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Litigation Committee response to the Ministry of Justice consultation on solving disputes in the County Courts (CP6/2011)

The City of London Law Society ("CLLS") represents approximately 14,000 City lawyers through individual and corporate membership including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multi jurisdictional legal issues.

The CLLS responds to a variety of consultations on issues of importance to its members through its 18 specialist committees. This response in respect of Ministry of Justice's consultation paper entitled *Solving disputes in the county courts: creating a simpler, quicker and more proportionate system* has been prepared by the CLLS Litigation Committee.

In making this response, we confine ourselves to those questions which raise issues relevant to the work undertaken by the members of the Litigation Committee.

Q31: Do you consider that the CMC's accreditation scheme for mediation providers is sufficient?

Q32: If your answer to Q31 is no, what more should be done to regulate civil and commercial mediators?

In our view, there is already a large supply of suitably qualified mediators, and no need for regulation.

Q33: Do you agree with the proposal to introduce automatic referral to mediation in small claims cases? If not, explain why.

Q34: If the small claims financial threshold is raised (see Q25) do you consider that automatic referral to mediation should apply to all cases up to (i) £15000, (ii) the old threshold of £5,000 or (iii) some other figure? Please give reasons.

Q35: How should small claims mediation be provided? Please explain with reasons.

Q36: Do you consider that any cases should be exempt from the automatic referral to mediation process?

Q37: If your answer to Q36 is yes, what should those exemptions be and why?

We object in principle to the proposition that parties should be forced into mediation. Although the proposal is limited to claims up to a certain value, our view is that there should be no compulsion as existing sanctions are sufficient. Elsewhere in the Consultation Paper there are proposals to "educate" prospective litigants about the benefits of mediation, and for the Court Service to provide encouragement and information in that regard, as well as information about potential costs consequences of failing to mediate. We consider that to be sufficient.

Q38: Do you agree that the parties should be given the opportunity to choose whether their small claims hearing is conducted by telephone or determined on paper? Please give reasons.

We agree that for small claims it is appropriate to give parties the opportunity to have hearings conducted by telephone or determined on paper.

Q39: Do you agree with the proposal to introduce compulsory mediation information sessions for cases up to a value of £100,000? If not, please explain why.

Q40: If your answer to Q39 is yes, please state what might be covered in these sessions, and how they might be delivered (for example by electronic means)?

Q41: Do you consider that there should be exemptions from the compulsory mediation information sessions?

Q42: If your answer to Q41 is yes, what should those exemptions be and why?

For cases in the multi-track, parties and their advisers are subject to pre-action protocols. There is a professional duty on legal advisers to advise clients about the benefits of mediation, and we believe that this is done. We note that the proposal is to have compulsory mediation information sessions at the allocation stage. Of course, for a case to have got to that stage, no settlement will have been forthcoming under the pre-action protocols. We do not consider it appropriate for parties to be compelled to attend compulsory mediation information or assessment sessions when advisers will already have advised their respective clients of the benefits of mediation, and when pre-action protocols have failed to produce a resolution prior to the issue of proceedings.

Q43: Do you agree that the provisions required by the EU Mediation Directive should be similarly provided for domestic cases? If not, please explain why.

Q44: If you answer to Q43 is yes, what provision should be provided and why?

Provided the parties agree, we agree with the proposals that, (a) with certain limited exceptions, the content of written settlements negotiated at mediations be made enforceable and (b) mediators and mediation provider organisations be protected

from being compelled to give evidence, subject only to very limited specified exemptions.

We do not agree that a the limitation period should be stop running because a mediation has been commenced. Parties and their legal advisers must be taken to know the applicable law. If necessary, parties can enter into a "standstill agreement" to prevent a limitation point being taken while a mediation process is undertaken. However, we consider there could be considerable difficulties and complexities in, effectively, extending limitation periods during the mediation process, which itself can be uncertain and subject to different considerations in different jurisdictions.

Q45: Do you agree that the provision in the TCE Act to allow creditors to apply for charging orders routinely, even where debtors are paying by instalments and are up to date with them, should be implemented? If not, please explain why.

Yes. In our view there is an important distinction between the obtaining of security and respecting an agreed repayment regime. Subject to there being safeguards to ensure that the charging order is not enforced if the debtor is in compliance within the agreed payment regime, we see no reason why creditors should have to wait for default before being allowed to apply for a charging order.

Q51: Do you agree that the procedure for TPDOs should be streamlined in the way proposed? If not, please explain why.

We agree that an interim order should become final after a specified passage of time without any need to for a further hearing.

Q52: Do you agree that TPDOs should be applicable to a wider range of bank accounts, including joint and deposit accounts? If not, please explain why.

