of the reforms[1].

10. DESIRABILITY OF RETAINING THE ADMIRALTY & COMMERCIAL COURTS' BLANKET EXCEPTION:

The ChBA's opinion is that the blanket exception should not continue. We recognise that there are arguments both for and against it, but on reflection have concluded that the arguments in favour are only superficially appealing and, when looked at in light of the overarching Jackson reforms, do not stand up to scrutiny.

11. <u>Arguments for:</u>

As the ChBA understands them, these were/are essentially practical.

- To date, there has not been significant criticism of costs in the Admiralty and Commercial Court ("**ACC**"), so the impetus for costs budgeting is significantly less.
    - This is not to say that the costs in ACC cases are not high - just that there has been less vociferous criticism of them. It may also be explained by the fact that the number of cases dealt with by the ACC is significantly smaller than most other courts, with the result that there are less court users to be heard complaining.
- The really large and high value cases dealt with in the ACC tend not to be problematic when it comes to proportionality, because the value of the dispute tends to overwhelm the legal costs. More cases in the Commercial Court tend to be of higher value, so this may explain the lack of problems identified with their costs to date.
    - Proportionality is not just concerned with a direct comparison of costs to the value of the proceedings. Furthermore, just because court users are **willing** to spend millions of pounds on their litigation does not mean that the proportionality requirement is being met - and the impact on other court users also needs to be taken into account. It is unacceptable, as a matter of principle, for wealthy court users to be able to demand a

[1] See Jackson Preliminary Report paragraphs 43.1.1, Jackson Final Report chapter 40, and in particular paragraphs 40.2.7-9, 40.5 and 40.7.

disproportionate allocation of public resources simply because they are willing to expend more of their own money.

- Another possible reason for limited costs problems to date is the nature of the disputes and the case management process already in place. The cases are more heavily judge managed, and tend to be (relatively) quicker than in other jurisdictions. Limits on evidence, expert evidence, disclosure and e-disclosure are common-place and have been widely used in this jurisdiction for some time. Particular care is taken with the very large cases, including rigorous case management (CMCs lasting 2 or 3 days are not exceptional). This may have already had the result of effectively limiting excessive costs that the costs budgeting process is supposed to be providing.
    - To the extent that this is the case, then obviously it is to be applauded and, if possible, replicated in other divisions. But costs budgeting should assist this process.
- Case management is generally by the judges in the ACC. Without additional resources, it is difficult to see how costs budgeting could be imposed without an adverse impact on the court's impressive through-put.
    - This problem is one felt by all the divisions. The ACC cannot be a special case for this reason.
    - The ChBA is also aware that some of the ACC judges may feel that they do not have the experience necessary to deal with costs budgeting. The answer to that is simple - like everybody else, they will rapidly acquire that experience.
- One of the major aspects of the ACC is speed of process - proceedings from start to finish in a matter of weeks are not that unusual. Costs budgeting being imposed in all cases could be particularly impracticable.
    - Costs budgeting imposed on all cases would be a problem here. But this issue can be dealt with by means of identification of cases where costs budgeting is inappropriate, followed by case-specific exclusions from the regime.
- The Commercial Court has a particularly important role in 'selling' English legal services to the world. It has succeeded to date, and anything which might be seen to impinge on that could be problematic. Keeping the *status quo* which has not proved to be a problem is a good starting point.
- If costs budgeting works as it is intended, then it will improve the reputation of the ACC. If it does not, then it should be reconsidered in any event. Furthermore, there is no evidence that foreign litigants who choose to litigate in England are any less concerned about costs than English litigants. Why (as a matter of principle) should an international litigant have any more or less protection than an English one?

12. <u>Arguments against:</u>

There are arguments of both principle and practicality against maintaining the blanket exception.

