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At 2.29 pm

Mr Jonathan Haydn-Williams took the Chair

THE CHAIR: A very warm welcome to the Law Society Civil Litigation Section Spring Conference. We have a pretty content-rich afternoon for you. When we asked, after the last conference and our members generally, what they would like us to cover, we got Brexit as the number one item and costs number two, so that is what we did. Then of course Brexit has not gone quite where anyone expected, and who knows where it is going to go, so rather than doing a full hour on Brexit, the second half hour is now on the disclosure pilot scheme. But Brexit, whilst it may have become boring politically, is very relevant to us legally.

We are very lucky to have a sponsor this afternoon. Auscript are kindly transcribing the conference, so for the first time you will, after the conference ends, in the coming days receive a full transcript of everything: all the words of wisdom that you have heard this afternoon, which is really welcome. We have been trying to do it for a little while and it has not happened, but it is happening now, and it will be an archive on our website for people who have not been able to come today to look at and for, hopefully, new members to look at. In due course we will no doubt go to live streaming, but we are starting with the technology that works and we are having a transcript. Auscript have a stand at the back of the room which you can look at. I would encourage you to go and talk to them and view it during the break.

So to our leading speech: Brexit: What the Civil Litigator Needs to Know - and perhaps we should say "really, really needs to know". It is a great pleasure to welcome, or welcome back, I think, Diana Wallis, who is senior fellow in law at Hull University; she has been an MEP for Yorkshire and Humber for 13 years; she is the past vice-president of the European Parliament for five years and past president of the European Law Institute between 2013 and 2017.

What I would do is ask you perhaps to turn to the fifth sheet of your conference pack, and there is set out Diana's full and very impressive CV. I am not going to read it all because there is so much there, but what I would say is that you will see that she is superbly qualified to talk to us this afternoon about Brexit: What the Civil Litigator Needs to Know. So with that, I will hand over to Diana, and I am sure you will welcome her warmly.

MS WALLIS: First of all, thank you very much, Jonathan, and all of you, for inviting me here today to talk about what some people have been calling already the "B word" and what it means for civil litigators.

I, too, like Jonathan, started my legal career in a solicitor's office a long time ago when, yes, I think we just about had a telex, and that was a key part of our cross-border practice and how we communicated. But what I also remember about that time is that it was a time of relative calm and not much change. The biggest bit of change that came on my horizon as a young solicitor dealing with cross-border litigation was the arrival of the Brussels Convention. That caused great excitement, a lot of conferences like this, and we had to learn to deal with a new world. But change happened relatively slowly.

Today, we are facing a lot of change, a lot of uncertainty, and that equals, I guess, a lot of risk for litigators because we are not sure about the context, or indeed the legal framework, in which we are operating because of all the uncertainty caused by Brexit. It takes the risk in

litigation to really another level. When I set to thinking about what I might share with you by way of thoughts this afternoon in this situation, I think what I tried to think I would hone in on are those areas where we do know what is likely to happen and where we can to some extent begin some sort of preparation or think about how we might sensibly advise clients.

Having said that, I am working on the following assumptions, whether I like them or not, and that is that Brexit will happen some time between now and Halloween. Of course it might not, but let us work on that hypothesis. We are clearly not sure on what basis - still - we might exit, and that makes a huge difference, but what we do know is that we have a government that is absolutely opposed to anything that has anything to do with the Court of Justice of the European Union. That being the case, we can realistically assume that all the civil justice instruments will fall away, and that is the way the preparations have been going at the moment.

Also, as far as we know - although this is an area, clearly, that is the subject of discussion between the two main political parties - it looks as though we will be leaving the internal market. If that is the case, all that quasi legal consumer legislation which protects consumers and deals with the legal relationship between consumers and businesses will also fall away; likewise the motor insurance directives, which are of key importance to anybody dealing with road traffic accidents on a cross-border basis.

So from what we see at the moment, if we go, all that is lost - and that is what we have to face and that is what we have to prepare for.

If you are somebody dealing with cross-border litigation, we have got used to having the various European instruments which over the years, since the advent of the Brussels Convention, have made doing that sort of work much, much easier and much more certain for clients. What we can say now is that if all these things go, yes, there will still be ways of doing those things, but they will be much more complex, much more expensive and much more time-consuming - so there will be possibilities, but it is not going to be as easy as it is now and therefore we need to be ready to advise clients of those potential issues and allow them to make informed choices.

I have mentioned it already: the Brussels Convention, now of course known to us as the Brussels Regulation - Brussels I - on Jurisdiction and Judgments. That is the sort of key point of our entry into the European Civil Justice system. It is the bedrock, if you like. Where we stand at the moment, and because of the most recent extension, flex-tension, or whatever you want to call it, we know that we have Brussels I up until Halloween - or 1 November, to be exact - so Brussels I is still definitely with us until then.

So presuming, as I have said, that after that date we do not have it, or earlier if we exit earlier, what are the jurisdictional consequences for clients? What do we have to look out for?

First of all, we have to appreciate that we have got used to a regime where any defendant would normally have the luxury of being sued in their home court - that was the premise on which Brussels I was based. Now, however, any of the small businesses we advise, or individuals who have entered into contracts in another EU country, could be, without Brussels I, at risk to being dragged into litigation in a foreign court. So that is the first thing to be aware of: suddenly that door is open again whereas before we had the certainty that as a defendant we would be in our own court.

Obviously in terms of tort we are back to a jurisdictional rule where normally this will be where the harmful event took place. This will have implications for road traffic accidents, if you are advising clients involved in accidents while they were on holiday or working in another EU member state - and I will come back to that in a moment - because we have enjoyed, again up until now, a simpler, easier regime. If consumers are booking holidays or buying other items or services online, they could be caught up potentially in litigation in another EU member state.

I will give you an example. A couple of years ago my husband and I rented a car when we were going to Sardinia, and we did it online. We then had a rather unfortunate experience with the car hire company who felt we owed them quite a substantial amount of money. I said politely, "Please get lost unless you are going to come and sue us here", because of Brussels I. I would no longer be able to do that, as they threatened they would have been able to take us to court in Sardinia.

So that is the risk for clients and individuals of losing the protections in Brussels I.

Of course the other part of Brussels I, apart from jurisdiction, is judgments. We have arrived at a place with the latest amendments to the Brussels I Regulation where enforcement of our judgments - judgments exiting from the UK - is almost automatic in other EU jurisdictions because of the so-called abolition of the exequatur. That ease of enforcement will go. You are going to be back potentially to a two-stage procedure which will allow a recalcitrant defendant in another jurisdiction potentially to re-open issues. It will vary from jurisdiction to jurisdiction. There may be some jurisdictions where we manage to get bilateral agreements. But the potential is there for enforcement of judgments to become very, very much more long-winded and complex, as it used to be when certainly I first practised in this field - not impossible, but very much more complex and difficult.

I know - and I applaud - that the Law Society has been working hard to try to persuade the Government to look at the UK entering the Lugano Convention, which would give us almost similar possibilities to the Brussels I regulation - not quite but almost. But just beware that much as though it is a wonderful aspiration, and I fully concur with it, unless we are part of some very comprehensive free trade agreement, and unless we can come to some sort of agreement about how we deal with the jurisprudence of the European Court, it is going to be difficult. It is a possibility, it is the right aspiration, but it will take us a while to get there, in my view, if we do exit.

We have, of course, in international terms the Hague Convention on choice of Court of 2005. That will help us to some extent post 1 November where it has been used, so there is some solace there.

What would I say we could do to prepare for this new world? My guess would be that if you operate in a sector of providing legal services where you think you are likely to get repeat cross-border claims with any particular jurisdiction - I do not know, it may be, for argument's sake, that where you practise you have a very large Polish community, or maybe historically you have done a lot of work for British ex-pats in Spain – I do not know. There could be 101 scenarios. But I think any firms that are engaged in that sort of work – I would go back to where we used to be and start looking for very good sort of corresponding lawyers, agents, whatever you want to call them, in other jurisdictions with whom you can build very good relationships and trust that they will operate well with you in serving clients, because my feeling is that we are going to need that in the future because if you are advising the client at

the beginning of a piece of litigation, and if realistically it has to be brought in another jurisdiction now, rather than the UK, you are going to want to do that and you are going to want to do it with good partners. So I would say to dust off all those old relationships, make new ones, and be ready to use them if necessary in the future because I think that is one way to survive - and maybe prosper - in this new world.

I am not going to go through them all because there is really no point - we are going to lose them - but I say that because there are a whole number of justice instruments. The payment order, the enforcement order, the small claims procedure, all of these made cross-border litigation easier. Critics will say that some of them were not much used. Okay, that may well be the case, but they are not going to be there now, so everything is, as I have repeatedly said, going to be more complicated, and you are going to need to think of other ways of doing it.

For instance, again, if somebody comes to you, even if you have a defendant ostensibly in this country but no assets here or the assets somewhere else, again, you may want to ask questions about where you commence any proceedings in terms of jurisdiction.

The other area that I wanted to deal with briefly is road traffic accidents, mainly because they are the biggest or most numerous types of tort claim that we experience on a cross-border basis. Here we are really going to go back to the future in a sense. We have had a system whereby, if you had a client had who an accident for argument's sake in France, they would, by reading together Brussels I and the various motor insurance Directives have the possibility ultimately of bringing proceedings here in the UK against agents of the insurers who would deal with it in the name of the defendant rather than having to go to the place where the accident occurred in a foreign jurisdiction. As I have said, we lose those two bits of interlocking European legislation which means now, as in the past, if somebody has an accident in another jurisdiction, they are going to have to go there to pursue the culprit. At the time I was in London I can remember working for a firm that did a lot of accident work to do with France. Clients had to go repeatedly to France for medicals and for all sorts. That is the sort of territory we are going to be going back to, so it is going to be uncomfortable, but we need to be able to advise clients at the beginning of how this is going to be. It is not going to be as easy as it was.

The other area which is probably not quite so complicated and not quite so badly affected is applicable law: Rome I and Rome II. Rome I applies to contracts; Rome II to tortious obligations. As long as you have the contract right and sorted out which law you want to apply, that is the main issue. I do not think there are going to be huge problems with applicable law. It is rather Brussels I that gives us the headache.

What else in this period of uncertainty can we do? I know you are all solicitors, but what I would say to you is I think we have to look at some alternatives. We have to look at arbitration and possibly at mediation, certainly when advising clients about what we put in to contract terms when we have that choice, because at least at the moment, when we do not know what is coming down the road in terms of jurisdiction, enforcement and applicable law, if you choose arbitration you can control the forum, you can control the tribunal, you can control the applicable law, and the most important thing is that you have enforcement through the New York Convention. Certainly, my gut feeling would be at the moment, when we are not sure what on earth is going to happen next, if it is appropriate then arbitration may be a sensible choice. It may give certain clients the certainty that they crave, so for any arbitrators it could be a golden age.

I think we also need possibly to think about ADR in general, particularly when it comes to consumers. If we bear in mind that we have our domestic ADR regulations of 2016, which came as a result of the European ADR Directive, what that does is oblige every business selling goods and services to consumers to name an ADR entity which they may use. That will still have domestic application, it has not been changed, but it also means that if you are advising a consumer who, for instance, has an issue with a supplier in another EU country you can still look at the T&Cs for their ADR provider and I see no reason why a client in this country should not be able to use that possibility. All I am saying is be aware of the ADR possibilities because they will still be out there. The only thing we will not have, which is a great sadness, again because all the internal market regulation falls away, consumers and others will not have access to the EU's online dispute resolution platform, a platform that initially has been relatively successful, at least in putting people in contact cross-border and in getting disputes sorted out. Because we will not be within the internal market, we will not have access. I think it is probably not high on the Government's priorities at the moment but, again, if somebody was being intelligent, I would say if we want to pay to access it that might be a possibility, but who knows where we might end up.

