

**RESPONSE OF THE TECHNOLOGY AND CONSTRUCTION BAR ASSOCIATION TO LORD JUSTICE JACKSON’S PRELIMINARY REVIEW OF CIVIL LITIGATION COSTS**

**Introduction**

1. This is the response of the Technology and Construction Bar Association (“TECBAR”) to Lord Justice Jackson’s Preliminary Review of Civil Justice Costs (“the Jackson Review”). It reflects the views of the TECBAR committee, and the results of a survey of the views of its members[[1]](#footnote-1).

2. TECBAR recognises and wishes to record in writing that (in its view) the Jackson Review is a formidable achievement. It provides a comprehensive overview of civil litigation costs both in this country and in other jurisdictions.

**Preliminary matters**

***Scope of this Response***

3. In view of the broad sweep of the Jackson review, it (inevitably) addresses a number of issues which are not of immediate concern to members of TECBAR and/or upon which TECBAR is not able to offer any distinctive view. On these matters, TECBAR broadly supports the approach taken by the Bar Council in the Jackson Working Group’s Response.

4. In particular, TECBAR considers that the funding of litigation ought to be the subject of a further and separate review, and, as a result, this topic is not addressed in this Response. However, TECBAR considers that percentage contingency fees should not be introduced. CFAs remain rare in TCC work, and seem unlikely to have a significant impact upon TCC litigation in the short to medium term.

5. Instead, this Response addresses two principal topics, which are of particular concern to TECBAR:

(1) First, the Pre Action Protocol (“PAP”);

(2) Second, case management.

***Barristers’ fees in TCC litigation***

6. Before addressing each of these topics in turn, TECBAR notes (and firmly agrees with) the observations in relation to litigation in the Technology and Construction Court (“TCC”) at chapter 34, paragraphs 3.2 and 3.4 of the Jackson Review.

7. Paragraph 3.2 states that:

*“...in the majority of cases concluded the costs incurred appear to be proportionate to the sums at stake...”*

8. Paragraph 3.4 makes the point that:

*“Litigants in the TCC are almost exclusively businesses...The parties to such disputes have a choice of dispute resolution methods....The parties on both sides are often ‘repeat players’, advised by specialist solicitors. As the senior in-house solicitor of one major contractor put it to me, the decision whether to bring a claim or defend a threatened claim is an* ‘investment decision’. *It is unsurprising, therefore that most (but not all) TCC cases are resolved at proportionate cost...The same in-house solicitor also pointed out that* ‘proportionate cost’ *meant a cost proportionate to the importance of the issues at stake, not merely to the nominal value o the claim. For example, reputational issues may be involved....”*

9. Accordingly, although it may be that in relation to certain types of litigation there are significant concerns as to the proportionality of the costs which it involves, litigation in the TCC is not (on the whole) one of them. It follows that there is no need for the introduction of cost capping.

10. In this regard, TECBAR submits that the fees charged by the Bar are plainly in proportion. This can be tested in a number of different ways. However, we consider that two points of particular force can be made:

(1) First, the rates charged by the Bar almost always compare very favourably with the rates charged by solicitors and experts involved in the same piece of litigation;

(2) Second, the services of the Bar are in very high demand in international and domestic arbitrations. This is an extremely competitive market in which clients are very sophisticated commercial concerns, and if the rates charged by the Bar were (or were seen to be) disproportionate or poor value the market would operate very swiftly to provide the requisite correction. If the Bar were poor value, its services would not be in high demand. The fact that its services are in high demand demonstrates that the contrary is the case.

***The need for pluralism***

11. One of the features of civil litigation recognised (rightly, in our view) in the Jackson Review is its diversity. It covers an enormous range of very different types of case, and it would be wholly undesirable to seek to impose upon it a single, inflexible and all-embracing costs regime. Flexibility of approach is required in order properly to reflect the fact that one size (both in theory and as a matter of practical reality) does not, and cannot sensibly be made to, fit all.

12. It follows that it may well be that the proposals and observations which are set out below would not be suited to different types of litigation. However, it is the firm view of TECBAR that they provide the basis for the most apposite and practicable approach to matters of costs in litigation in the TCC.

**(1) The Pre Action Protocol**

13. The unanimous view of the TECBAR committee and the respondents to the survey referred to above was that the PAP substantially and unnecessarily increases costs. It is now commonplace to see very detailed letters of claim supported by voluminous appendices, and equally detailed letters of response, which, in the event that the meeting between the parties does not result in a settlement, are then reproduced and often elaborated as pleadings.

14. It was also the unanimous view of the committee and respondents that the formal PAP should be abolished, and replaced with a more informal process which is limited to a summary letter of claim, a summary letter of response and a meeting. Such a process would reflect the practice which is currently adopted in the Commercial Court, which TECBAR is advised by COMBAR commands widespread support.