- The most obvious argument is - what is good for everybody else should be good for the ACC. As a matter of principle there is no difference between a large case in the ACC and a large case in the Ch D or TCC. Apart from the "high value case" point, all the reasons which lead Jackson to favour costs budgeting (see Chapter 40 section 7 of his Final Report) apply equally to the Commercial Court.
- On an issue related to the previous argument, some practitioners have indicated that they have concerns that a blanket exception in one division may encourage forum shopping. The ChBA is concerned about this, though it does not feel that it is in a position to assess the likelihood of this occurring; but the appearance of such issues should be avoided if possible.
- It is worth noting that the pilot schemes were in the TCC, in defamation cases, and (most significantly for these purposes) in the mercantile courts. Obviously aspects of the ACC are different to the mercantile courts, but there are clearly quite significant similarities in the types

of dispute dealt with by the two courts. If the mercantile court judges and users found the costs budgeting process to be useful and/or non-problematic, one would expect the ACC judges and users to (ultimately) do so as well, at least in the absence of evidence to the contrary.

- Although costs budgeting is designed to limit excessive costs, the main way this is supposed to occur is by means of improved case management, and an improved approach to litigation on the part of parties. In particular, it is supposed to give the courts a tool with which to improve / guide their general case management. To that extent, having a budget should **further** improve the Commercial Court's ability to effectively case manage. Furthermore, to a large degree the other Jackson reforms depend on the court having an understanding of the costs of the litigation, and the costs budgeting process is in many cases the best (or even only) way of ensuring this.
- The fact that case management is carried out by Judges in the ACC ought to make it **easier** to apply the Costs Management provisions - just as the pilot schemes operated in the main with judges considering the costs budgets.
- The costs of providing costs budgets is fixed at a low level (2% of the overall budget for initial budget, 1% thereafter for amendments). It is hardly a large imposition and the Jackson Final Report noted that in the pilot scheme costs budgeting tended to take a few minutes at a CMC, or even a relatively short time where the costs were disputed (see Chapter 40 section 2).
- Further, it might be supposed that it would be easier for well resourced litigants employing experienced and competent solicitors to prepare (and adhere to) budgets than it would be for many less well resourced litigants engaging less experienced solicitors in other courts. After all (as Jackson pointed out) most large commercial organisations require a budget before acting in litigation.
- You do not have to have a blanket exception - you can provide specific exceptions (such as for Part 8 claims) where costs budgeting is felt to be inappropriate or unnecessary. For example, the type of cases that are likely to take less than 3 months from start to finish could be exempted.

13. <u>Conclusion:</u>

There is no reason in principle to maintain the blanket exception for the ACC. Furthermore the practical arguments in favour of it, once analysed, do not stand up. What is important is that the right types of case are excepted from the requirement to produce costs budgets for the first CMC, and that it is clear to the parties whether their case is within the initial costs budget regime or outside it. This would avoid unnecessary costs being expended on a purposeless task.

14. THE CURRENT VALUE BASED EXCEPTION FOR THE CHANCERY DIVISION, TCC AND MERCANTILE COURTS:

The considered view of the ChBA is that a simple value-based exception is too crude a tool to be justified in future. This is, somewhat ironically, particularly highlighted in Chancery Division cases where the value is often entirely unrelated to the complexity of the matter. For example, a trust dispute can often have assets at stake of many millions of pounds, but be concerned with only one or two legal issues with little or no evidential dispute. And probate disputes can be just as complicated regardless of whether the estate is worth £100,000 or £100,000,000 - an argument about undue influence and testamentary capacity is value insensitive.

15. The arguments in favour of the value based exception are, once again, entirely practical. Again, however, on analysis those arguments do not stand up:

- Larger value cases tend not to have the problems with disproportionate costs that the costs budgeting is designed for.

    - As with the ACC, proportionality is not just concerned with a direct comparison of costs to the value of the proceedings.
    - Furthermore, at least with Chancery division cases, value is not a particularly useful guide to complexity.
- Larger value Chancery cases tend to have their own special circumstances, which tend to mitigate against disproportionate costs - e.g. the Part 8 claims regime.
    - If there are special circumstances in a particular category of case, they can be dealt with in a more targeted manner. Otherwise, what is good for everybody else should be good for the Chancery Division, TCC and mercantile courts.

16. The arguments against are, again, a mixture of practical and principle.

- Once again, the overriding argument is - if it is good enough for everybody else, it should be good enough for the larger value cases. In particular, the costs budgeting regime is too important for the implementation of the Jackson reforms to exclude cases on such a crude basis.
    - Whilst this argument is good to the extent that one is comparing like with like, one should be careful about making comparisons. For example, there are obvious comparisons and similarities between Chancery Division, TCC, mercantile courts and ACC. As to courts beyond those jurisdictions, however, they are sufficiently outside our experience for us to express a view.
- If anything, the larger cases should be able to deal with costs budgeting with a greater (relative) degree of ease.