We see no objection in principle why a creditor should not be able to follow a debtor's assets into other bank accounts such as joint and deposit accounts. We are, however, concerned about the scope for possible injustice and unfairness to third parties by reason of the proposed presumption. We consider that it should be for the creditor to demonstrate his or her entitlement rather than for the third party (who may have limited resources, and may not be as well versed in litigation matters as the creditor and the debtor) to disprove the presumption. There should be a process to establish true beneficial ownership with the other joint account holder being given full opportunity to make representations.

Q53: Do you agree with the introduction of period lump sum deductions for those debtors who have regular amounts paid into their accounts? If not, please explain why.

Q54: Do you agree that the court should be able to obtain information about the debtor that creditors may not otherwise be able to access? If not, please explain why.

We agree that the court should be able to obtain information about the debtor that creditors may not otherwise be able to access. The court is well placed to conduct any balancing exercise that may be required and to hear any relevant representations. Furthermore, we consider that provision should be made for the creditor to pay the reasonable costs incurred by any third party in complying with a request made by the court for information. For example, when banks are required to

disclose information to a claimant who has a freezing order, it is usual for the order to make provision for the claimant to pay the bank's reasonable costs of complying with the order.

Q55: Do you agree that government departments should be able to share information to assist the recovery of unpaid civil debts? If not, please explain why.

Yes, but only to enable or facilitate a response to a court request for information.

Q56: Do you have any reservations about information applications, departmental information requests or information orders? If so, what are they?

We consider that there should be safeguards in place to ensure that debtors have the opportunity to make representations to the court before any order is made.

Q57: Do you consider that the authority of the court judgment order should be extended to enable creditors to apply directly to a third party enforcement provider without further need to apply back to the court for enforcement processes once in possession of a judgment order If not, please explain why.

No. We consider it is important that the court retains the role of evaluating competing interests and ensuring any necessary protections. What is being proposed is already a considerable extension of the tools available to the creditor: by an Information Order, the creditor will be in a position to obtain, through the court (albeit subject to safeguards), information from third parties which previously he/she might not have been able to obtain. The judgment creditor will not be as dependent as before on answers given by the judgment debtor at, for example, an oral examination.

Q58: How would you envisage the process working (in terms of service of documents, additional burdens on banks, employers, monitoring of enforcement activities etc)?

Subject to there being provision for reasonable costs incurred to be paid by the judgment creditor (see our answer to Q54 above), we consider that this should be a matter at the discretion of the Court.

Q59: Do you agree that all Part 4 enforcement should be administered in the county court? If not, please explain why.

No. The proposed changes should be for the benefit of all judgment creditors. We see no reason why judgment creditors who have succeeded in the High Court should have to transfer enforcement proceedings to the county court to obtain the benefit of the additional remedies. The remedies should be available in the same court as that in which the judgment was obtained.

Q60: Do you agree that the current financial limit of £30,000 for county court equity jurisdiction is too low? If not, please explain why.

Q61: If your answer to Q60 is yes, do you consider that the financial limit should be increased to (i) £350,000 or (ii) some other figure (please state with reasons)?

We agree that the financial limit should be increased to £350,000 as proposed.

Q62: Do you agree that the financial limit of £25,000 below which cases cannot be started in the High Court is too low? If not, please explain why.

Q63: If your answer to Q62 is yes, do you consider that the financial limit (other than personal injury claims) should be increased to (i) £100,000 or (ii) some other figure (please state with reasons)?

We agree that the present financial limit is too low and that it be increased to £100,000.

Q64: Do you agree that the power to grant freezing orders should be extended to suitably qualified Circuit Judges sitting in the county courts? If not, please explain why.

Yes.

Q65: Do you agree that claims for variation of trusts and certain claims under the Companies Act and other specialist legislation, such as schemes of arrangement, reductions of capital, insurance transfer schemes and cross-border mergers, should come under the exclusive jurisdiction of the High Court? If not, please explain why.

Yes.

Q66: If your answer to Q65 is yes, please provide examples of other claims under the Companies Act that you consider should fall within the exclusive jurisdiction of the High Court.

We consider that unfair prejudice and derivative claims under the Companies Act 2006, together with claims under section 90A of the Financial Services and Markets Act 2000 should fall within the exclusive jurisdiction of the High Court.

Q67: Do you agree that where a High Court Judge has jurisdiction to sit as a Judge of the county court, the need for the specific request of the Lord Chief Justice, after consulting the Lord Chancellor, should be removed. If not, please explain why.

Yes.

Q68: Do you agree that the general provision enabling a High Court Judge to sit as a Judge of the county court as the requirement of business demands, should be introduced? If not, please explain why.

Yes.

Q69: Do you agree that a single county court should be established? If not, please explain why.

Yes, so long as there remains available to litigants in local areas access to a county court within a reasonable distance and at which they can receive assistance and guidance in connection with the issue and process of applications.

THE CITY OF LONDON LAW SOCIETY
LITIGATION COMMITTEE

Individuals and firms represented on this Committee are as follows:

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