CITY OF LONDON LAW SOCIETY

LITIGATION COMMITTEE

MINUTES OF MEETING

Committee Meeting held at Freshfields Bruckhaus Deringer

Date 23 September 2008, 4:00 pm

Present:	**Firm**	
Lindsay Marr (Chairman)	Freshfields Bruckhaus Deringer LLP	("LM")
Duncan Black	Field Fisher Waterhouse LLP	("DB")
Gavin Foggo	Fox Williams	("GF")
Carolyn Wilson (for Richard Foss)	Kingsley Napley	("CW")
Simon James	Clifford Chance LLP	("SJ")
Joanna Page	Allen & Overy LLP	("JP")
Tom Coates	Lewis Silkin LLP	("TC")
Julie Herriot (for Stefan Paciorek)	Pinsent Masons LLP	("JH")
Rory McAlpine (except for items 1 and 2)	Denton Wilde Sapte LLP	("RM")

In attendance:

Koser Shaheen	Freshfields Bruckhaus Deringer LLP (minutes)

Apologies:

Apologies were received from: Angela Dimsdale-Gill, Richard Foss, Tony Marks, Arundel McDougall, Hardeep Nahal, Stefan Paciorek, Kevin Perry and Philip Vaughan.

1. MINUTES OF MEETING OF 1 MAY 2008

LM said that he had received by email a few minor corrections by email. GF noted that he was wrongly shown as having attended.

2. MATTERS ARISING FROM PREVIOUS MEETING

2.1 SRA Consultation on Standards for Solicitor Higher Courts Advocates

LM reported that the Committee' response to the CP had been finalised and submitted on 25 July 2008. LM noted however that the SRA had now announced that, contrary to the proposals underlying the consultation paper, it would not be moving to a voluntary scheme but instead would be looking to streamline the present accreditation process. Apparently, this was due to a concern that abolishing compulsory accreditation would result in incompetent solicitor advocates appearing in court.

2.2 New Commercial Court building project

LM reported that after he last meeting Hardeep Nahal had emailed a report that moves were progressing to agree to take additional accommodation in the new Rolls Building, which would ease the concerns previously expressed as to there being insufficient space in the new building. LM would ask HN to update the Committee at the next meeting.

2.3 Public relations and communications

LM reported that the City of London Law Society had recently appointed Lehman Communications to assist with PR and communications for the Society's work. Lehman were meeting the chairs of all the specialist committees (LM had met them recently) to familiarise themselves with the work of the Committees and discuss what assistance they might give – for example, lobbying on a particular issue or reform, and opportunities to publicise a committee's work where a matter was of public interest.

3. OPEN MEETING

3.1 LM reported on progress with plans for an open meeting in late November or early December. After the last meeting LM had met with Mr Justice Andrew Smith and Mr Justice Flaux (who had taken over responsibility for the pilot from Aikens LJ following the latter's appointment to the CA) to discuss the idea and invite participation from the commercial judges. This had been welcomed and the judges were supportive of the proposal.

3.2 In terms of format, the judges had suggested that the most useful format would be for the panel of speakers being primarily from solicitor users of the court with the aim of maximising feedback to the judges. LM therefore proposed a panel of 4 or 5 speakers including he judges taking one slot (the final slot?). The 3 or 4 practitioner speakers could cover different aspects of the pilot with the aim of introducing the topic, giving a summary of feedback and experience during the pilot, and opening the topic up for debate from the floor. He said that the previous CLF meeting at the Allen & Overy offices had generated a lot of responses from the floor and we should aim to achieve this again.

3.3 Possible speakers were discussed. LM had a volunteer from his firm to speak from his firm and Simon James and Julie Herriot also volunteered to arrange speakers. The Committee felt that it could be beneficial to invite a member of the bar to be on the panel (e.g. to speak on handling of hearings). LM reported that David Macintosh had offered to give n introduction.

3.4 LM would take this forward with the volunteers and meet the judges again with a view to confirming date and publicising the meeting n early October.

3.5 LM asked that committee members collate feedback from their colleagues and feed it in to the panel. LM suggested that it may be useful to have a committee meeting in November before the open meeting to discuss feedback and issues raised. It may be necessary to ensure anonymity for feedback.