17. Finally, if a value based exception is to be maintained, one point which has arisen is how to **value** a claim for that purpose. This issue is particularly highlighted when considering Chancery division cases. For example:

- If you are seeking to remove the trustees of a £10m trust fund, is the value £10m? What if you are only seeking to remove 1 out of 3 trustees - is it £3.3m?
- If you are seeking approval for a trustee's proposed distribution of £1m out of £10m trust assets, is the value the £1m being distributed, or the £10m of the trust fund? And is it 'in dispute' if no parties are disputing it?
- Is a claim for rectification of a trust deed, paid for by potentially negligent solicitors, valued by reference to the changes in beneficial entitlement, or by reference to the legal costs of the potential negligence action, or by reference to the potential recoveries under the possible negligence action?

18. Is a claim for an injunction to restrain a development in breach of a covenant or that infringes an easement the value of the development or the value of the damages in lieu that, often, the claimant is really seeking?

If the value based exception is to be maintained then precise guidance on how to value cases that are not simply money claims would be essential for the benefit of both the courts and the court users.

19. <u>Conclusion:</u>

Part 8 claims are a special case - see below. More generally, the value based blanket exception does not stand up to scrutiny. We favour exceptions for specific types of case, where an exception

is justified, rather than a general exception of all cases where the amount in dispute can be identified at or above a specified level. This is, however, on the assumption that costs budgeting is applied consistently by judges of all courts. If it becomes known that the judges of a particular court do not make costs budget orders, or that discretionary exemptions are routinely granted, then one is back in the territory of the risk of selection of forum based on that assumed benefit, which is unsatisfactory. If there is a concern that the costs budgeting rules would not be consistently applied in all courts in higher value cases, then it might be better to have an initial exemption for cases over a specified value, whether £2million or £2.5million or £5million, with a view to reviewing after a year how costs budgeting is working in those cases falling just below the cut off point and deciding at that stage whether to remove the high value exemption. .

20. An alternative approach is to have a system requiring an application to exempt cases from costs budgeting, with a presumption that exemption orders would be made only exceptionally in cases below £2m (or whatever figure is thought appropriate) but for good reason in cases above that figure. That at least would ensure that the parties considered the issue, and that the court had the relevant information to hand to consider the issue properly. But the disadvantage of that approach is that costs budgets would not be prepared for the first CMC, the issue of whether to have costs budgets would have to be considered at a CMC, and then a further hearing would have to be held at a later stage to deal with costs budgets. It also means that the question of costs budgets or none would be likely to become a tactical issue and be exploited in that way. Furthermore, guidance would still be required on how to assess the value (in dispute) of a claim.

21. WHETHER PART 8 CLAIMS SHOULD BE EXCLUDED FROM THE COSTS BUDGETING REGIME:

Please note that the ChBA does not have any particular expertise in JR claims, and accordingly this response is primarily made in respect of non-JR Part 8 claims.

22. In respect of this issue, the ChBA considers that there are very good reasons to exclude a large number of Part 8 claims from the costs budgeting regime. However, the issue is not entirely simple.

23. Part 8 claims are concerned with matters where there is no dispute of fact (CPR r.8.1(2)(a)) or where there is a rule or practice direction mandating the procedure (CPR r.81.(2)(b)). In the former case, there are a number of reasons why the costs budgeting regime is in general not of particular use:

A number of areas where there is a high risk of disproportionate costs being incurred are effectively excluded. In particular, disclosure, detailed witness evidence and expert evidence tend to be the exception rather than the rule.

In particular, Part 8 claim litigation is often 'non-contentious', with the parties working together to resolve matters. For example, trustees and beneficiaries often need to resolve questions, but are fully aware that the costs are all coming out of one pot (the trust fund), or parties recognise that the issue between them is one of the true interpretation of a contract, and therefore they act in a

unified (or at least, non-aggressive) manner to minimise costs. In such cases, costs budgeting is likely to simply add an unnecessary further cost.
Part 8 claims also tend to be 'shorter' than contentious litigation. There are fewer interim applications, and from start to finish tend to take a shorter period of court time (often as a result of the parties having co-operated prior to the issuing of proceedings), with a consequential reduction in litigation costs and the opportunity for disproportionate increases to litigation costs.
As the consultation paper notes, in many Part 8 claims, there is never a CMC.

