

Litigation Committee submission to Lord Justice Jackson regarding the possible extension of fixed recoverable costs

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's professional work is conducted through nineteen specialist committees drawn from the CLLS's membership, who meet regularly to discuss pending legislation, law reform and practice issues in their fields. This submission has been prepared by the CLLS Litigation Committee (the "Committee") and addresses issues raised by Lord Justice Jackson's investigation into the possible extension of fixed recoverable costs. The membership of the Committee is set out in the Schedule to this submission.

1. The Committee would, overall, be concerned about any extension of the system of fixed recoverable costs beyond its current application. The Committee would be particularly concerned if fixed recoverable costs were to be applied to commercial litigation, which is the Committee's primary focus. The reasons for this concern range from points of principle to points about the practical application of any such system. These include the following twelve points.
2. **First**, the rationale behind costs shifting in the English civil justice system is that a litigant, whether a claimant or a defendant, who is compelled to have recourse to the courts in order to vindicate its rights should not be left out of pocket as a result of the need for litigation. If a claimant has a good claim that a defendant refuses to acknowledge, the claimant should recover judgment both for the amount of the claim and also the costs that the defendant has forced on the claimant. Similarly, if a defendant is not indebted

to a claimant, the defendant should be compensated for the costs imposed on it by being taken, wrongly, to court.

3. Fixed recoverable costs do not represent a genuine attempt at costs shifting. They do not aspire to compensate a litigant for the actual costs of its engagement in the courts. Instead, fixed recoverable costs provide for the payment of a sum, selected for policy reasons, in lieu of genuine costs shifting. This sum might approximate to the actual costs of the litigation, but more likely it will not. The extent of the successful party's costs recovery will, for reasons explained further below, be a matter of luck.
4. The English legal system has not historically regarded the cost of litigation as simply another cost of doing business that must be borne regardless of the rights and wrongs of the litigation. Commercial litigation does not represent one of a number of possible new business opportunities that a party may choose to pursue or not as it sees fit in order to make a profit. Commercial litigation commonly involves enforcing agreements or seeking damages resulting from the infringement of parties' existing rights. It is seldom optional or undertaken with enthusiasm. The ability to enforce rights is, however, fundamental to trade and commerce.
5. A strong justification is, in the Committee's opinion, required for departing from the principles underlying costs shifting. The Committee does not consider that a sufficient justification has been made out for departure, at least in the sphere of commercial litigation. In particular, for reasons set out below, the Committee does not consider that any of the policy arguments set out in paragraph 1.2 of Chapter 23 of Lord Justice Jackson's *Review of Civil Litigation Costs: Preliminary Report* justifies departure from true costs shifting.
6. The Committee accepts that the current costs system in England and Wales is far from perfect. Fixed recoverable costs will not, however, address the problems in the system.
7. **Secondly**, the potential to recover actual costs is one of the factors in the international popularity of the English legal system. Especially at a time when the legal system is facing questions, whether justified or not, as a result of Brexit, the Committee would be concerned at any steps, such as fixed recoverable costs, that might offer encouragement to England's competitors.
8. **Thirdly**, there is a significant difference between, on the one hand, litigation (notably personal injury litigation) in which one or both sides' lawyers are paid only the sums that are recovered in costs from the losing party (success fees apart) and, on the other hand, types of litigation (notably commercial litigation) in which that is not the case.