The other possibility, of course, is mediation. Equally, it gives clients some control. As far as we can see, we are retaining some bits of the mediation Directive. The SI that has been agreed shows that we are retaining the definitions and other parts of the Directive. The Directive itself will fall away but the importance of mediation will remain. Of course, again the fact that we would previously in certain circumstances have been able to enforce mediation settlements where they were done under a court consent order or judgment via Brussels I, that will go, but, of course, longer term we now have the new Singapore Convention on mediated settlements so there may, ultimately, be a mediation equivalent of the New York Convention to look out for. Sliding dispute resolution clauses may be the other option to advise clients to consider. It is a changing world. We do not know what is going to happen next. We are meant to be having elections to the European Parliament in a few weeks' time. It is not clear if they will happen or will not or what. We do not know if we are going to out before that date or if we are going to be out before 1 November or if everything will change again. There is huge uncertainty. What I hope I have done is given you from my experience and from what I know of the relevant legislation a few pointers. Dust off some old relationships and look at alternative, or I would say appropriate, dispute resolution in some cases to see if that can offer some certainty. Thank you very much.

THE CHAIR: Thank you, Diana, for that informative and very practical presentation. Sometimes I have heard it said that Brexit is only really going to be relevant in litigation to the biggest firms. I think that shows that is incorrect. It is going to be relevant to all of us, all sizes of firms, because our clients are going to keep going on holiday and renting cars. They are going to keep buying online. Those are the two examples that we have heard about. There are five minutes for some questions. So any questions? There is a microphone making its way to you.

QUESTIONER: Just one point of clarification. If we leave with a deal do we expect a two-year transition period in which many of these things can be worked out, rather than falling off a cliff?

MS WALLIS: Yes. The two-year transition period will prolong the life of most of these instruments. The problem is, as I said, at the moment if the Government's red lines stay as they are, we are inevitably going to lose them unless the whole sort of parameters of the deal change. But, yes, we have got breathing space hopefully, but until we know what is coming

out of whatever talks, your guess is as good as mine. If they approve the current withdrawal agreement we would have two years' breathing space, but that does not look very hopeful at the moment.

THE CHAIR: Of course the tip from Diana about putting arbitration clauses in contracts is something that you can be doing here and now. Any other questions? I was just going to raise a point about mediation. I know a lot of mediators have written in, to the papers and so forth, to say, "why can we not just use mediation to sort out Brexit?" It is a comment as much as a question, but it seems to me that, particularly with the backstop, we seem to have forgotten that the Good Friday agreement is really not in the greatest shape and that 20 years ago one of the major reasons, one of major things that led to the Good Friday agreement was Senator George Mitchell of the USA holding a two-year mediation, because mediation works internationally. I do not know if it is a comment that is valid in any way.

MS WALLIS: I think it is valid. I do work as a commercial mediator and I do wish that the way in which these negotiations have been framed had learned more from mediation practice and skills. I think it would have been helpful to have a third party neutral, but, to be fair, every time I have raised this with somebody they say, "Well, how do you find somebody that is neutral?", and I have said, "Well, Canada", you know, but everybody thinks that everybody has to an extent a view about Brexit. I think there is nervousness about finding an appropriate neutral. So maybe it has to be a computer.

I was involved in an experiment with some academics and others in Liverpool last summer, where they had devised an AI computer system to try to settle Brexit, but at least that came up with some changing parameters about how you might move the parties closer together. So, again, I think there is help and there are skills out there that one would have loved the parties to have harnessed.

THE CHAIR: Any comments from any mediators out there - I know we have got one or two in the room - about the future of mediation post Brexit? I think it is something that can be used in all sorts of disputes, so let us keep using it. It will be more important than ever, I think, as Diana said. Can we have a show of hands, in the last, say, five years, how many of you have actually dealt with a dispute which in some way has crossed borders within the EU? (Show of hands) Yes, so we have got, what is that? About half I reckon. A third to a half. okay, that is interesting. So, yes, it is relevant to our members. If no one has questions on that, we will move on to the next short session. Let us thank Diana again for coming and talking to us about that important subject. (Applause).

The next bit is me, but you will be relieved to know you have only got me for five minutes. When Diana and I were discussing what she was going to talk about, half an hour is not a long time and I volunteered to cover the other topic connected with Brexit for litigators of service of documents.

I had a situation, I remember, in the 1980s, when clients wanted to urgently serve proceedings in Germany. It was fine, I knew about jurisdiction and the Civil Jurisdiction and Judgments Act 1982. We said, "Yes, we can sue in England. We can enforce in Germany against the German defendant, no problem". I contacted a German lawyer who said, "No problem, we will do it for you". A month went by and I was being chased by the client, and then another couple of months. I contacted the German lawyer and he said, "I am really embarrassed because I am afraid I cannot do it, because I did not realise you can only serve in Germany under the Hague Convention and you are going to have to get all

the papers translated, submit them via the Hague Convention through your local people in the High Court, and then it will go to a federal office solely dedicated to dealing with overseas process in Germany, and they will decide whether they are willing to allow this to be served on a German citizen in Germany. Then if they decide it will be, they will, in the fullness of time, hand it over to the local official to go and serve it". The clients were not best pleased with this news, but what could I do. It was embarrassing that it had drifted for two months: it was not our fault, but telling the client that did not really help. Later, we had the convention on service, which came into effect in 1997, and then after that in 2008, I think, we had the regulation which we have still got, and if we do not get something agreed in its place we will be going back to that situation as it stood in the 1980s.

If you look at your handouts, at the back, I wrote an article in October 1997 - it only seems yesterday - and I have quoted some of it on page 1. On page 2, I have put some top tips. For those that used to read Viz, you will remember the Viz top tips. Here are some top tips that are not quite so rude.

Tip A on page 2 is, this is the here and now. We do not know what is going to happen, but the here and now, this is what you can do. If you are not going to have an arbitration clause, then consider including in any new contract with an EU party, together with an England and Wales jurisdiction clause, a clause providing for service of proceedings on an agent of that party in England and Wales. What that should achieve is avoid the need to seek the leave of an English or Welsh court to serve a claim form on the EU party out of the England and Wales jurisdiction. Service can be effected on the nominated agent in England and Wales.

Tip B: before you effect service on the agent, if it comes to proceedings, do check with a lawyer in the defendant's home jurisdiction - someone that you have teamed up with, as suggested by Diana. If you do use that sort of service, you want to be sure that it is not going to be a problem down the line when you try to enforce it.

Tip C: if your firm is willing to be the nominated agent, if you are acting for an EU party, do ensure that you have terms of engagement which set out clearly what you are agreeing and not agreeing to do. On page 3, some firms are quite happy to provide this service because it can be a way of getting work. If proceedings arise and you are the agent to receive process, you have the chance to offer your services to deal with the case.

Tip D: a colleague mentioned to me, "Look, if it's a no-deal Brexit, the High Court Foreign Process Office could become very busy". So if you have proceedings, particularly if the limitation period is approaching, even if it is outside the EU - United States whatever - it may be wise to get them in earlier than usual to get your leave to serve out of the jurisdiction, which of course you still need in non-EU states.

With a couple of minutes left, there were a few other bits and pieces I thought worth drawing to your attention as a sort of general update.

Two cases on standstill agreements on pages 3 to 5. Page 3 is *Huw Jenkins v JCP Solicitors Limited* [2019] EWHC 852 (QB). Huw Jenkins was, until recently, the chairman of Swansea City Football Club. I do not have my scarf today. I was there on Saturday. We were nearly going to beat Hull but they came back strongly! Caitlin, at the back of the room, who is our product manager, is also from Hull, so she was pleased with that. But it is quite a cautionary tale of problems which occurred.

Tip A: if you are going to enter into a standstill agreement to prevent the limitation period expiring, you do have to get it right first time. If there is any doubt as to the name or identity of any party, ensure that every possible party is joined in the contract. It is a contract. If it goes wrong, short of a successful action for rectification the chances of amending it are remote. That is what happened in this case. Six months after a standstill was entered into they issued proceedings. They actually did persuade a judge that the proper defendant could be substituted in the ordinary way, but she then looked at the case and thought: "Well, that's not much use because when the claim form was issued the limitation period had already expired because the standstill agreement wasn't with the right party". But even if you do not need a standstill agreement, when you are issuing proceedings close to the expiry of the limitation period we all know that we should include all possible parties as defendants or claimants because we can always discontinue later against unnecessary ones. There may be a bit of cost involved, but it might be less costly than a negligence claim.

On page 4 still, the second case - this has had quite a lot of publicity - was under the Inheritance (Provision for Family and Dependants) Act 1975. It was actually an obiter comment by Mostyn J in the case of *Cowan and Foreman v Farrer & Co Trust Company & Ors* [2019] EWHC 349 (Fam): "...never in the future (should standstill agreements) rank as a good reason for delay". He was not happy at all that solicitors had got together and agreed to extend the statutory time period under the Inheritance Act. There was some concern that "this is going to destroy the whole idea of standstill agreements". My view, which is set out on page 5 - it is only a view, but I hold it quite strongly - is that it probably does not apply to Limitation Act cases, because the Inheritance Act is a piece of substantive law – the limitation period under the Limitation Act it is not - it is procedural.

Tip A – this is on page 5 – in Inheritance Act claims standstill agreements seem best avoided for the present. They might be the only option, but if that is the case you need to warn the clients about their possible inadequacies.

Tip B: under the Limitation Act 1980 - the ordinary limitation periods - there does not seem any sensible reason to suppose that standstill agreements will be treated as ineffective, but care is always needed in putting them into effect and in drafting them.

Finally, pages 6 and 7 are just drawing to your attention that as of 1 April the Financial Ombudsman Service's jurisdiction and powers were considerably extended. They have now taken in SMEs. I have set out what the definition of a SME is. In taking new complaints, from £150,000 the limit goes up to £350,000. We do need to be advising clients about this. Ombudsmen appear in the Practice Direction on Pre-Action Conduct as one of the options for ADR. If we do not advise clients on the possibility, we could be negligent. We may also be able to act for them, probably on some sort of conditional fee basis. In complex cases I have not had good experiences with ombudsman generally. I just think that you need the rigour of a court. But before the FOS, if the client loses there are no adverse costs, and if the client gets rejected by the ombudsman or does not like the amount awarded they can say: "We are not accepting it. We are going to go to court". So why would you not try the Ombudsman? Be aware of the time limits. And why not make a Data Subject Access Request before you make your complaint, to get some documents to help you with the claim.

Finally, on page 6, tip C: if you want more detail then we are organising a webinar on 3 July 2019 on this topic. If you are a member of the Civil Litigation Section, which I would encourage you to join if you are not already a member, then it is free - it is part of your package - or if you want to do it on a pay-as-you-go basis then that is available.

Just about on time, I am now going to hand over to my colleague, Raj, who is going to introduce the next speaker. Thank you.

Ms Rajinder Rai took the Chair

THE CHAIR: Disclosure is an issue that we as practitioners deal with every day in our working lives, so it gives me great pleasure to introduce Natalie Osafo this afternoon to our conference. She is an associate and solicitor advocate (civil proceedings) at Slaughter and May. She acts for corporate financial institutions, high net worth individuals, and is President of the Junior London Solicitors Litigation Association. She has also worked on behalf of that Association with the Disclosure Working Group in relation to those proposals, so I think there is no one more fitting this afternoon than Natalie who can talk us through the new disclosure pilot, and so I would like to introduce her.

MS OSAFO: Good afternoon, everybody. We are now just four months into the disclosure pilot. I am conscious that we are still in the relatively early days of the scheme and that the Disclosure Working Group, in particular, has put on a number of sessions in the run-up to the launch of the pilot. The purpose of this session is going to be to provide, first, a brief overview of the disclosure pilot and then, primarily, to focus on sharing some practical tips in relation to two brand new documents which have been introduced under the regime: firstly, there is the list of issues for disclosure; and, secondly, there is the Disclosure Review Document.

So a couple of threshold points before I dive in. The views that I will express will be my own personal views. The slides - and you will, I understand, receive a soft copy of the slides after this session - are based on the slides which were used by the Disclosure Working Group, with some tweaks from myself.

What I intend to do is to keep this quite pragmatic - I will dip in and out of the slides and really highlight the key points and key takeaways along the way - but, as I say, you should receive an electronic copy of the slides so that you can go over the finer details subsequently.

The last thing I should say is that your sole and best point of reference with respect to how best to approach the disclosure pilot is the Practice Direction and the Disclosure Review Document.