24. It is worth noting that the general argument against the ACC and value based exemptions set out above ('if it is good enough for others, it is good enough for them') does not apply to these points because the litigation is fundamentally **different** from Part 7 litigation.

25. That said, there are a number of situations where Part 8 claims do not fall within the descriptions set out above. In particular, there are the cases which start as part 8 claims but in fact raise substantial factual disputes and have to be directed to proceed as Part 7 claims (or some effective hybrid of the two). Furthermore, it may be that some of the practice direction- or rule-mandated uses of the Part 8 procedure would not have the same arguments apply to them.

26. The ChBA would therefore suggest the following:

- The costs budgeting regime should not apply to Part 8 claims in general.
- Where a CMC is ordered, the court should consider whether to direct that the costs budgeting regime should apply and, if it concludes that it should, either give directions to that effect so that costs budgets can be drawn up in advance of the CMC, or alternatively give the direction at the first CMC to be dealt with at a later hearing.
- Where the case is directed to proceed as a Part 7 claim, or equivalent (e.g. points of claim / defence are ordered) the costs budgeting regime should automatically be triggered, and if this occurs at a CMC then a further costs management conference should be listed thereafter.

27. We thought about whether it might be possible / desirable to identify particular types of Part 8 claims to which the regime should apply. It may be that there are such types, but we are concerned that having a handful of specific exceptions would inevitably be complicated and quite possibly not noticed / understood by practitioners.

28. OTHER AREAS OF UNFORESEEN DIFFICULTIES:

One area of the Jackson reforms which has not been widely advertised, and which is not well known about, is the changes to costs capping. In general the costs capping rules are unchanged, albeit moved to CPR part 3. However, under Practice Direction 3F section II "*Costs Capping in Relation to Trust Funds*" there are now entirely new provisions which apply when a party intends to seek costs from a trust fund (which is defined to include deceased persons' estates, and therefore applies to most probate claims).

29. The party who wishes to seek those costs is supposed to file and serve a "notice of that intention together with a budget of the costs likely to be incurred by that party":

In a part 7 claim, with their first statement of case (i.e. claim form or defence);

In a part 8 claim, with their evidence or acknowledgement of service.
See PD 3F paragraph 5.5.

30. The Court will then consider "*when proceedings first come before the court for directions*" (of its own motion if necessary) whether to impose a costs capping order; PD 3F paragraph 5.6

31. The idea is admirable, but there are a number of problems.

32. First - this needs to be better advertised. Almost nobody is aware of it.

33. Secondly - the costs capping rules still only appear to apply in accordance with CPR r.3.19(5), which requires that:

"*(a)it is in the interests of justice to do so;*
"(b)there is a substantial risk that without such an order costs will be disproportionately incurred; and
"(c)it is not satisfied that the risk in subparagraph (b) can be adequately controlled by:
"(i) case management directions or orders made under this Part; and
"(ii) detailed assessment of costs."

34. Given the Jackson reforms, it is difficult to see how the courts are supposed to conclude that costs capping orders are likely to be available in **any** litigation, let alone litigation at such an early stage as the first directions hearing. These provisions ought to be made more available in trust fund cases if they are to be useful. There is a clear argument why trust fund cases are different from the norm, namely that the party is seeking payment of their costs from effectively a third party.

35. Thirdly - putting in costs budgets at such an early stage is often very difficult. Particularly if you are not aware of what the other side's stance / evidence is / will be. Accordingly, it might be better to require the notice early on, but leave the budget until shortly before the first directions hearing.

36. Fourthly - it appears, from reading the entirety of PD 3F it **might** be thought that the budget to be filed should be in Precedent H, although this is not clear. This should be made clearer. Also, Precedent H is quite possibly excessive at such an early stage, or if the proceedings are non-contentious, or if (for whatever reason) the costs budgeting regime does not apply. As such, the CPRC should consider requiring a simpler budget for these purposes.

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19th July 2013