9. In the former type of case, a system of fixed recoverable costs places a degree of control on the actual costs of litigation. This litigation tends to be bulk litigation with a high success rate, where lawyers might be underpaid for their actual work on one case, but can compensate by over-recovery on another case.
10. In the latter type of case, fixed recoverable costs are a sum that the successful party is awarded in lieu of actual costs, but are not based on the fees that the successful party has in fact paid its own lawyers. In these cases, fixed recoverable costs might prevent the losing party from being hit with "disproportionately high legal costs", but they will do so by imposing those costs on the successful party - even if those costs were reasonably and necessarily incurred. The successful party will still be required to pay its lawyers for the work needed to pursue the litigation, the fees for that work being determined in the highly competitive legal market place. All that will change in practice is that the successful party will recover a lower proportion of its costs. The civil legal system should, in the Committee's view, aspire to promote access to justice, not to impose costs on successful parties forced into court in order to vindicate their rights. If the rules governing litigation require disproportionately high legal costs to be incurred, it is a strange policy choice to impose those costs on the party with substantive merit on its side.
11. **Fourthly**, the Committee accepts that the costs of litigation in England have increased in recent years, and that this is a matter of concern that should be addressed. This increase in costs is in part the result of technological change (eg disclosure costs more because many more documents are now created), but it is also in part the direct result of judiciary-led reforms. For example, the Woolf reforms and, more recently, some of the reforms implemented in the light of Lord Justice Jackson's *Review of Civil Litigation Costs* have increased costs because, in both cases, they have required lawyers to take additional procedural steps for which lawyers inevitably charge their clients.
12. A system of fixed recoverable costs will remove - or, at least, potentially reduce - one element of the expense of litigation, namely that of costs budgeting (also, in a small number of cases, costs assessment). Fixed recoverable costs will not address the core point that the cost of litigation is primarily dependent on the steps that the parties are required to take by the Civil Procedure Rules. Parties have a degree of latitude in some areas (eg the number of witnesses they speak to), but the main costs of litigation are the product of the Rules.
13. To have any significant impact on the actual cost of litigation, it is necessary to look beyond the system for determining the amount of costs' recovery and to consider what steps are genuinely required in order to take a case to a fair

trial. Equally importantly, judges need to exercise the extensive powers they already have to control the cost of litigation. This might mean exercising more robustly powers to strike out claims or grant summary judgment rather than allowing manifestly weak or obscurely pleaded cases to proceed to trial; it might mean real consideration of the scope of disclosure rather than defaulting to standard disclosure (a problem that Lady Justice Gloster is currently addressing); or it might mean judges not being content merely to reduce the total set out in a draft costs budget without also adjusting the steps required in the litigation.

14. ***Fifthly***, a system of fixed recoverable costs could produce perverse results. For example, if there is inequality of arms between the parties, the richer party might be inclined to fight the case in an extravagant manner in the expectation that the less well-resourced party will be forced to abandon the claim or defence, regardless of the merits, because it cannot meet the irrecoverable costs. There will not be the same incentive to economy on both sides.
15. ***Sixthly***, perhaps unlike fixed recoverable costs for lower value, bulk, litigation, fixed recoverable costs in commercial cases will only approximate to actual costs by chance, if they do so at all. Commercial cases, particularly higher value commercial cases, come in all shapes and sizes. A claim for £25 million might require short pleadings, minimal disclosure, a small number of witnesses, and be resolved at a four day trial. Alternatively, it might require lengthy pleadings (regularly amended), a million pages of disclosure (with numerous interim applications regarding relevance and privilege), a large number of witnesses and a forty day trial. To determine recoverable costs by reference to one factor alone - the sum claimed - is to randomise recoverable costs and, as a result, potentially to cause injustice. As we have said, fixed recoverable costs do not represent genuine costs shifting.
16. In this regard, there are major differences between the parties' costs in common law jurisdictions and in civil law jurisdictions. The latter generally impose fewer procedural and other obligations on the parties, with resulting lower costs and less uncertainty. The nature of common law systems is wholly different.
17. ***Seventhly***, it appears that the level of fixed recoverable costs will, if introduced, be determined on the basis of a narrow approach to "proportionality", ie on the basis of the sum claimed or recovered alone (cf CPR 1.1(2)). Proportionality, especially on this very restricted basis, is a difficult concept to apply because it ignores the main factor that determines whether a party chooses to pursue litigation. That factor is an assessment of the claim's prospect of success when balanced against the potential return.

Risk and reward are the principal determinants in making any investment, whether in real property, stocks and shares, or litigation.