With that being said, I will first say a little bit about how the pilot came about. The origins of the Disclosure Working Group, which has produced the Practice Direction which is now being piloted, was feedback from the GC-100 which they fed to the Lord Chief Justice in 2015. What they fed back was that part 31 of the Civil Procedure Rules was ineffective in controlling the burden of costs of disclosure and was not fit for purpose - a very familiar phrase to many people in the room. The Disclosure Working Group, chaired by Lady Justice Gloster, was tasked with finding ways to address the concerns raised by court users, and what they produced was a brand new practice direction for disclosure, which is Practice Direction 51U, and that was approved by the CPR Committee last summer and they approved a two-year pilot of the Practice Direction in the Business and Property Courts here in London and in the regions listed on the slide (slide 2) behind me. That pilot has been in effect since the New Year, so as of 1 January this year.

The pilot is mandatory and applies to all proceedings except for certain categories of proceedings which have been excluded. For example, it does not apply to part 8 claims, because they have their own distinct regime which applies. Nevertheless, the court could decide to exercise its case management powers if it considers that it is appropriate for the disclosure pilot to apply to certain part 8 claims. I have listed on the slide some of the other categories of proceedings which are excluded from the regime.

I should also say that there is ample opportunity to give feedback. This is a pilot. It is something which is being tested in the two years to come. It is being actively monitored by Professor Rachael Mulheron of Queen Mary, University of London, and so you can feed back any pointers, you can just drop a short e-mail, any feedback that you want to give towards the pilot, to the e-mail address which is listed on the slide (slide 2) behind me. The idea is that if the pilot is successful it will result in a permanent rule change and replacement of part 31.

I will briefly say a quick word about principles. The principles underpinning the pilot are set out in paragraph 2 of the Practice Direction, and there are also what are known as "disclosure duties" in paragraph 3 of the same Direction.

Many of the principles, you will be reassured to know, should be familiar. The Disclosure Working Group has not thrown out the baby with the bath water. It has tried very much to ensure that key principles are retained, such as ensuring the fair resolution of proceedings is achieved by way of disclosure and also ensuring that disclosure focuses on issues which are relevant in the proceedings.

Similarly, with respect to disclosure duties, there should not be any surprises because many of the duties applied prior to the pilot and are essentially putting into writing existing duties of parties and their legal representatives in proceedings, but something notable is that it has arguably never been made quite so explicit what the duties of legal representatives/lawyers are in particular and what the particular sanctions will be if those disclosure duties are breached.

In terms of when the duties kick in, this is when a person knows that they are or may become a party to proceedings which have commenced, or knows that they may become a party to proceedings which may be commenced. Particularly in relation to proceedings which may be commenced, it is important to adopt a very practical, common-sense approach to that test, and there are further details, as I say, on the duties and the principles underpinning the pilot in the slides you will receive and in the Practice Direction.

So a quick word about the disclosure models, which are really at the heart of the Practice Direction. The first stage of disclosure is "initial disclosure" under the pilot, and this will be the first stage unless one of three things occurs. It will not be the first stage if: (i) the parties agree to dispense with it; (ii) the court orders that it is not required; and (iii) providing initial disclosure would result in the disclosure of the larger of more than 1,000 pages or 200 documents being disclosed then it is also dispensed with there. It is very much anticipated that the threshold is likely to be exceeded in large commercial disputes. Nevertheless, the intention is that initial disclosure should be used where possible, for example where the core issues in proceedings do not really turn on documentary evidence and you are looking at a very small universe of documents for disclosure.

So what does initial disclosure involve or mean in practice? Well, it means disclosing the key documents on which a party has relied in support of claims or defences in their pleadings

and also key documents which are necessary for the parties to understand how to meet the claims and defences. There is no obligation with initial disclosure to search beyond any search that you already undertook.

The next stage is "extended disclosure". Within 28 days of the final statements of case, each party should indicate whether or not it is likely to require an extended model of disclosure. You do not have to make a formal court application, but you do have to complete what is known as the Disclosure Review Document - or the DRD - and I will say a little bit more about that later. In most cases involving disputed facts, they are likely to require some form of extended disclosure, and the question will very much be about how much and in relation to which issues.

There is a menu of models that the pilot introduces with respect to extended disclosure. You firstly have Model A, and this is essentially initial disclosure plus any known adverse documents at the same time. Nothing more is needed.

Secondly, you have Model B. This is a limited form of disclosure comprising initial disclosure, but without the page limit that I referred to, and you can include any new documents that you wish to rely on at that stage. No searches are required beyond that, but, again, you must disclose any known adverse documents.

Model C is a request-based, search-based form of disclosure. It is for requesting very narrow classes of documents. There are some parallels with arbitration-style disclosure, so with Redfern schedules, but you should be wary of avoiding the excesses that can sometimes creep in with Redfern schedules. For example, a request for "notes of all and any meetings relating to *x*" is not the kind of request that Model C is envisaging. It is something far more focussed, such as "notes relating to meetings between *x* date in relation to the board of this particular company" - something much more focussed. Again, you must disclose any known adverse documents or smoking guns. We will see a very exciting gun on the slide (slide 7) at some point, but it has not popped up yet.

Model D is the next model. There are parallels between this model and what many of you will be familiar with as standard disclosure. As I say, Model D has to some degree parallels with this and resurfaces to some extent here under the pilot, but this model is envisaged to be a search-based model of disclosure which requires the disclosure of documents which are likely to either support or adversely affect a party's case in relation to issues, and it can include or exclude what are known as narrative documents.

Finally, there is Model E, and this is a wider search-based form of disclosure. It is a very wide and extensive form of disclosure. It is essentially Model D again, plus any documents which may lead to a train of enquiry which may then result in the identification of other documents for disclosure. So it is very broad, and it will only be awarded as a form of disclosure in exceptional cases. So there up on the slide (slide 7) is the image of a smoking gun I mentioned. Under all of the models you are required, as I say, to disclose any known adverse documents.

Now we will move on to some practical texts and depending on whether you see the glass as half full, because you are an optimist, or half empty, because you are not, these are either useful tips or pitfalls to avoid. I will share these in relation to the two documents that I mentioned earlier; so, firstly, the list of issues for disclosure and, secondly, the DRD, the Disclosure Review Document.

Beginning with the list of issues, when you are drafting your list of issues for disclosure, paragraph 7.2 of the Practice Direction requires the claimant to prepare a list of issues for disclosure within 42 days of the final statement of case and what constitutes an issue for disclosure is as follows, as you will see from the slide (slide 8) behind me:

It is only those key issues in dispute which the parties consider will need to be determined by the court with some reference to contemporaneous documents in order for there to be a fair resolution of the proceedings. It does not extend to every issue which is disputed in the statements of case by denial or non-admission.

So, the most important thing to remember here and the operative term is "key", key issues in dispute. I have heard from some members of the working group that so far in the course of the pilot since it has been underway, the parties seem not to be focusing on the word "key" enough and people are being too inclusive in the list of issues for disclosure which they are producing.

The five practical tips in terms of drafting your list of issues to avoid pitfalls such as the one mentioned are as follows.

Firstly, at the top, start by preparing your list of issues for disclosure as early as possible, ideally at the same time as drafting or in parallel to drafting your statements of case. You should also involve your counsel team actively in that process, particularly when determining which issues to include on the list. The reason this should hopefully be useful is because you can use the issues which are raised in your pleadings and in your statements of case to guide how you determine which issues you are going to need documentary disclosure on. In a similar way, another practical tip would be that if you are drafting your list of issues, so the list of issues that existed under the pre-pilot scheme, at the same time you might be able to use that as a base for shortlisting which of those issues should make their way on to the List of Issues for Disclosure because you require documentary evidence to fairly resolve that issue.

To take an example, for example, if in a dispute a core issue was whether or not a written contract was already amended at a meeting between the parties to that contract, you may feature that issue on your List of Issues for Disclosure and seek disclosure of, for example, any notes of that meeting at which the oral amendment allegedly took place.

Tip number three is to frame your List of Issues for Disclosure in as clear and as pragmatic a way as possible and to think how you will approach preparing your list of disclosure further down the line at the time of drafting that list. This is because it will likely be the main point of reference for both you and your document review team for all subsequent steps in the disclosure process.

The next tip is to remember that the List of Issues for Disclosure is not a statement of case. Nevertheless, you do still need to ensure to comply with the Practice Direction that they are providing a fair and balanced summary of the key areas of dispute identified by the party's statement of case and this is why, as I say, you may find it useful to prepare the list alongside the preparation of your pleadings and your List of Issues.

The final tip: do not draft too many issues for disclosure. The idea is that you should try and avoid including unnecessary issues The Practice Direction actually actively encourages you

and the parties to consider whether there are any issues on that draft list which can be removed and, for those of you who are tempted to adopt a very belts and braces approach, fear not, the Practice Direction also provides that you can amend your List of Issues for Disclosure at any time before or after the case management conference, particularly, for example, in a situation where the statements of case have subsequently been revised or amended after producing the list.

In terms of what is envisaged, and this is again something very new but very core under the pilot, you should be considering, once you have got your List of Issues For Disclosure, which of the models for disclosure that I have described should apply to each issue, so it requires a very nuanced assessment against each issue of what is the most appropriate model from that menu of models for disclosure to seek.

I will now say a little bit about the DRD - the Disclosure Review Document. The main purpose of the DRD is really to provide a way of structuring and clearly recording the discussions between the parties and between the parties and the court on disclosure, particularly in relation to the scope of disclosure that is being sought.

Secondly, and quite excitingly for me as a millennial dispute resolution lawyer - and I do not know if we have any other millennial dispute resolution lawyers in the room - but very excitingly, the DRD is also proactively encouraging the efficient use of technology. For the right cases, technology such as, for example, predictive coding, and using predictive coding to prioritise what you review amongst very large data sets, or, for example - and we had a reference to AI in the session just before me; it is very exciting to see how AI is helping us with Brexit - it may also be able to help you in the context of identifying privileged material in your disclosure set that you might need to withhold from production. So, there are lots of ways that technology can facilitate the disclosure process, particularly when you are dealing with lots of documents, and this could in turn result in time savings and other efficiency gains with respect to how you carry out disclosure.

So a practical tip, it is very good, to the extent that you have not already, to start familiarising yourself with the available technology now and also with the e-disclosure resources that are available internally at your firms and externally and to get training on the technology now. Do not wait until you are in the middle of a live case.

I am a bit of a technophile, as you can probably see, and I often blog and write about how new technology is being used in the dispute resolution sector. If you are interested in finding out more, please feel free to drop me an e-mail. There should be some contact details included within the handout about how to do that.

Turning back to the DRD, why technology is important is that question 14 in section 2 of the DRD requires the parties to explain why they are not using TAR - technology-assisted review - particularly in cases that have in excess of 50,000 documents in the review universe. The DRD marks a quite significant shift towards TAR and the consideration of technology being a default consideration which you are required to consider, especially in large cases and, if not, you have to explain to the court why.

The DRD also aims, as it says at point 2 on the slide (slide 10), to avoid lengthy correspondence. I am sure many of us in the room can empathise or at least imagine situations where there is a lot of to and fro in e-mails and in letters between both sides with respect to disclosure, particularly in very large complex proceedings where there can be an

avalanche of correspondence and so the DRD is seeking to avoid this by requiring the parties to co-operate and engage constructively in completing it and also providing a single place where the respective parties' positions on disclosure are recorded. Ideally, what is envisaged of the pilot is that the judge would only need to refer to the DRD to get an understanding of what the parties' positions are on disclosure.

In terms of what the DRD records, there are four main things which are displayed on the slide (slide 10).

Firstly, it records the issues for disclosure and the disclosure orders that you are seeking against each of those issues.

It also records in section 1(b) Model C requests if you are seeking that form of disclosure.

Thirdly, section 2 provides a structure for scoping out your data landscape. So, this is thinking about things like key sources, both electronic and hard copy, where data is located, key custodians that you will collect data from and searches that you will run across your review pool. It may seem counterintuitive but, actually, section 2 of the form is a really good part of the form to think about early, if not first, and particularly in relation to discussing it with the client, particularly those representatives of the client that you will be liaising with disclosure on and who will have conduct of the proceedings. This is because it is a great check-list for going through the very fundamental aspects of disclosure that you need to think about very early on and will help to structure those discussions with the client.

Fourthly, and finally, it also records the orders that the court makes in respect of the matters that I have just mentioned.

A note that I would flag is that in very straightforward cases you may not need to complete all sections of the DRD. It is really dictated by the extent and form of disclosure that you are using. It is also a template so it can be modified as required.

Do not be afraid of the DRD.

I am going to show you the DRD shortly. It is really just to give you an overview of what the form looks like broken down into its various sections.