15. Such a simplified process would retain what was almost certainly the intention behind the introduction of the Protocols as part of the Woolf reforms by providing the machinery by which (a) the parties might be informed of each other’s case prior to the formal commencement of proceedings and (b) settlement might be promoted, but would discard the costly and unnecessary procedural baggage which the PAP has acquired since 1999.

16. It follows that TECBAR does not consider that the proposed pilot scheme is necessary.

17. However, if the PAP is not to be abolished and replaced with the more cost effective and streamlined procedure suggested above, the TECBAR committee take the firm view that Court supervision would lead to yet further unnecessary costly satellite litigation and as a result would make the situation worse than it is at present.

**(2) Case Management**

***Overview***

18. The TCC benefits very considerably from what is in effect the system of docketing which it operates, as a consequence of which the same Judge deals with a case from start to finish.

19. It is understood that a serious concern of other areas of the Bar (but not of TECBAR) is that too often the Judge who is assigned to hear a Case Management Conference has been given too little time to familiarise himself or herself with the detail of the case. Accordingly, it is understood that, for example, the Chancery Bar Association intends to put forward a strongly argued case in favour of a system of case management which (in broad terms) reflects the current practice of the TCC.

20. As a result of the docketing system, it is TECBAR’s view that the current approach to case management in the TCC is working well, and does not require substantial reform.

***Lists of Issues***

21. Although it is understood that, as a means of addressing the concerns referred to at paragraph 19 above, there are various Bar Associations which favour the introduction of issues-based case management by reference to an agreed List of Issues, such an approach commands no support from members of TECBAR. TECBAR is in very firm agreement with chapter 38, paragraph 5.3 of the Jackson Review, and sees no merit whatsoever in the introduction of such an approach. It would only lead to satellite disputes as to the content of the List of Issues. Parties would propose contentious formulations of the issues in question in order to gain what might be perceived to be an advantage and/or would seek to re-plead their cases via the List of Issues. The writers have experience of this happening.

22. In a relatively simple case, a formal list of issues is entirely unnecessary. In a complex case the process of formulating and agreeing a comprehensive list of issues is very expensive indeed, and, in our experience, of little ultimate utility, since when accurately formulated it repeats the substance of what can already be seen from the pleadings.

***Witness statements and statements of case***

23. TECBAR shares the concern that witness statements have become unnecessarily long, and too often provide a narrative account of events by detailed reference to and/or repetition of documents in respect of which the witness in question is not able to give direct evidence (being neither the creator nor the contemporaneous recipient of the documents in question) and/or the contents of which can be read by everyone for themselves in any event. The costs of those parts of witness statements which are unnecessary or irrelevant should be disallowed.

24. So far as supplementary or responsive witness statements are concerned, provision needs to be made for omissions to be remedied, even if the issue in question is not a new one (provided that this does not lead to prejudice or injustice). Flexibility is required.

25. For example, it may be that a particular issue which, at the time the first round of witness statements were prepared, was not obviously significant has become of significance as a result of the first round witness statements served by one or more of the other parties. In these circumstances it would plainly be undesirable if a party were to be prevented from serving additional and relevant evidence simply on the basis that it had missed its chance the first time round.

26. However, as a general proposition, TECBAR agrees that responsive witness statements should be confined to matters which have not been covered in the first round of statements.

***Statements of Case***

27. TECBAR agrees that the costs of those sections of Statements of Case which are obviously prolix or unnecessary should be disallowed. Statements of case should set out only the material facts, and the setting out of evidence should be firmly discouraged. However, a degree of flexibility will be required. It is suspected that in most cases where Statements of Cases are lengthier than necessary they are the result of a concern on the part of the pleader (a) to avoid later arguments that a matter which ought to have been pleaded has not been pleaded alternatively (b) to pre-empt a detailed Request for Further Information. There are often differing views on what does and does not need to be pleaded, and we consider that the correct approach needs to have sufficient flexibility to reflect the fact that such questions are matters of art rather than science.

**(3) Disclosure**

28. TECBAR supports the retention of standard disclosure for cases in the TCC. If there are to be alternatives to standard disclosure, these should be considered on a case by case basis, with standard disclosure providing a default option.

29. There is no support for the introduction of a disclosure assessor. TECBAR shares the view that it is unlikely that such a position would be attractive to retired City solicitors, and in any event it considers that the introduction of assessors will only serve to increase (rather than decrease) costs.

30. TECBAR sees no merit in restricting the number of disclosure applications which a party is entitled to make. The introduction of such a limit would be bound to lead to injustice, and is in any event unnecessary.

**Conclusion**

31. TECBAR considers that the TCC continues to provide a lead in the necessary procedures which enable cases to be resolved expeditiously and cost effectively. With reform of the PAP as suggested above, TECBAR considers that further significant costs savings can be made.

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1. Although it is fair to say that the number of responses which were received from members was relatively limited. [↑](#footnote-ref-1)