About the CLA

The CLA was founded in 2006 as an association for all those in the business of commercial litigation and dispute resolution. The association's members are drawn from a number of professions who serve clients involved in business disputes and the association is representative of practitioners from throughout England and Wales as well as Northern Ireland and Scotland.

Introduction

Before specifically addressing the questions that the consultation poses, we consider it important to set out some key concerns that have emerged from members and steering board members of the CLA. Since these underpin several of the responses given below to the consultation's specific questions.

CLA's position

CLA wholeheartedly opposes the introduction of FRC into commercial disputes. The consultation records that barrister and solicitor representative groups previously opposed FRC in commercial cases, and that position, so far as CLA is concerned, is maintained. That is not to suggest that the reported support for FRC from the Federation of Small Businesses is to be dismissed or ignored; rather, CLA's view is that introducing FRC does not achieve the objective of giving more confidence for smaller businesses to defend their interests in the Courts if necessary and crucially does not reduce the costs that small businesses will have to incur to be represented before the Courts.

CLA's concerns

(a) The Shortfall

The over-riding concern of CLA members is that the introduction of FRC into commercial litigation would result in the highly unattractive situation whereby the winner of a piece of litigation would lose out. This is contrary to the policy objective identified in the impact assessment attached to the consultation, which states:

"The policy objective is to make legal costs proportionate in low-value civil litigation (cases up to £100,000 damages)...FRC would ensure that costs are proportionate and predictable, so helping to increase access to justice as potential litigants would not be prevented from bringing their cases for fear of excessive costs."

We consider that this assumption is fundamentally flawed, and that the issue of the proportionality of legal costs cannot be dealt with by controlling what a winner recover from the losing party, without reducing the amount of work that is necessary and reasonable on a case and the costs that the winner will need to incur to be successful. If the amount of work a lawyer must do results in disproportionate costs, then the system must be changed to reduce the amount of work a lawyer must do. This is what the HMCTS reform programme purports to attempt to deliver. There are two areas that the system

would first need to change: first, the way in which cases are managed, and, secondly, the efficiency of the Courts.

Mechanisms already exist to ensure that costs are proportionate, as set out in the CPR. The CPR states that costs incurred are proportionate if they bear a reasonable relationship to the sums in issue in the proceedings, the value of any non-monetary relief in issue in the proceedings, the complexity of the litigation and any additional work generated by the conduct of the paying party. Although Court of Appeal guidance on proportionality is lacking, the lower courts rule on proportionality on a daily basis and commercial practitioners know, in general, what will be considered to be proportionate and what will not (we suggest that this may be one reason why the Court of Appeal has not really been troubled by the issue). Introducing a grid of FRC does not cover all the factors that are currently considered when assessing proportionality and attempts to create a one size fits all solution (albeit with different bands) is, we suggest, nigh on impossible. Commercial litigation unlike personal injury and some other forms of civil litigation, is rarely formulaic or standard.

In order to reach the policy objective above, several assumptions have been made, as set out below, with which we do not agree, specifically:

- "Proposed FRC are assumed to reflect the amount of work which an efficient and effective provider would undertake"
- "There would be no change in the number of litigants in person"
- "Claim settlement outcomes would remain the same".

In commercial disputes, we consider it highly unlikely that there will be any (or any more than a tiny number of) cases where solicitors and Counsel will be able to limit their fees (and thus their charge to the client) to the figures set out in the proposed FRC matrix; in the majority of cases there will be a difference (and probably a significant one) between the actual, and reasonable, costs incurred and the FRC.

Sometimes the difference between actual and reasonable costs incurred and the FRC may be minimal, but, for cases where the difference is large, solicitors and Counsel handling commercial disputes will need to (and will) charge the client any shortfall in cost recovery ("the Shortfall"). This would lead to, for example, a successful claimant in a business contract dispute having to pay its legal representatives the Shortfall out of its damages; whereas, in a breach of contract case, the victim of a breach of contract should be put in the position it would have been in had the wrongdoer performed the contract, that principle would be breached if a successful party loses a significant chunk of its damages (which is intended in order to pay as compensation) in order to pay its legal representatives.

Evidence that legal representatives in commercial disputes will charge their client the Shortfall can be found in the fact that, currently, they do (and the market does not prevent them from doing so); commercial practitioners habitually and repeatedly advise their clients that, even if a case is won and an Order for costs made in favour of the client, the likelihood is that there will be a shortfall between the actual costs incurred and what is recovered and that that shortfall will need to be borne by the client itself.