Firstly, you have got section 1(a) and this is where you will set out your List of Issues for Disclosure and then against each of the different issues that you are seeking disclosure on you will identify which extended disclosure model you are seeking disclosure on.

The next section that I have mentioned is section 1(b). You will only complete this if you are seeking Model C disclosure. There is a space for you to list the documents that you are requesting and also for the other side to respond before the court ultimately takes a view on what disclosure will be ordered.

You have section 2 of the form which again I have mentioned. This is primarily for search-based forms of disclosure, so if you are selecting Models C, D or E you will be thinking about sketching out your data landscape and the searches that you will be conducting and using this section of the form, as well as technology.

Finally, section 3 of the form is not a section of the form that you need to complete, but it

does set out very useful methodology for the disclosure process once you have obtained your disclosure order.

To conclude and to briefly recap, I have explained what issues (and the emphasis is really on key), should be included in the List of Issues for Disclosure. I have also shared some practical tips for drafting it. We have covered the DRD as well and the way that is structured and what it aims to achieve.

Just to close and to bring this all together, the key take-away is to really focus on the key disputed issues which it is necessary to obtain disclosure on in order for those issues to be fairly resolved and to keep coming back to those key issues when you are preparing your List of Issues for Disclosure, the DRD and subsequently once you have obtained your disclosure order from the court.

Thank you very much for listening to my session today. I am very happy to take some questions during the Q&A.

THE CHAIR: Has anyone got any questions for Natalie today?

QUESTIONER: Thank you very much, Natalie. You mentioned there is some intelligence coming back or some feedback from the pilot that people were not being suitably focused on what the key issues are. Is there any feedback coming about whether parties are genuinely choosing models other than the one that is closest to standard disclosure, because a model of options has been tried before and I think part of the reason it did not succeed is that everyone just went for the equivalent standard disclosure almost automatically without really giving it much thought?

MS OSAFO: That is a very good question. I have not had specific feedback on that point, but I know that members of the Disclosure Working Group when the pilot was designed were very wary of the fact that there may be a tendency to gravitate towards Model D because that is standard disclosure. I think it is very much envisaged that there has been lots of training that judges have been undertaking to ensure that is not the case. Judges are very much behind this and the pilot is really geared towards ensuring that parties are using the appropriate models and are not trying to shoehorn everything into Model D. It is very early days. What you relayed in your question has not been fed back, but I think this is very much set up to avoid that type of scenario and the courts will be proactively encouraging parties to pick appropriate models.

THE CHAIR: Does that answer your question? Anybody else? The lady at the back.

QUESTIONER: Americans like to say: “If it ain’t broke don’t fix it”. The point may be academic at this stage, but I am listening to you explain everything that we need to do and what we need to focus on. I cannot help but think about how much time that is going to involve for us and then carrying that cost on to our clients. I would be interested to know if you are able to share from your discussions in the working group what was the key factor that really was pushing for a change in disclosure. I would like to see how that is going to proceed going forward and what the justification for that was. Also, I think it is a fair point about the technology. I fully support that, but do we really need a whole new model in order to incorporate that?

MS OSAFO: I think you have asked me about four or five questions there. I will do my best

to try to cover them. You started with the reference to "if it ain't broke why fix it?" I am sorry if I have poorly reiterated that being from the English jurisdiction. Essentially, the clients' concern was that disclosure was too expensive. It was proving to be a very expensive process for a number of reasons: parties document dumping, not being very focused in the documents that they were disclosing to the other side, there often being a lack of co-operation between parties, which fed into the costs issue, and just not really being fit for purpose with respect to how Big Data has really evolved and just the volume of documents that are now involved in disclosure and being equipped to really deal with electronic data in particular.

There were a multitude of different reasons as to why there were ways that disclosure could be working better. I think particularly in large, complex document-heavy cases that seemed to be where most of the concerns were. I should also say that I am not a member of the Disclosure Working Group, but I have worked very closely with members of the working group, so the views that I express are not the Disclosure Working Group's views. They are just my own personal views and understanding and interpretation.

You have also touched upon technology and whether this will make any difference. I think that there is a clear shift from the EDQ when you look at the predecessor to the DRD towards actively requiring parties to think about technology and to explain, so I think that kind of 'think and explain' culture and obligation to justify why you are not using TAR will hopefully drive a bit of a cultural shift towards parties using technology more for the right cases. There will be some cases where it is not efficient or cost-effective or necessary to use technology.

It is all really going to depend on how much the court users, the clients, us as lawyers and judges get behind the pilot, because it is a rule change but it requires people to look also to the intention and the spirit behind the pilot and what it is looking to achieve and how it is looking to respond to the concerns that clients had in order to work. I do not know if there are any other questions in the middle that you feel I have not answered. As I say, I will hang on afterwards for the networking session, so if people have any other questions please feel free to come and find me on the floor or to drop me an e-mail.

THE CHAIR: We have one more question from the gentleman over there.

QUESTIONER: The previous rule was obviously CPR 31. I do not think there was a lot wrong with CPR 31 except human nature. That was the problem with CPR 31. People were not being honest enough in their disclosures, particularly with adverse documents. I am not too sure that the new rule is going to cure the defects in human nature. I very much doubt it. The best and perhaps the big improvement here is the TAR thing with electronic disclosure in big cases, but I think in some cases you just have hyper-litigious solicitors and hyper-litigious clients basically, and that is why they do not necessarily want it disclosed properly. That is my view of human nature and of CPR 31.

MS OSAFO: Thank you for sharing your views. There is a lot in there that I can certainly see are valid points to raise. I guess some of the primary aspects of the pilot try to respond to those scenarios where you have got highly litigious parties and it may be that the rules are not enough to incentivise a change of attitude, approach and behaviour to disclosure.

The main way that the pilot seeks to respond to that is by way of these disclosure duties. It has never, arguably, been made so explicit what is required. There are provisions that expressly say, effectively, that you should not be dumping a load of irrelevant documents on

the other side; that you should be cooperating and working constructively with the other side and take reasonable steps to preserve documents, et cetera. I guess it goes a little bit further, in that it does not just set out expressly what is expected and what is good practice and what litigators, as you say, should be doing anyway but it also expressly sets out the sanctions that will flow from that if those duties are breached.

So perhaps I am a little bit optimistic, but I think I am hopeful that if people get behind it that it will spark some change and that it will also empower, I guess, lawyers to be very precise in correspondence if a party has breached a specific duty or fallen foul of a behaviour that, as you say, is not cooperative and not constructive; that they will be able to kind of cite those expressly set out duties in correspondence and sanctions could be sought from the court accordingly.

QUESTIONER: You have said that it was set up in such a way that it was to detract against people picking against - the equivalent of a Model D. However, as the first question highlighted, the original system similarly was a menu. We have heard before about judicial training, like costs budgeting, and we have seen how that sort of stuff works out. What is the incentive really for people not all to go along and just make this into exactly the same as we currently have and just waste a load of money?

MS OSAFO: Sanctions - in a word. I think that is the hope: express duties and sanctions. Imagine how you would personally feel as a lawyer if you breached your duties and your name was being bandied around the court as having fallen foul of the disclosure duties that are very express under the pilot, and I guess in part also the firm that you work for. So there is a deterrent there.

QUESTIONER: But I mean, more so, what is going to make you go towards an option where you are just going for the simple option which is more focused on adverse things? I think that, obviously, should be the better option, but everyone is going to gravitate towards Model D. What are judges actually going to do about that?

MS OSAFO: I see what you mean. So where people are tempted to just go for Model D as opposed to something else?

QUESTIONER: Yes.

MS OSAFO: It is very early days, but I would imagine that the intention is really that the court is going to be very proactively asking parties why they have gone for a model and is it justifiable, and if they feel that another model is more appropriate that will be ordered. It may be that actually, for example, a party is seeking Model D but Model C disclosure is more appropriate. I think those are the two that have a very close relationship. So it is really reliance upon the courts being proactive in that. From the Disclosure Working Group sessions and panels that I have sat on, I know it is very much the intention of a number of those who are involved, particularly those sitting on the bench, for it to apply in that way. So we will have to see. You raise a fair point, but I think the courts are going to be questioning and probing parties on the models that they are seeking so the most appropriate order is given.

QUESTIONER: If you opt for Models D or E, or you advise your client on either Model D or Model E, you are protecting yourself from a professional negligence case, because Model E, as you have described it, is one where you are looking at a trail of enquiry which might

prove to be positive for a case. If you just opt for, say, Model A, B or C, and you lose an opportunity to act in your client's best interests, does that not become a difficulty in terms of a professional negligence case against you as a solicitor? Does that not mean that actually our first starting point will probably be Model D or E until the client says "No. Actually, let's go for C because it will be cheaper"? Is that not going to be a problem under this?

MS OSAFO: I cannot say I have ever given much thought to that scenario. There will obviously be all sorts of client considerations and strategy that people will overlay behind which model they select, but ultimately the starting point has to be "What is the key issue that is being disputed?" and "What is actually necessary and most appropriate for us to be able to fairly resolve this specific issue?"

QUESTIONER: It is the unknown unknown, is it not, on disclosure?

MS OSAFO: Yes.

QUESTIONER: That is the difficulty.

MS OSAFO: I guess in some ways there is the backstop that, with all of these models, it is still envisaged that known adverse documents should be disclosed, so if there are smoking guns that you come across in the course of your searches that you are conducting under those models you do have to disclose those.

THE CHAIR: I think that is a fair point. I think the main issue here is that we all have to concentrate our minds very early on in relation to disclosure and the sanctions in place if we do not - and never sign a document for a client, obviously! Can we say thank you to Natalie for attending today and her contribution? (Applause).

If I could just close that section. There were quite a number of things that came up that we already deal with as practitioners in relation to disclosure. For me, the terminology of "extended" was one we deal with in relation to specific disclosure. Preservation of documents is something. I think we all advise our clients to retain them until the bitter end in case the trial judge wants to have sight of them, including mobile phones. Obviously that duty has always been there in place - we have the protocols which we have to address our minds to in relation to the documents we are disclosing in our letters before action - so that is nothing that we are not familiar with already outside of the Business and Property Court. There will always be changes in litigation, I fear, and this is just another area where we have to go along for the ride. Personally, I am not going to sign any documents for the client. I am going to send it to them or e-mail them and join in with the technology.
Thank you.

Mr Jonathan Haydn-Williams took the Chair

THE CHAIR: Time for tea now. It is coming up to 4.00 pm, so we are running over a bit, but that is a good sign usually. If we resume sharp at 4.15 pm, okay? Great.

(After a short break)

Ms Deborah Burke took the Chair

THE CHAIR: Good afternoon, everybody. My name is Deborah Burke, and I am a committee member of the Civil Litigation Section. I am in charge of the next session. I am delighted to be able to welcome the next four speakers to our conference this afternoon. You are going to be hearing from District Judge Ian Besford, who was appointed a district judge in 1999 and regional costs judge for the North East in 2005. Before that he was a solicitor in private practice, and he was also the principal of a cost drafting firm.

Then we are going to hear from Carl Brewin from Hardwicke Chambers, who specialises in land and real property, landlord and tenant law and commercial law work related to property transactions. Carl is also an accredited mediation advocate. Before coming to the Bar, he also worked in a solicitor's firm.

Next, we are going to hear from John Wright. Until 2016 John practised as a solicitor focussing on construction law. He now sits exclusively as an arbitrator, adjudicator, mediator and dispute board member. He is a past chair of the board of trustees of the Chartered Institute of Arbitrators and past co-chair of the International Construction Project Section of the IBA.

Lastly, you will hear from Colin Campbell. Colin was a Costs Judge at the Royal Courts of Justice from 1996 to 2015 where he remains a deputy. When in post, he sat as a an assessor with High Court judges in numerous costs appeals and was a member of Jackson LJ's working group on insolvency fees. On retirement, Colin became a consultant at Kain Knight Costs Lawyers and he is an accredited mediator with Costs Alternative Dispute Resolution (CADR). He is on the editorial board of the Civil Court Practice, joint editor of *Costs Law Reports* and contributed to *Friston on Costs* on Costs Mediation.

You are going to hear from each of those speakers for about ten minutes each. Just before we welcome District Judge Besford to speak to you as the first speaker, I am going to spend two or three minutes talking about a current costs consultation on the extension of fixed recoverable costs in civil cases. The consultation was announced by the Government last month, and at the moment the Law Society is formulating its response to that consultation.

