CONSULTATION PAPER
COSTS BUDGETING AND COSTS MANAGEMENT

1. Introduction

1.1 The Civil Procedure Rule Committee ("CPRC") has set up a sub-committee to advise on 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. We will also consider whether any other claims currently within the mandatory costs budgeting regime should be exempted. The aim is to produce a new definitive rule for inclusion in the CPR to replace the existing rule 3.12(1) with its reference to exemptions from mandatory costs budgeting as defined in directions made by the President of the Queen's Bench Division and the Chancellor of the High Court.

1.2 The members of the CPRC on this sub-committee are Coulson J (chairman), Sales J, District Judge Lethem, Barrister Edward Pepperall QC and Solicitor Qasim Nawaz. In addition, Hamblen J has been co-opted onto the sub-committee to represent the Commercial and Mercantile Courts.

1.3 The sub-committee is holding two consultation meetings after court hours on 10 and 16 July 2013 in the Rolls Building, Fetter Lane, London WC4A 1NL and also seeks written responses from other interested parties.

2. Brief Background

2.1 Following observations in his Preliminary Report Sir Rupert Jackson concluded after some consultation, at chapters 27 (paragraph 2.24) and 40 (paragraph 7.4) of his Final Report, that mandatory costs budgeting should not apply to the Commercial Court. That Court does, however, have a discretion to order the production of costs budgets and to engage in costs management.

2.2 Shortly before the changes to the CPR consequential upon the Jackson Report came into effect, it was realised that, if the mandatory costs budgeting requirement did not apply to the Commercial Court, but did apply to the TCC, the Chancery Division and the Mercantile Court, there was a risk of distortion of the spread of legal business between the different courts and between London and regional court centres. In consequence, a revised version of r.3.12(1) (in the form which came into effect on 1 April 2013) was agreed by the CPRC in something of a hurry; this maintained the exception in respect of the Admiralty and Commercial Courts, but also made cases in the TCC, Chancery Division and the Mercantile Court subject to directions from the PQBD and the Chancellor. Their subsequent directions were to the

effect that the exception to mandatory costs budgeting applied to all claims in excess of £2 million.

2.3 There was no doubt that this was something of an emergency solution. The Master of the Rolls and the Deputy Head of Civil Justice were anxious that the whole issue be re-considered as soon as possible. In those circumstances this sub-committee was formed. Subsequently, the CPRC also asked the sub-committee to look at the separate question of mandatory costs budgeting in relation to Part 8 claims.

3. The Need For Consultation

3.1 The sub-committee concluded that, because Sir Rupert Jackson had consulted court users in relation to a possible exception for the Commercial Court, it would be necessary to consult again on the desirability of the new r.3.12, particularly if the exception was to be modified or done away with altogether.

3.2 Following this consultation exercise, the sub-committee anticipates that it will report to the CPRC at its first meeting of the new legal year in early October.

4. The Current Blanket Exception

4.1 The preliminary view of the majority of the sub-committee is that the Admiralty and Commercial Courts' blanket exception at r.3.12 may be unnecessary and inappropriate.

The costs management regime is an important new tool in the attempts to keep the costs of civil litigation within reasonable bounds. The obligation to produce costs budgets (subject to the court's discretion to direct otherwise) is an important part of that regime and there is no obvious reason why it should not apply to all specialist civil courts. Indeed, it is noted that the Mercantile Courts and TCC ran a successful pilot scheme for costs management, which was recently the subject of a favourable report by King's College.

4.2 Of course, even without the blanket exception, if the court concluded that a case should not, for particular reasons, be the subject of the costs management regime, then the individual case can be excepted under the existing rules. Early written applications could be made to court for a direction to exempt the case from the need to produce a costs budget and from the costs management regime, by reason of the specific features of a particular case or if the parties agreed this. That may be a further reason why the blanket exception is inappropriate.

4.3 However, it is important to stress that these are preliminary views only and the sub-committee is concerned to discover whether there are any reasons which justify the maintenance of the blanket exception. Of particular interest would be the effect on the willingness of commercial organisations in international transactions to agree upon the jurisdiction of the Courts of England and Wales.

5. The Current Value-Based Exceptions

5.1 Depending on its conclusion on the future of the Admiralty and Commercial Courts' exception, the sub-committee will also need to consider how important it is to maintain a level playing field across the different courts and regional centres trying commercial cases and whether some qualified exception to the mandatory costs budgeting requirement is the appropriate means by which to achieve such objective.

5.2 If there is to remain some qualified exception for cases in the TCC, the Chancery Division and the Mercantile Courts (or indeed be some new qualified exception in the Admiralty and Commercial Courts), should such exception be framed by reference to financial value? If so, at what level? Alternatively should the parameters be different or formulated differently?

5.3 Concern has already been expressed about the existing formulation adopted in the joint direction issued by the PQBD and the Chancellor in relation to the Patents Court, because the financial value of some intellectual property claims may be difficult to discern. The point can be made in relation to a range of cases; for example, where injunctive rather than financial remedies are sought.