18. For example, a party may have a claim for 100 that, in the light of the requirements of the Civil Procedure Rules, will cost 100 to pursue. If this claim is assessed as having an 80% chance of success, it may well be reasonable and proportionate to pursue the claim if costs can be recovered. Success would offer a 100% return on the costs invested and at risk, which, particularly in the current interest rate climate, could be an attractive investment for the risk involved. If, however, the claim is assessed as having only a 40% chance of success, then the cost of pursuing the claim, when balanced against the risks, may well be considered disproportionate.
19. If recoverable costs were restricted to 30% of the sum claimed or recovered on the basis that this is deemed to be the "proportionate" expenditure, the risk/reward ratio in this example becomes different. A party would have 130 at risk in its own costs and in possible costs liability to the other side, against a potential net return of only 30, or 23%. The main beneficiary of fixed recoverable costs in this example is the party that would have lost, because the claim is less likely to be pursued. A refusal to compensate properly for the costs that the legal system requires to be spent in order to pursue a claim will potentially deny access to justice. A legal system should be devoted to promoting access to justice and vindicating legal rights, not frustrating them.
20. It might be objected that it is impossible for a litigant currently to determine in advance what its costs will be. If so, that will not change with fixed recoverable costs because a litigant will still be faced with uncertainty as to its own costs even if it has greater certainty as to its potential costs recovery from and liability to the other side. Fixed recoverable costs will only solve one aspect of the problem they seek to address, and may not even entirely solve that aspect of the problem if fixed recoverable costs are subject to a number of variable factors or adjustments.
21. In practice, however, the Committee's experience is that commercial litigants invariably require their lawyers to estimate the costs of bringing or defending a claim. Experienced solicitors can usually (though, we concede, not always) do this to an acceptable level of accuracy. In the light of an assessment of their own costs, solicitors can also commonly make a reasonable estimate of what the other side's costs are likely to be. Costs are seldom indeterminate.
22. ***Eighthly***, as we have said above, even with fixed recoverable costs, there will still be uncertainty as to the costs payable or recoverable. For example, the "rules" set out on page 14 (under the grid in paragraph 5.4) of the published version of Lord Justice Jackson's somewhat pre-emptive speech of 28

January 2016 entitled *Fixed Costs - The Time Has Come* retain considerable scope for argument as to costs. For example, when is work "substantially started", let alone "completed"? when does a case involve "exceptional complexity"? when has substantial additional work been caused by the conduct of the other party?

23. ***Ninthly***, it has been reported that some members of the judiciary favour fixed recoverable costs because this system would absolve them from the need to carry out costs budgeting, which few relish. That is manifestly an inadequate reason to introduce fixed recoverable costs.
24. ***Tenthly***, at a practical level, fixed recoverable costs raise numerous issues. What about the costs of interim applications? What about the costs of cases in which a challenge to the jurisdiction of the court is successful, in whole or in part? What about the costs of cases in which summary judgment is granted, or a claim is struck out? What about Part 8 claims? What if fixed costs amount to more than a party's actual costs? What about claims that only seek a declaration or an injunction? What about cases that proceed for a substantial period as claims for unliquidated damages? The issues with fixed recoverable costs do not end at the level of principle but extend to implementation.
25. ***Eleventhly***, what criteria will be used to determine the level at which costs are deemed to be "proportionate"? Should it merely be a percentage of the sum claimed or recovered without regard to likely actual costs? If so, what criteria can be used to determine the right percentage? Will the fixed recoverable cost simply represent an a priori assumption as to what it is appropriate to spend on a claim for a particular sum, ignoring the main factor in the decision, ie the prospect of success? Or, will an attempt be made to determine the actual costs of generic litigation - whether it be a Platonic ideal or based more in the real world - or at least to balance of costs between the various stages of litigation (eg the allocation to disclosure in the grid in paragraph 5.4 of Lord Justice Jackson's speech of 28 January 2016 appears very low for a commercial case)? Should fixed recoverable costs involve bands or a fixed sum plus a percentage of the sum claimed or recovered? Should percentages be cumulative, eg 50% of the first £100,000, 40% of the next £150,000 and so on? Adopting fixed recoverable costs begs numerous questions as to methodology.
26. ***Twelfthly***, a small minority of the Committee is more sympathetic to the aims of fixed recoverable costs because fixed recoverable costs do potentially reduce, even if not entirely eliminate, one aspect of the financial uncertainty involved in litigation. This may be attractive to some litigants in some types of case, even if it involves a rough and ready approach to justice. However,

even those more favourably disposed towards fixed recoverable costs consider that a pilot is required in order to assess both whether there is demand for fixed recoverable costs and how it would work in practice. In the commercial sphere, a pilot in the Mercantile Court might be appropriate for cases involving, say, less than £250,000.

23rd January 2017

Schedule

THE CITY OF LONDON LAW SOCIETY Litigation Committee

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