Our President has spoken recently about the possible positive and negative impact on access to justice of an extension to fixed recoverable costs. The Law Society's position is that, whilst we are not opposed to them in principle, we do think they should be restricted to low value, non-complex claims, with costs being fixed at a reasonable rate, with the potential for cases to escape fixed recoverable costs if they are complex or unusual, with rates and thresholds being reviewed regularly, court procedure rules being aligned with any new process, and - I always laugh when I say this; I am going to try to say it with a straight face - appropriate and efficient IT in the court system to support the introduction of fixed costs. One thing that the Law Society is particularly firm on is that we fundamentally disagree that the proportionality of legal costs can be dealt with by restricting what can be recovered from an opponent or charged to your own client without reducing the complexity of the procedure around the cases that are brought.

So that is my little speech about fixed recoverable costs. If anybody would like to contribute towards the consultation response, please do collar me at the end, or speak to Kate Fox (kate.fox@lawsociety.org.uk), who is our policy adviser at the Law Society looking after this issue, or make contact with us in some way, because we really want to make sure that we have all of your views in advance of the consultation response, and the deadline for that is 6 June.

Without any more ado, I am going to hand you over to Ian Besford, and he is going to talk to you about costs. Thank you.

DISTRICT JUDGE BESFORD: Thank you. You will be getting copies of these slides in due course. It is entirely my fault you do not have them in your pack. I was quaffing champagne in Paris when I should have been preparing these slides, so I am very sorry about that. I always start my talks with a picture of Hull. Do come and have a look at the city and surrounding area. This is a photograph of what you missed last year I think.

Proportionality. Gosh, everybody complains "But what is proportionality? How can you asses it? How can I make a profit?" Well, surely, all of us deal with proportionality each and every day. You decide whether it is proportionate to wear an expensive suit or dress or, perhaps, your roughs and your simpler clothes. You are making those judgments each and every day. I had to make one when I won the lottery at the weekend. Do I buy a bottle of vintage champagne or prosecco? Well, of course, it depends on whether I won a fiver or a million. Decisions we each make every day need to be proportionate.

Proportionality. It is subjective, people tell me, but of course what we are looking at is not the two ends of a length of string, but what is the bit in the middle? A broad range of views. You need to look at what most of us in this room will consider to be proportionate. When one looks at it mathematically you have a sort of bell graph and you are looking for the part right in the middle. The greatest number of people agreeing. As an example, my favourite car is an Aston Martin. Is it proportionate to spend £1,100 or £110,000? That very much depends on whether it is brand new, a write-off, or whatever. A brand-new Aston Martin, according to Mr Google is about £120,000, so in this particular case I would say £110,000 is proportionate, and I suspect most of us in this room would agree.

Why is it for the judiciary to determine proportionality? Well, it is something we do every day. I have been doing it for some 20 years. I assess damages. What is a proportionate, reasonable and appropriate sum. I make assessments when people unfortunately get divorced in financial remedy cases and there are of course the good, old-fashioned assessments which we are all so familiar with and enjoy. So, proportionality is not a new concept for judges. We can and have been doing it for many years.

But to assist the judiciary and the parties, in CPR44.3(5) we are told what is proportionate. The figure has to bear a "reasonable relationship" to the factors set out in 44.3(5). A practical point for those of you who either attend CCMCs or send somebody else: please do read CPR 44.3(5). It really is not that long. The amount of times I ask in a CCMC, "What are the factors that are going to make the sum you are seeking proportionate?" and I usually have advocates looking down at their papers and mumbling: "Oh well... It's the amount sought sir". I then ask what is the likely damages to which they reply, "Oh, well, damages are around about £100,000". Fine but it is probably not proportionate to spend £300,000 on costs without some other factors present.

Advocates keep forgetting factors such as the value of non-monetary relief; if it is an injunction, a trespass, a land dispute, nuisance. That is a factor.

Complexity. I hate to break it to you, but not every case is complex. If it is complex, please do tell me, and explain why. I will then factor that in having regard to that factor in determining a proportionate sum.

Additional work generated by the conduct of the paying party. “Why is that in?” people say. Well, it is. However, the difficulty is that at the CCMC I do not know who is going to be the paying party.

On that point, an interesting case is *Group Seven v Nasir* [2017] EWHC 2466 (Ch) where there was in fact a contingent cost put into the budget for the possible lack of cooperation of the defendant. So it is possible that this is a relevant factor, but I have to say rare.

If you want to recover what you think is a proportionate sum, tell me why the amount you seek is proportionate by reference to CPR 44.3(5). Alternatively, at the end of the process you are going to end up with a sum you are going to be upset with and having to rely on significant developments or good reasons to be awarded a higher sum. Good luck on that one!

The court’s position. Well, we have already heard at the earlier lecture about disclosure. There was a thought within the judiciary, especially the higher judiciary, that disclosure was running rampant and that it was taking up a disproportionate amount of time and cost. That is why there is a pilot coming in. Proportionality is mentioned so much in the CPR. CPR 1.1(2): we have to deal with cases “justly and at proportionate cost”. Cost management: we have to assess costs within a range of reasonable and proportionate figures.

The one that everyone hates: applications for relief from sanction. Can the litigation be conducted efficiently and at proportionate cost if I grant the relief sought?

And, of course, assessment on the standard basis. I still remember *Home Office v Lownds* [2002] EWCA Civ 365 being published. One of our DCJs was the successful counsel in the case: Graham Robinson. That was an appeal from the district bench – I think it was DJ Bellamy, as he then was – trying to give effect to, and implement the idea of proportionality in the Woolf reforms. His decision was overturned. It has however now come back. Even if costs are necessary and reasonable, they are not recoverable unless they are proportionate.

We have heard a lot today about clients, but can I say, I think you need to be talking to them about proportionality on day one. There is no point in having a claimant coming in all fired up for the forthcoming litigation, wanting to turn over every stone on Chesil Beach to be able to find that one little nugget which is going to win him the case if the claim is only worth £10,000. You will very soon have spent a disproportionate sum. I think that there has been a number of problems where the expectation of what the client wants and the reality of proportionality is are out of sync, hence all the satellite litigation. I suspect that most of you are dreading where, after the event, the clients are coming back against you to recover the balance of the unrecovered costs which you have spent thinking that they wanted to turn over every stone.

Can I say that you have got to wise up because otherwise there is going to be an enormous amount of very contentious, disappointed, angry litigants and, remember, for those who do personal injury work, the difficulty is that the public have in their mind “no win, no fee”, which they think means they will not have to pay a penny. But of course, the reality has now changed. In *May v Wavell* it was succinctly summed up, “Clients must now go into litigation expecting to recover, even if successful, only a contribution” towards the costs.

People quote at me the next case, *Kazakhstan Kagazy v* Zhunus, the lowest amount which

can reasonably be spent, having regard to all of the circumstances. However, that might be the case where it is a multi-million-pound case, and any sum is likely to be proportionate, but in the ordinary run of the mill case it has little relevance. Proportionality applies irrespective of necessary or reasonable costs.

So to recap, proportionality applies from day one and continues to apply throughout.

The CCMC. At the CCMC you need to tell me why your sum is proportionate. If you do not tell me the relevant factors to support your budget, you are not going to get the sum you seek. This is especially so if the only factor you refer to is value. Then of course, at the assessment process, the time when you get paid, all your hopes and aspirations will usually be dashed. I recommend you read *Harrison v University Hospitals*. It is a very important case. Basically, absent 'good reason' you are going to recover what the budget is, plus you might get something towards the incurred costs as well. However, the budgeted future costs tend to be sacrosanct.

I know that there is an alternative argument, which is wonderful and costs judges love hearing such arguments about the meaning of paragraph 52, but I think the consensus is that the budget sum, if it has run the expected course, is the amount you are going to recover.

However, proportionality is not finished with following the CCMC. The court should, at the end of the process, ensure that a party only recovers a proportionate sum. The other case in the slides, *Arjomandkhah v Nasrouallahi*, is a case where the claimant had spent way beyond what the budgeted figure, it was totally disproportionate but lost the action and the costs. At assessment of the defendant's costs the claimant tried to argue, the defendant's costs were disproportionate, even though they had only spent a third of what the claimant had spent. No, the court was not having any of that, and declined to reduce the costs further.

Also, interestingly, and I suspect some of the other speakers will also comment, the issue of mediation arose in *Arjomandkhah*. The defendant had refused to engage in mediation which the claimant argued was conduct that ought to be taken into account. The court however accepted such refusal was not unreasonable as there were good reasons why she did not do so.

Budgeting. I have told you that the budget is a sum within a range of reasonable proportionate costs. Budgeting is not a detailed assessment. I am not going to go through the budget considering it pound for pound. I am just going to give you a figure by reference to a particular phase as to what is considered a proportionate figure In *Jallow v MoD* it was recognized that once a figure for the phase has been given, where initially you may have wanted to use the most senior partner at £1,000 per hour, there may need to be a rethink if the sum budgeted will only allow the use of the most junior fee earner. Once the sum has been set, the court recognizes that there will need to be a discussion with your client. Junior fee earner/senior partner? The client will however know what figure is likely to be recovered if successful and to make decisions accordingly.

There is still some confusion as to how we undertake budgeting. If you are a High Court Judge they tend to look at the hourly rate, and assess what is proportionate. The proportionate hourly rate is then multiplied by an appropriate/proportionate amount of time, and the resulting figure is the amount for the phase. Others, and perhaps supported by the CPR, do not do it that way. The hourly rates multiplied by the time that you are going to spend or reasonably or necessarily spend does not automatically equate to a proportionate sum. The

budgeting process involves looking at the budget and asking, "How much do we think for this type of case, using our experience and the 44.3(5) factors is it proportionate to spend". It is the resulting figure that is allowed for each phase.

In the slides I have referred to the case of *Yirenki v MoD* which is an appeal case where a Master had a habit of allowed the parties to challenge the hourly rates on assessment on a budgeted case. *Yirenki* confirmed that you cannot make such an order as the process is not concerned with the hourly rate. The budgeted sum stands and challenges cannot be reserved to assessment. I have also referred in the slides to the case of *Page v RGC Restaurants*. Beware, when you prepare the costs budget, make sure you budget for the whole case. Do not think to yourself, "I will only need to budget up to the second CCMC or to the pre-trial conference", because if the judge does not agree with you, there is a guillotine in allowing costs that you have failed to put in your original budget. As a salutary lesson in the consequences of second guessing the extent of budgeting at the CCMC, it is a case worth looking at.

Sanctions. Unless the court otherwise orders any party who fails to file a cost budget will face a sanction. I have referred to some recent interesting cases concerning applications for relief in such circumstances. Looking at the cases, it very much depends on the particular judge, the time and circumstances of the default. The issue of sanctions is a lecture by itself, but the point to note is that when you file and serve the Precedent H and costs budget, make sure you serve it at the correct time. The rules contain a number of alternatives as to timing and can I say that different courts have different nuances in their orders as to when the budgets should be filed. I know everyone claims at least six minutes for reading the order listing a CCMC, but can I suggest that you do actually spend the six minutes because each order coming from individual courts is likely to be slightly different as to timing. Miss the deadline for your budget and you may well be penalised by receiving either no costs, save court fees, or limited costs as in *Page*.

I was asked to mention part 36, but I am running out of time. It does apply to costs. There is a slight divergence of opinion between, I think, a High Court judge and a deputy High Court judge in the cases of *Finnegan v Frank Spiers* and *Culliford & Anor v Thorpe* as to whether where there has been acceptance of a part 36 you can then go on to get an interim payment. If you want to, or need to apply, I think you need to look at those cases, pick the one that applies to you, argue it and let us see if we can get a third decision to clarify the present ambiguity.

The other interesting cases on part 36 are *JLE v Warrington & Hamilton Hospitals* before Master McCloud who, on an assessment where the costs were something like £400,000 reduced them to £200,000 on a line by line assessment. The receiving party had successfully *Calderbank-ed* but only by £7,000 more than the assessment. In the context of the substantial reduction, it really was not a win at all. Master McCloud was concerned that under 36.17(4), the additional 10 per cent interest was disproportionate for the amount in percentage terms the receiving party had actually beaten their part 36 offer. The additional interest was disallowed. In preparing for this talk, I was interested to see, that *JLE* has very recently been followed by Deputy Master Friston in *Androse v Retro Companies* where the betterment as a percentage was only seven and a half per cent. The Deputy Master only allowed seven and a half per cent interest as being a more meritorious and proportionate way of dealing with the issue.