5.4 Furthermore it is desirable that parties should know clearly at the outset whether they are subject to an obligation under the Rules to produce costs budgets, so the problem of formulation of any exception is significant. This may be a further reason why the blanket exception is not sensible but,

if the limit is not to be expressed in financial terms, then how else can it be expressed?

6. Part 8 Claims (including JR)

6.1 Concern has been expressed in a number of quarters about the application of the mandatory costs budgeting regime to Part 8 claims. Sometimes Part 8 claims may not attract the obligation to produce costs budgets because there is no CMC (e.g. this will usually be the case for Judicial Review claims under Part 8 read with Part 54), but in other cases a CMC may be ordered and the obligation may apply.

6.2 The sub-committee considers this rather indirect and non-transparent way of regulating the applicability or otherwise of the obligation to produce a costs budget to be unsatisfactory. It may also fail to cover all cases which ought to be exempt from that obligation. The view has been expressed that, since Part 8 claims were designed to be relatively quick and inexpensive, it is an unnecessary burden if costs management issues arise at the outset of such claims. It is for these reasons that the CPRC asked the sub-committee to consider this point too. In this regard, observations on the way in which r.3.12 and r.3.13 are drafted and interact with each other would be helpful.

6.3 The sub-committee's preliminary view is that, whilst costs management orders have a particular benefit to longer cases, they are of much less relevance to the short form procedure envisaged in Part 8 and in Judicial Review. Accordingly, it

may be appropriate for the mandatory costs management regime to be dis-applied in relation to all Part 8 claims (including Judicial Review). Having such a simple rule could also promote clarity for the profession and litigants about when costs budgets do or do not have to be produced. Although that would be the basic position, it would be open to a court to order the parties to produce costs budgets in a particular case in the exercise of its ordinary case management powers, where costs management would be desirable in the specific circumstances of the case. Again, however, views on this possible reformulation of r. 3.12(1) are sought

7. Other Matters

7.1 Although mandatory costs budgeting and the costs management regime have not been in place for very long (save in respect of those areas of work which were the subject of Pilot Schemes), 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.

8. How to Participate

8.1 The sub-committee invites written representations on the issues addressed in this Paper. These should be sent to Jane Wright, Post Point 4.32, Ministry of Justice, 102 Petty France, London SW1H 9AJ or jane.wright@justice.gsi.gov.uk (please

note “CPRC Cost Management Consultation) in the subject line of your email. Responses to be received no later than 20 July 2013.

8.2 The sub-committee is also holding the two consultation meetings at the Rolls Building on 10 and 16 July, referred to above. Space is limited, so attendance at those meetings will be by invitation. If you wish to be invited to attend, please let Jane Wright know by email not less than 5 days before the meeting.

Coulson J (for the sub-committee)
14 June 2013

Please note:

Information provided in response to this consultation, including personal information, may be published or disclosed in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004).

If you want the information that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence. In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the CPRC.

The CPRC will process your personal data in accordance with the DPA and in the majority of circumstances; this will mean that your personal data will not be disclosed to third parties.

List of consultees

ABI
Administrative Court users Group
Administrative Law Bar Association
Admiralty Solicitors Group
APIL Professional Negligence Lawyers Association
Atkins Chambers
Bar Association for Commerce Finance and Industry
Bar Association for Local Government and Public Service
Bar Council
Bar European Group
Birmingham Chancery Court Users Association
Bristol Chancery Court Users Association
Bristol Mercantile Court Users Association
Chancery Bar Association
Chancery Division Court Users Association
Chartered Institute of Loss Adjusters
City of London Law Society
Commercial Bar Association
Commercial Court Users Group
Commercial Litigants Association
Commonwealth Lawyers Association
Emmes Gilmore Liberson
Engineering and Construction Industry Association
European Patent Lawyers Association
Forum of Insurance Lawyers
Fraud Lawyers Association
Hugh James
Human Rights Lawyers Association
Insolvency Court Users Association
International Bar Assertion
IP Bar Association
IP Lawyers Association
Judiciary
Keatings Chambers
Law Commission
Law Society
Leeds Chancery Court Users Association
London Common Law and Commercial Bar Association
London Common Law Association
Manchester Chancery Court Users Association
Mercantile Court Users Association
Midland chancery and commercial Bar Association
Morgan Cole
Newcastle Chancery Court Users Association
Northern Chancery Bar Association
Northern Circuit bar Association
Northern Circuit commercial Bar Association
Patents Court User Group
PI Bar Association
Pinsent Masons
Planning and Environmental Bar Association
Property Bar Association
Public Access bar Association
Revenue Bar Association
Rolls Building Court Users Association
Society of Construction Law
Solicitors association of Higher Court Advocates
Supreme and Privy Court Users Association
TCC Users Association
Technology and Construction Bar Association
Technology and Construction Solicitors Association
TLT
Western Chancery and Commercial Bar Association
Wragg
39 Essex Street