We would actually be quite concerned if a particular commercial practitioner solicitor or barrister was frequently offering to limit his/her fees to whatever could be recovered from the other side, as this would tend to suggest that he/she was not doing the work properly and competently, perhaps choosing instead to "cut corners" or to delegate the work to cheaper, less experienced staff; this in turn could lead to under-settlement of cases, to claims against the legal representatives, and to reputational damage to the legal profession, none of which should be encouraged.

Whilst this problem could be eradicated if the FRC were fixed at a reasonable rate for the work to be done, in a commercial case we doubt that this could (and even less would) be achieved given in particular the huge number of variables in commercial disputes; certainly, even under the current system, recoverable costs (on assessment) are less than the actual costs of doing the work, as

intimated above. Even more certainly, the figures suggested in the FRC in the consultation are nowhere near amounting to reasonable remuneration for the legal representatives in a commercial dispute.

The pertinent point is that, by their very nature, commercial cases cannot be run on a 'one size fits all' basis; whereas, for example, many personal injury cases follow the same pattern and can be run on a volume model (for example, RTAs involving claims for minor whiplash, tripping claims involving minor injuries), this cannot be said of commercial litigation cases; each commercial dispute needs to be run on a bespoke basis, as every case is markedly different from every other (except for those cases which can be, and are, run as a group action or class action (and are thus treated differently anyway)).

Indeed, it should be recalled that the trigger for Jackson LJ's Review of Costs was the perception that costs in personal injury cases were disproportionate (and which led to fixed costs and the portal); there were no such concerns expressed about commercial disputes. We are concerned that commercial disputes are being swept up in a fever pitch driven by political policy agendas aimed at cutting the cost of insurance. That policy objective is not met by introducing FRC for commercial cases. We submit that the current system of costs budgeting/costs management, now that it has bedded in, provides the fairest and most pragmatic way of balancing the need to keep costs proportionate and (relatively) certain with the need to ensure that a party is reasonably compensated for the costs it has to incur in a commercial litigation case.

The only certainty brought by the proposals is that losing parties will normally know their exposure to adverse costs. However, we consider this benefit (which in any event is a qualified benefit, because of the likely 'escape routes') to be of very little relevance when compared with the drawbacks of FRC. In addition, we reiterate that this objective is already achieved by costs budgeting. Our experience of commercial client expectations is that clients expect to be properly compensated in costs when successful and that the fear of not being would be (and indeed already is) a far bigger factor for them when contemplating whether to commence litigation than is the fear of paying unknown adverse costs. Considerable evidential force for this be derived from the fact that, as we understand it, the Capped Costs Pilot scheme, being a voluntary scheme, has had very little (and possibly no) take-up despite its fairly widespread availability in the Business and Property Courts ("BPC"). It must be borne in mind that the costs assessment process already provides a 'safety net' on adverse costs.

We suggest that one reason (admittedly of several) for such poor take-up of the Capped Costs Pilot is that court users know that the capped costs (which would be the FRC) cannot account for many variables of a case, including the efficiency or approach/level of obstructiveness from the opposing side, the client's characteristics, or the demands of the courts. Inefficient courts penalise litigants and solicitors unfairly and could potentially do so to a greater extent in a FRC environment. A properly resourced and funded court system is at the heart of efficient civil litigation conduct and it is a common concern amongst our members that the courts are not functioning as they should be. The concept of proportionality should reflect not just the cost of work involved – but that the court process and interaction with it is also proportionate. Many factors are not within the control of practitioners and the current service provided by the courts would not deliver the outcomes sought by the reforms.

(b) Lack of suitable legal representation

We are concerned that, contrary to the policy objective, and to the potential detriment of businesses in England and Wales, lawyers (both solicitors and Counsel) will, for economic reasons, cease acting in cases where FRC applies. This would leave a whole swathe of commercial disputes unable to be litigated with the use of legal professionals. The result of this would be that either cases cannot be litigated (leaving justice undone and victims of an injustice aggrieved and helpless) or they would be litigated by parties without legal representation; the latter would pile considerable pressures on the already-stretched Court resources (it being well-known that cases involving unrepresented parties take longer to hear) and is less likely to lead to a just result (since the unrepresented parties would of course not be familiar with the relevant legal principles). Such an outcome would also of course be a great blight on the reputation of the legal profession.

Whilst it might be countered that Courts frequently grapple with unrepresented parties in business cases which fall within the small claims track, it would in our view be dangerous to extrapolate and assume that this would not lead to the consequence set out in the preceding paragraph; our members'