Lastly, *Warren v Hill Dickinson*. You can apply for an interim costs certificate before you

apply for a detailed assessment but at the time when your application is heard, you have to have filed the detailed assessment request.

That is probably one of the quickest talks I have given on the CPR. Thank you very much indeed and I am sorry to have overrun. (Applause).

THE CHAIR: And I am handing over to Carl, thank you.

MR BREWIN: It is a judge's life. I was not quaffing champagne and did get the slides in on time although I wish I was rather quaffing champagne instead, but never mind. I am going to cover very briefly again in 10 minutes, or less, which might be an impossible task, costs in property and other tribunals very briefly.

I do not know whether you can see that very well or whether you have got a better version in your packs, but in addition to the Employment Tribunal, which sits on its own, there are seven chambers of the First Tier Tribunal. It was created in 2008 as a result of the Tribunal, Courts and Enforcement Act 2007, the idea being at the time to rationalise the tribunal system in taking on the function of what were then 20 previously existing tribunals, and appeals lie to the EAT from the Employment Tribunal, or the Upper Tribunal, and one of the four chambers presided over by a High Court Judge. As you can see, some are UK based, some England and Wales only, and some England only, so although there has been a rationalisation there still is somewhat a mixture.

The idea behind them, in short, is to provide a speedy, inexpensive access to justice, more informal, user-friendly and less legalistic approaches than that taken by the courts, and specific legal and lay member expertise, and much more of an inquisitorial process, which I have to say I find when I appear in front of them. There is a presumption of costs shifting in civil courts, and the policy underpinning this is that it is only fair that a successful litigant should recover the costs which they have incurred in vindicating their rights in the face of opposition. The concerns over the effects of costs shifting and the risk of adverse costs orders and access to justice have led to certain reviews, not least by Lord Justice Jackson, which we all know and have read, in 2009, and in 2011 by the report of the then Senior President of Tribunals, Sir Robert Carnwath, which in particular recommended certain adjustments, including the power to award wasted costs and unreasonable conduct costs in tribunals.

So different cost regimes apply across tribunal chambers and in different types of cases. In some chambers or cases there is no power to make a costs order at all, for instance the social entitlement chamber, or in relation to mental health cases and the FTT health education and social care chamber. But in the tax chamber, for instance, there is full cost shifting in complex cases where a taxpayer has not specifically requested proceedings be excluded from liability for costs, so for each and every scenario you may be able to find some liability may accrue. Costs in the Upper Tribunal are governed by rule 10(1) of the Tribunal Procedure Rules, of 2008, to the extent that the Upper Tribunal generally speaking may not make a costs order only, except to the extent and in circumstances that the other tribunal, the lower tribunal, have the power to make an order for costs.

So I am going to turn then to the property chamber, which is the one in which I practise most often. Rule 13 governs the position, and the general rule is that each side will bear their own

costs, but, aside from this, there may be other opportunities for costs recovery on the basis of contracts, for instance, and other legislation, which may either assist to shift costs or allow costs to shift, or restrict costs. There is provision in respect of wasted costs and/or unreasonable behaviour.

So what are the restrictions on cost recovery? Well, when we are talking about contract you can see that the types of costs that could be recoverable there include not only legal costs but other costs indirectly related to those legal costs. For instance, you might not have thought about such legal costs that are incurred as a result of litigation with third parties, for instance, but despite potential recovery under contract, statute sometimes intervenes. In this case under a lease, for instance, to assist a leaseholder, so section 20C of the Landlord and Tenant Act 1985, which incidentally is applicable in both courts and tribunals, allows a tenant to apply for an order that all or any of the costs incurred are not able to be regarded as relevant costs to be taken into account in determining the amount of a service charge payable by a residential leaseholder. The test for this is what is just and equitable in the circumstances, which will be based on a number of factors. For instance, whether the tenants are successful, the parties' conduct overall, and practical and financial consequences and considerations for those affected by an order. There is a further challenge under the Commonhold and Leasehold Reform Act 2002, in respect of administration charges. So payment for fees here in relation to grants of approval is under leases or provision of information under a lease or dealing with breaches of covenant, for instance. Since April 2017 section 131 of the Housing and Planning Act has complemented section 20C to bring the same regime in place in respect of administration charges as was already in place for service charges generally. So the just and equitable test is similarly applied.

Well, that is all very well and good but what are we talking about in practice? Perhaps I will limit this to one of these cases. Let us talk about the *Conway v Jam Factory* case, the only reason being I live near it, and there is always a bit of schadenfreude as I walked past. The freeholder in that case, so it is the one on the right, and that is the glorious old Hartley's jam factory building in Southwark, was the freeholder was entitled under the lease to employ or retain the services of an agent as it might reasonably require in the interests of good estate management, and leaseholders were liable to make a contribution to related expenses.

Following a number of disputes, a number of leaseholders began to withhold the payment of those service charges, and Jam Factory Freehold entity was later incorporated by some of the leaseholders. It purchased the freehold and so the leaseholders took over, in effect, managing the building. However, by then the freehold company was facing significant financial difficulties. The previous agent's services were retained to manage the building, for instance, although many leaseholders were unhappy with it, and efforts were made to appoint a manager. The tribunal criticised some of that behaviour but found that the proposed new manager was unsuitable and concluded that it would not be proportionate to appoint a manager. It found that the freeholder's costs could in principle though be claimed under the terms of the lease, but still made an order under section 20C limiting them.

So, taking into account the unsuccessful application and the tribunal's criticisms of the freeholder and the agent, the end result of this was that 10 per cent of the freeholder's costs incurred in resisting the application were not to be regarded as relevant costs. The five main principles the tribunal relied on here were, first and foremost, the just and equitable test, and whether it is appropriate in the circumstances; second, the circumstances that included the conduct of the parties, the circumstances of the parties and the outcome of the proceedings overall, and the split between what was fair and right; where there is no power to award

costs, for instance, there is no expectation of an order under section 20C in favour of a successful tenant, although a landlord who has behaved unreasonably cannot normally expect to recover costs of defending such conduct; fourthly, the power to make an order under section 20C should only be used in order to ensure that the right to claim costs as part of a service charge is not used in circumstances which make its use unjust. One of perhaps the key circumstances in this case was that it was relevant because the landlord here was a resident owned management company with no resources apart from the service charge income. The result might have been different otherwise.

There is power certainly, and in other chambers, but in respect of the property chamber, the First Tier Tribunal. Rule 13 provides a power to award costs in respect of unreasonable behaviour, but this only goes so far. There is a three-stage approach, first given in the *Willow Court v Alexander* case, a 2016 case. The first stage here should query whether a person has acted unreasonably by applying an objective standard of conduct to the facts of the case. If there can be no reasonable explanation for the behaviour then it will properly be adjudged to be unreasonable. It is at this stage that it is necessary to take into account whether a party is legally represented or not, and that element of it factors in quite significantly.

If the rule 13 approach is engaged at stage one, then at the next stage the discretionary power will be engaged and the tribunal will need to decide whether, in the light of the reasonable conduct or not, it should make an order for costs or not. So, in so doing, the Upper Tribunal in the *Willow* case said it was not necessary to find a causal link between the costs incurred and the behaviour to be sanctioned, and reasonable conduct is all that is required to trigger that at stage two.

And the third and final stage concerns the terms of the order to be made. The tribunal here highlighted in particular the need for the First Tier Tribunal to keep the over riding objective in mind, akin to that we find in the CPR, which enables a tribunal to deal with cases fairly and justly. It includes also dealing with cases proportionately, as we have already heard about, and it therefore does not follow that payment of the whole of a party's costs will be appropriate in every case.

What does it give to us? We know that no one size fits all definition for unreasonable behaviour exists. The creation of different standards of conduct, depending on whether or not a party has had the benefit of legal advice, is very difficult to apply in practice, given the different circumstances of each and every case. No doubt there can be arguments put for and against in every situation. Is there to be evidence, for instance, and detailed submissions and what advice was given, correspondence and so on? Is that disproportionate to the amount that you might end up recovering overall? And this fits into the point that they should not become routine or major disputes in their own right. There is clearly a balance to be struck between a tribunal on the one hand being able to understand what has gone on, and spending then too much time dealing with satellite costs issues, something which courts have been keen to focus on in their own reviews of costs in cases. Is it too high a bar? Is it fair to represent a litigant, for instance? Tenants often make bad points that are based on arguments without legal foundation and may or may not be within the tribunal's powers, but often the case will trundle or roll along to a hearing with all of these points remaining live. There may or may not be mischief behind it. It might simply be ignorance. Often applications can be made simply because a leaseholder has a grudge or does not like the way in which their property is managed, for instance, but with no sanction for this, are the costs of represented litigants simply being increased for no good reason? And if so, is that of itself proportionate, fair and in accordance with the overriding objective? Arguably not.

The emphasis then is on the tribunal to consider a case to answer, again looking at the exception rather than the rule. The question for us practitioners in each and every case is whether it is worth making that fight. The general experience is that it really does have to be such a high level of bad conduct in order to warrant pushing for these kinds of orders, so the effect of that overall is that costs recovery remains a limited and restricted process. I will leave it there and move on.

MR WRIGHT: Good afternoon. I am going to talk about costs in arbitration. There are arbitrations and there are arbitrations. Many arbitrations - and Carl has already mentioned this in a different context - have no relevance to costs at all because there is no costs recovery. I do a rather quaint area called coal mining arbitrations where the Coal Authority effectively pays all the costs. In, say, travel arbitrations, there is no costs recovery. So part of what I do does not involve anything to do with costs, but I will try to justify my position here by talking about cases where costs are important.

Obviously, there are arbitrations all over the world, and I arbitrate quite a lot overseas, and, again, costs regimes are very different, but I am going to talk about the powers of the tribunal generally regarding costs with particular reference to the Arbitration Act 1996; advances on costs, which is related more to institutional arbitrations under the London Court of International Arbitration and the ICC; what are the costs of arbitration; security for costs, which is relevant in arbitration just as it is in court proceedings; the expression "costs follow the event", what does that mean, and is it the same as in court; and sealed offers, which is effectively part 36 in a different guise; so trying to focus on where things are different from the courts.

Broadly, arbitrators have huge flexibility and parties in arbitration have huge flexibility. You do not have the situation of having costs budgets generally. I will touch on that very briefly in a moment. To me, Mitchell is a character in EastEnders and Dentons is a law firm. I do not have to worry about sanctions and things like that. You do have sanctions, of course. If parties misbehave - and we heard before the break about what are the sanctions for disclosure, and I have done various cases where I have imposed sanctions for heinous disregard for disclosure obligations - what does the tribunal generally have as its powers regarding allocation of costs?

The Arbitration Act essentially says that the tribunal can make an award allocating the costs as between the parties. That is absolutely standard, exactly as the court would do. The parties can agree otherwise but they cannot agree before, so you cannot have a clause in a contract which says: "If you arbitrate against me, win or lose, you will pay my costs as well". That was missed out in the Construction Act. Those who do construction will know that I am not quite describing it accurately, but that is what the 1998 Act is known as. There, I think the legislation got it slightly wrong by allowing one party to say, "If you adjudicate against me" - that being the procedure which was being introduced - "then you will pay my costs as well as your own". That was outlawed, fortunately.

I do have a case which I am working on at this very moment where costs may be relevant. They are not normally relevant in adjudication, but I am working on one - and I do not think anybody from the firm is in the room, but I will not say what I am going to decide because I do not know yet - where there is an indemnity between the parties and the contract says "If you act in a particular way, you will indemnify me against all my losses". Can those include legal costs incurred in adjudication where they are not normally recoverable? I do not know

what the answer is. If anybody has an answer I would love to know, and I may be able to incorporate it in my decision. Institution rules often also provide for the tribunal to allocate or to apportion costs, and I have mentioned there particularly the ICC rules and the LCIA rules.

Advances on costs. We arbitrators are very precious about being paid. We do not do it for fun. We obviously enjoy it, but we like to get paid at the end of the day. What do institutions do to protect the tribunal's position as regards payment? There is no provision under the English Arbitration Act for the parties to put up a sum by way of security for the arbitrator's fees. What normally happens if you have an ad hoc arbitration is that the arbitrator in his or her terms and conditions will say: "Please pay me and I will start some work".

I have focused again on the ICC and the LCIA because they are reasonably relevant to UK proceedings and they are also two of the most commonly found sets of rules in our arbitration generally. The ICC court will fix an advance in arbitration and will say that each of the parties shall pay half. The LCIA court broadly does the same. There are slight differences but, for the purposes of these 10 minutes they are the same. What happens if one party does not pay? So the advance on costs is, say, £20,000, and one party pays its £10,000 and the other party does not. Well, the tribunal, ad hoc obviously, would be allowed to proceed because it is for the tribunal to decide. The institutional rules generally, and the ICC particularly, will not allow you to proceed; it says you must be paid. What normally happens, of course, is one party has to stump up the other's as well. There is then an issue as to whether that is effectively inherent bias. If you are being paid only by one party, are you more likely to find in their favour? I would like to think not, but someone earlier referred to human nature. Well, human nature is what it is. If one party does not pay, it has been found that it is not generally a repudiation of the arbitration agreement - so the arbitration does continue - but effectively you do have to get both parties to pay the advance on costs, or if one party does not pay then the other must stump up.

I had an interesting case, not in this country, a couple of years ago, where the respondent said: "I've got this very, very large counterclaim, five times the claim, and I'd like to bring it". The institution said: "Well, you'll have to pay some costs". So they then said: "Ah, well, actually, no, it's a set-off. It's not a counterclaim". We had to decide whether it was a setoff or a counter claim. We, as the tribunal, had to go to a local lawyer to say: "Is this a setoff or a counterclaim?" He, much to our relief, said it was a counterclaim, so they then withdrew it, but not before an awful lot of time and effort and money had been spent in determining that point. If you are a counterclaiming defendant then the position is exactly the same as if you are a claimant.

What are "costs of the arbitration"? This is a fairly dry part of the subject so I will deal with this fairly quickly. Under the Arbitration Act it is the arbitrator's fees and expenses, the institution's fees and expenses and the parties' legal and other costs.

The costs must be properly and reasonably incurred. You have already heard about that far more eloquently from Ian than I am going to be able to manage as regards arbitration. Proportionality is relevant, but it is not something that I would expect an English arbitrator to follow slavishly. I think if I was faced with a claim that the other side had not acted proportionately I would obviously be interested in what the courts say but you do not have to act judicially as regards costs. I think an arbitrator acting under the English Arbitration Act who simply blithely ignored everything the English judges say would be playing with fire,

but it does not mean that you are absolutely bound by it. So it is advisory but probably no more than that.

There is a power which is unusual, and it is slightly perhaps to do with costs budgeting - it is in a slightly different way - under section 65 of the Arbitration Act, which is that the tribunal has a power to limit the recoverable costs. I have been asked to do it once only by one party and the other party objected, and in the event I did not allow it. I raised it myself in an arbitration last year and both parties said: "No, we absolutely do not want that". I am not quite sure why. I was never going to say: "Well, why are you so against this?" But essentially, obviously it is for the tribunal to say would the parties consider limiting their costs of particular parts of the proceedings, such as disclosure, or, of course, for the whole of the proceedings. If that is an issue it needs to be dealt with before those costs are actually incurred or before the steps which will lead to those costs being incurred are actually set out. I would like to have more experience of it. There are very few English cases on that. Broadly, they are supportive of what the tribunal can do, but certainly when I was asked to do it, and I looked up the cases, it did not take me very long to find them because there are very, very few indeed. As I say, you will normally get support from the courts, but it is a power which I think underused.

Security. We have talked about security for the arbitrator's fees. Security for legal costs. There is broad discretion under the Arbitration Act, section 38, which is the preservation of rights, preservation of property and so on section, so the tribunal has got power to order that a party provide security for the other's costs. I ordered it in a case only a few months ago where one party was plainly insolvent. They were asking for particular steps to be taken right at the start of the arbitration and the other side said, "We are not taking those steps unless you pay for them". That seemed, having heard argument and having had a hearing, to me to be a reasonable position, so I ordered security. I have not heard any more so maybe that had the unfortunate effect of stifling the claim, but that was not something that I felt I had to take into account.

As I say, you do have a very broad discretion. If in arbitration, and particularly an international arbitration, you have simply a non-UK and individual corporation, you would not expect to take that into account as the only factor. It may be a factor, but it should not be the only factor because otherwise from a policy point of view you will not have people coming to England to arbitrate if they are from outside the jurisdiction.

There is a specific power under the LCIA rules. I have never seen it exercised and the book on the LCIA rules says it is very, very rarely exercised, so my experience obviously is not unique. My experience of civil law arbitrators is that security is not something they like to argue.

I mention just on the next slide my experience of civil law arbitrators as regards costs. Security is not something that they tend to award. I think the factors that they may take into account, and I certainly would in looking at this is, "Have you had an interim award which hasn't been honoured? Is the party insolvent? Is it using third party funding?" Well, that is a whole area. I am not going to start now in discussing third party funding, but that certainly is something which you would take into account.

What does "costs follow the event" mean? Generally, under the Arbitration Act costs should be awarded exactly in the same way as in court to follow the event. The tribunal can depart from this. There are particular powers under the ICC rules and the LCIA rules. If a party has

simply increased the costs by their behaviour, there is very broad discretion indeed, particularly under the LCIA rules, but if one party acts in such a way as to increase the costs of the arbitration, those can be taken into account. I have mentioned civil law and common law approaches varying. I did an arbitration which finished in the early part of last year and I was the only common law lawyer involved. In fact, I was not entirely sure why I was there because it was an entirely civil law approach. My approach to costs was materially different to the other two arbitrators in terms of the factors that I wanted to take into account and they wanted to take into account. I was only one of three and, in the event, our disagreement was (a) very polite and (b) limited to a relatively modest amount of money. I found that my common law approach really in terms of being quite rigorous and looking at costs individually and individual acts of the parties was very different to a civil law lawyer who took a much broader approach. I am not saying that is wrong; I am merely saying it is different.

Sealed offers, very quickly. What happens if you want to make an offer? There is no court procedure. You cannot do a part 36, so what do you do? "Sealed offer" is a very, very old expression. It used to be a letter you handed to the arbitrator and said, "Look at that when you have reached your decision". Now, how it is done is without prejudice save as to a costs letter, which the arbitrator is normally unaware of. It is certainly not shown to the tribunal at the time.

The only real difficulty with that is when do you tell the tribunal about it? In certain jurisdictions, and I certainly had one, there is a difficulty about having more than one award. You cannot have a partial award, a partial final award and then a final award. You have to have one piece of paper headed "final award". My position on that is you say to the parties, "I have reached my decision", or, "We have reached our award on liability, damages and so on. Now we are going to turn to costs. The first part of our award will not be changed. Have you got anything to tell us about costs?" Then, of course, you will be told, "We made them an offer of £10 million or whatever". That is when you take it into account.

It is not entirely easy sometimes and in English adjudication with construction cases, it is extremely difficult because you can only do one decision. You cannot do two. There are ways around it and, with the consent of the parties and co-operation, you can normally achieve a reasonable end result. It is not that easy and that is where of course the flexibility of arbitration rather is better than court procedure.. I think arbitration generally is excellent and I commend it to you. Thank you very much. (Applause).

THE CHAIR: Thank you, John. Now last but certainly not least, over to Colin. Thank you.

MR CAMPBELL: Good afternoon, everybody. Thank you very much for asking me to talk about mediation in costs. As everybody knows, the best known form of ADR is mediation and there is a definition there from the glossary to the CPR. The starting point, and we are talking about here about the action, is that, if during the course of the action, a party unreasonably refuses an invitation to mediate then there could be cost sanctions even if that party wins. In *Laporte*, the claimants were pleading for assault, battery, false imprisonment, malicious prosecution and violation of Article 11 of the ECHR, so a full house. The claimants invited the Commissioner to mediate and the Commissioner said, "Not likely, because there is no prospect of any settlement; these claimants want their day in court". The Commissioner was dead right because the Commissioner won on every single point, but when it came to the costs of the action Turner J said, "You can't have everything because you refused unreasonably to mediate when the claimants requested that to happen, so you can

have two thirds of your costs". The bill was £260,000, so, at a stroke, the Commissioner lost about £80,000. That sets the scene.

What about in costs? It is the same. We have three decisions at costs judge level against defendants who were invited to mediate the costs of the action and unreasonably refused to do so. In each case Master O'Hare, Master Simons and the Senior Costs Judge Master Gordon-Saker said: "You must pay the costs of the assessment on the indemnity basis". Why is getting an indemnity basis costs order important? Because the proportionality rule does not apply where you have an indemnity costs order in your favour. You only need to show that your costs were incurred reasonably and necessarily, so forget about rule 44.3(5). If you can get your costs of the assessment on the indemnity basis, you are going to recover a much better figure.

Why would you want to mediate the costs? Let's suppose we have got an order for costs in our favour and we do it the court way. Rules 47.6 to 47.15 apply. You need a bill, so for work done before 6 April last year you can present it on paper but thereafter it must be electronically submitted. Is an electronic bill popular? We had two years of electronic pilot schemes. Do you know how many electronic bills were lodged for assessment at the Senior Courts Costs Office in that period? You are all absolutely right. Not one. Do you know how many bills have been assessed in the past year by the Senior Courts Costs Office electronically since the rule became mandatory on 6 April? You are all right. None. There are a few in the pipeline but, whatever your view about the electronic bill, whether it is good or bad, one thing is certain, it has not been popular because nobody has used it.

Your timetable is three months to serve your bill. Three months after that you must apply for detailed assessment. There are penalties if you do not do it. You have to pay court fees - £5,500 for a large bill. You then wait. How long do you have to wait? It could be six months in the Costs Office. I do not know what it is in Hull. It may be much better. We have heard a lot about Hull today, how good it is so - immediately anyway.

Then the costs of the assessment. They can be more than the damages. People lose sight of the fact that the costs can be more than the damages recovered.

Proportionality goes mad. Ian has already mentioned *BNM* and *May v Wavell Group*. Two other cases that I can mention here are *Reynolds v One Stop Stores*. *Reynolds* – budgeted case, the claimant recovered £50,000 in damages but it was pleaded at £175,000, budgeted at £117,000. Two days of a line by line assessment, the district judge allowed £115,000. For half an hour he puts his proportionality wig on and says, "These costs are still disproportionate. Only £50,000 was recovered. You can have £75,000 for your costs and I am removing £40,000 under rule 44.3(5)". That is more than the damages when you add the VAT.

Ditto *Salmon v Barts Hospital* a couple of weeks ago. The budget was £155,000 in a case which was pleaded at £15,000. I do not know why the budget was so high. The costs were assessed at £52,000. The proportionality wig goes on and costs chopped down to £40,000. The recovery was £7,000, so by virtue of a proportionality test alone, all the client's damages were wiped out in costs.

Ian has already mentioned the *Lakani*, one day late with a budget and you are limited to applicable court fees going forward, the relief from sanctions refused. Then you are given a judge. You do not choose or appoint the judge. I know that people do judge shopping. I saw

it a few years ago when I was a costs judge: “This case is going to be appointed either to Master Seger Berry or Master Campbell. We hope it’s Master Seger Berry!”.

So I know that people do judge shopping and you do not know who you are going to get : then there can be an appeal and then what happens if you lose? If the Part 36 offer is beaten by the claimant, the claimant’s own offer or the receiving party’s own offer, then there is an additional 10 per cent of the costs assessed to pay up to £75,000 by the paying party, plus the costs of the assessment on the indemnity basis, plus enhanced interest. That is the court way.

What about mediation? It is your party. You choose. You choose the mediator but this must be consensual. Both parties have to agree. One side cannot say, “I want mediation”: the other side has to say, “Yes, we do as well”. If they both do not agree, then it cannot happen. You decide where. “What about next week? Where shall we have it? What about some rooms at the Law Society? How long? A day, half a day, you choose”. You choose how much you want to spend. Do you want a very senior mediator such as a retired senior costs judge or a Silk or somebody more junior in chambers or a solicitor or a costs lawyer? You decide whether you want to settle because the judge in the costs office, when he or she makes a decision, that is binding and enforceable but if you go to a mediation, you choose whether you want to settle or not. You cannot be forced to settle.

It is all in private, in a private room. You can make admissions if you want to which cannot be held against you later. There is no costs budgeting in mediation, no proportionality rules, no sanctions that are going to come and bite you. You do not have to use the electronic bill. You can use the paper bill option if you want to.

You choose the materials, so instead of loads of dusty boxes being deposited at the costs office for the Master to go through, you decide what the mediator sees. It might just be the pleadings. Very helpful is a mediation statement or a position statement by each side saying what the issues are and how much money is between the parties. The mediator sees the offers. Unless you have a *Calderbank* in court, if it is a part 36 offer, it is all in a sealed envelope and the court does not know about it until the end, but it is most important for the mediator to know what is between the parties, so the mediator is told; one side has offered £100, the other side has offered £50, so there’s about £50 between you. That is the difference between the two.

Can I just have the roving microphone, please, thank you very much.
I am sorry, I am running over slightly already.

How does it work in practice, the mediation? Debbie has had a jolly good day before bountiful Judge Besford and has recovered £50,000 worth of damages on behalf of her client, plus costs. That is the good news. The bad news is that although the case was budgeted at £115,000 it was pleaded at £125,000 and only £50,000 recovered, so proportionality alarm bells ring there.

Now, horrid Carl has acted for the nasty paying party and he has only made an offer under Part 36 against Debbie’s bill of £100,000 of £50,000, but they both agree to have a mediation, so how do I get it started? A facilitative mediation first of all. I get Carl and I get Debbie in the same room and we chat across the table. If I do nothing at all as the mediator, I am doing a good job because I have got a conversation going again that has broken down. Why has it broken down? Because they have stopped negotiating.

We explore the points of difficulty, so Carl is going to say, "Look at the damages recovered against the size of the bill, it is disproportionate, you are going to have a bad day before the costs judge". Debbie is going to say, "You put everything in issue; breach of duty, causation, quantum, we had to fight you tooth and nail, that is why the costs were so high". So if I can get the conversation going, we may be able to resolve it at the facilitative stage.

If we cannot, we can go into private session. So Carl goes into another room and I have a private chat with Debbie and she says to me, "We have read *Reynolds* and we have read *Wavell v May* and those other cases on proportionality, we may be vulnerable on the day depending on the judge. If we can get out of this for £85,000 against our bill for £100,000, we'll go for that".

So I trot along now to Carl and he says, "Our part 36 offer at £50,000, unless we have a really good day, is going to give us no protection. Debbie has offered to accept under Part 36 £90,000. If she has a good day, under part 36.17(4) and she wins more than that, I am going to have to pay another 10 per cent of the costs, so that is another minimum of nine grand. If I can get out of this for, say, £75,000, I'll go for that".

So you can see now I have got Debbie saying, "I will take £85,000", Carl saying, "I will pay £75,000", so I now become an estate agent because I should be able to negotiate a deal at that figure. Carl is willing to buy at £75,000, Debbie is willing to sell at £85,000. It has got to have £80,000 stamped all over it, has it not? So that is how the facilitative mediation will work. You do the deal and it is binding and enforceable.

If we cannot settle this at the facilitative stage, by agreement Carl and Debbie can ask me to act as an evaluator rather than the mediator. They can ask me to comment on what would be a fair outcome, £85,000, £75,000, a basis for settlement or to provide an evaluation as if I were sitting in the costs judge's chair. Effectively, I would give a judgment on the case and then invite them to go away and think about what I have said because probably what I am doing is simply rehearsing what would happen at a detailed assessment. If they can settle it, all well and good, so the evaluative stage is also most important.

Who pays for the mediation? You decide yourselves who has to pay it but the normal rule is that you share the costs of the mediation so each party pays their share of the mediator's fee and their own costs.

If it does not work, the costs of the mediation are costs in the detailed assessment, costs in the case. Why is that fair? Because if Carl has made an effective Part 36 offer and it goes to detailed assessment, he will get the costs of the assessment from the last date on which his offer could have been accepted including the costs of the mediation. If that does not happen, under rule 47.20, then Debbie will get the costs of the assessment including the costs of the mediation.

What you need is a signed mediation agreement and a willingness to compromise. If you want a winner and a loser, go to court because there may be one winner and one loser or you both may be losers. There is no point in going into mediation just to go through the motions to tell the judge later, "Well, we tried our best". You need an authority to settle from your client, so if it is NHSR, you need somebody from the NHSR or if it is an insurer, you need an insurer there or available by telephone.

Finally, you need an ability to feel and absorb pain. If people leave the mediation smiling, it

means that somebody has won and they should not win. You should both feel, "I am paying too much or I have taken too little", but at the end of the day what you are trying to do is reach a compromise.

So what does mediation mean? No court fees, no waiting for a hearing date; no risks you are going to get a wrong judge or no judge because they have block listed; no sanctions, no horrible proportionality surprises, no timetables from court; no Part 36 risks; no appeals. Everything is within your control the whole time because you cannot be compelled to go into a settlement that you do not want to do. I say mediation is certain, consistent, predictable and fair. Can you say that of detailed assessment? I am afraid now I no longer think that you can. Thank you very much. (Applause)

THE CHAIR: Thank you to everybody. I am very conscious of the time, but I am also conscious that you may want to ask questions of our panel, so if anybody has a question put your hands up now and Jade has the microphone.

QUESTIONER: In what we used to call the old days, when advising clients at the beginning in the retainer letter you would say, "If you win, you could recover between, you know, two-thirds to three-quarters of your actual costs". This is probably a question to the first speaker or, probably, the last speaker as well. What do we now say? I mean, I am reluctant to say that anymore and I will tend to say, "Look, with proportionality it's an unknown quantity really. You probably should assume the worst and that you may not recover even 50 per cent". It also comes up, and I see it as a mediator. I had a case before Christmas, it was effectively half the mediation was about costs. It was a late stage mediation and the issue was who is going to bear the costs and what could the recovery be. Generally, everyone present, including the solicitors, were of the mind that probably, you know, 50 per cent might be quite a good outcome with proportionality.

DISTRICT JUDGE BESFORD: I think it very much depends on the practice. It depends on your clients. There are those clients who have bottomless pockets and they will spend whatever it takes and the rules on proportionality do not stop that person spending as much as they wish. This is all about how much they can recover in the event that they are successful. You are experts; you have done one or two cases, I suspect, of that type of litigation. You will probably have an idea as to what the reasonable cost is, what you have recovered in other cases. Unless it is something totally unique, in the great way that judges do it, you know, glibly say, "It's not rocket science". And I would also stress, perhaps appropriately, sitting in the Law Society common room or whatever, that it has been your professional obligation for many, many years to give clients good estimates and, really, I would have thought you should be well honed at proportionality.

With regard to how much they are actually going to recover, Colin and I may disagree slightly because the case law is still up in the air, but theoretically, if you read certain cases, once the case has been budgeted either by the budget being approved by the other side or the court having set the budget, then you are going to have a pretty good idea that you are going to recover as a minimum the future costs from the CCMC. It is an arguable case, it is being argued, but there is still a line of authority to say that you cannot touch the costs that have been budgeted going forward, which then brings me to the other point – one of my hobby horses, but it does not apply to me – when you get your client in, if you want to give some certainty to your client as to the amount they are going to recover, why do you not do a

budget, send it to the proposed defendant with your letter before action and say to them, "Look, we think a reasonable proportionate budget, if you take every single issue, is going to be £200,000. If you concede liability today, if you concede we don't need to call 25 experts, et cetera, et cetera, our reasonable proportionate budget is only going to be £50,000". Then that will be able to influence how much you tell your clients they are likely to recover. I speak as a judge, not a practitioner. To me, everything is dead simple. I appreciate the reality is very, very different.

MR CAMPBELL: I think there are two problems. The purpose of budgeted costs is that you should be able to recover what you have been allowed in your budget because the budgeting judge will only allow reasonable, necessary and proportionate costs. But we have seen in Salmon and Reynolds that the budgeted costs have been completely unpicked where the judge has taken the view that the case has been over-pleaded and that makes it very difficult. In both those cases, the clients or claimants, unless their solicitors were kind to them and let them off the costs, were left with no damages at all. That is the first problem.

The second problem, there has been no guidance yet from the Court of Appeal. They refused permission to appeal in *May v Wavell Group*. Rupert Jackson, in one of his speeches, said it is to be expected that the Court of Appeal, in a cluster of cases, will give guidance about how rule 44.3(5) should be implemented and, here we are, six years later and there has been nothing. So the profession is completely in the dark and it is very difficult to advise clients whether, even in a budgeted case, how much your recovery is going to be in costs.

I think in answer to your question, is it going to be 20 per cent as it used to be, you would probably recover 80 per cent of your costs, it is no longer possible to say that, even in a budgeted case.

DISTRICT JUDGE BESFORD: On the case Colin referred to - *Reynolds* - there is a costs barrister, Andrew Hogan, who was in that who is absolutely spitting feathers at the moment about that decision. I understand he is applying for permission to second appeal it. Have you heard that?

MR CAMPBELL: I did not hear that, no. It was a decision a year ago.

DISTRICT JUDGE BESFORD: He is probably out of it now.

MR CAMPBELL: I think so.

DISTRICT JUDGE BESFORD: I know when he was talking, it was at a conference he was talking about trying to do something.

MR CAMPBELL: No, it was never pursued.

THE CHAIR: Any other questions?

QUESTIONER: Colin, you have touched there a couple of times on the case of *Salmon v Barts NHS Trust*, a very recent decision. Obviously in that case, that was looking as well at the correct approach from departing from an approved budget on assessment. I was just wondering, what are your thoughts, or any of the panel members, as to whether the correct approach was followed in that case? And, also, whether that kind of undermines the sanctity and certainty that the whole cost budgeting framework actually provides.

MR CAMPBELL: Are we under Chatham House Rules?

THE CHAIR: Do you want to be? Do you need to be?

MR CAMPBELL: I think it is a very difficult decision. What happened was the claimant did not spend the entire budget on ADR and experts. The judge held that that was a good reason to depart from the budget downwards, and then the paying party then said, "Aha, that figure is still much too high or those figures are still far too high. I want to challenge them". And it was held that because they had not spent all the money, that was a good reason to go down and the defendant did not need to show another good reason. I found that a very odd decision because if the receiving party had claimed the full amount that they were entitled to under their budget, the onus would then have been on the paying party to show good reason. But because the receiving party did not claim as much as she was entitled to, she had done the defendant's job for them. Does that answer your question?

QUESTIONER: Yes, thank you.

DISTRICT JUDGE BESFORD: It is out of kilter with a number of other decisions and certainly Simon Middleton and Roger Mallalieu in their supplement to the *White Book* are very against that sort of analogy. Would you concur?

MR CAMPBELL: I absolutely concur with that, yes.

DISTRICT JUDGE BESFORD: So whether it holds up, we have to wait and see. Thank you.

THE CHAIR: Much as I would love to talk about costs and to listen about costs, I think we will draw it to a close now. Thank you very much all four of you for such an interesting session. (Applause).

Mr Jonathan Haydn-Williams took the Chair

THE CHAIR: Okay, we are at the end. That was a very content-rich conference. We dealt with a wide range of types of litigation issues that can arise. Thanks to our sponsor, Auscript, you are going to have transcripts of this afternoon's pearls of wisdom which can be a resource in the future. You will have copies and people who have not been here can access them on our website and look at what has been said.

We cannot be experts in every area of litigation and dispute resolution – there is the danger of dabbling – but we do need to have enough knowledge of the different options available to advise clients how to proceed. We need to know enough that a bell will ring in our heads when a point arises which is outside our usual comfort zone and we can then check it or ask someone who is an expert in the area, and that is part of the aim of this afternoon.

Thank you to all of our speakers. We greatly appreciate you sharing with us your knowledge and experience. Thanks to Caitlin and Jade and the others from the Law Society team involved in organising this conference. Thanks to my fellow committee members. And thanks to you for all coming and supporting us.

Questionnaires are going to be e-mailed tomorrow, I gather, to all of you. Do, please, spare

some time to complete them as they do help us to shape our future programmes. We do read them and take them into account. Once you have completed the survey, you will then be able to download the available slides, so there is a bit of a carrot and stick there, so do complete them and return them.

So that is it for Spring 2019. A drinks reception will now take place at the back of the room. Thank you for coming. Goodbye. (Applause).