3.6 In the course of discussion there were some concerns expressed about the pilot and the prospects of the proposals making a difference.

- One concern is that the pilot proposals do not attempt to reign in disclosure significantly. There is thought to be a lack of understanding of the sheer scale of the paperwork involved in disclosure in a complex commercial case, due particularly to the explosion in email correspondence. This would be a topic worth debating at the meeting.

- There is a concern as to whether sufficient number of cases will have gone through the system to have tested it thoroughly (it was however still fairly early days).. It was suggested that some statistics on the number of cases that have been subject to the pilot scheme would be helpful.

- Concern was raised as to whether judges were allowed sufficient time to carry out active and effective case management.

- Costs – there were examples of solicitors preparing costs summaries for a hearing only to find that the judge made no reference to the summary.

3.7 LM said that the Committee should try to gather feedback from who we know, probably by email and pass the information on to those who would be speaking on the topic.

3.8 Possible speakers at the open meeting: LM said that one of his colleagues had agreed to speak on the topic of pleadings / lists of issues. JM said that she would volunteer her firm to provide a speaker on disclosure process. SJ volunteered himself or someone from his firm. It was also thought that a barrister speaker could be helpful, for example on the question of management of hearings. Possible candidates were discussed. Date of meeting: it was suggested that the first week of December.

4. MOJ (CPRC) CONSULTATION ON COSTS CAPPING ORDERS, 11 SEPTEMBER 2008. (RESPONSE DEADLINE: FRIDAY 24 OCTOBER 2008).

4.1 LM introduced the CP, noting that the intention was now to introduce cost capping powers and the present CP was therefore now looking at the rules to implement this rather than invite debate on the principle.

4.2 It was noted that the expressed intention was that cost capping should only apply in exceptional circumstances where ordinary case management powers were

inadequate. The Committee agreed with this approach and considered that proper case management was the preferable route in most cases. It was noted that the guidelines as to what amounted to "exceptional circumstances" were very general, referring to considerations of proportionality and financial imbalance. It was noted that cost capping concerned only costs recovery, not pending, and that the criteria for assessment of recoverable costs on the standard basis already included proportionality.

4.3 The Committee had some concerns about the operation of cost capping. It was noted that care should be taken that it did not stifle claims as claimants may need to spend money to have a reasonable prospect of success. In public interest situations, it was important not to penalise those who put their heads above the parapet, although it was noted that it may be possible to obtain a protective costs order to counter this problem. It was suggested that a relevant factor in deciding whether to costs cap was the importance of the issue to the party concerned.

4.4 The Committee discussed the particular questions in the consultation paper.

Q1: Do you agree with the definitions of 'a costs capping order' and 'future costs' (rule 44.18 (1) and (2))? If not, please give your reasons.

4.5 Agreed.

Q2: Do you agree with rule 44.18(3)? If not, please give your reasons.

4.6 It was noted that the proposal did not allow costs to be capped by reference to particular issue or issues except where the issue was to be tried separately. There was some discussion as to whether this was too restrictive. However, it as noted that separating costs by issue could give rise to difficult apportionment questions save in cases where there was a separate trial (generally costs estimates broke costs down by stage of work rather than issues). One approach might be a broad a percentage basis. and it was suggested that if it were done on a stage basis it would be easier to isolate. It was lo felt that costs capping could be seen to be used as a litigation tool but also a means of limiting claims.

4.7 After discussion, the conclusion was that the draft of paragraph (3) of the rule was acceptable.

Q3: Do you agree with the criteria that have to be met for a costs capping order to be made (rule 44.18 (4))? If not, please give your reasons.

4.8 The draft rule appeared unobjectionable, although the point had been made (see above) that proportionality was already part of costs assessment. It was suggested that a problem with relying just on costs assessment process is that it takes place on a retrospective basis. It was also felt that part of the problem lay in inadequate case management and that costs control should be dealt with adequately in most cases through the use of case management.

Q4: Are there any other circumstances which you consider should be included in rule 44.18(5)?

4.9 It was considered that the rule should include reference to the importance of the issues to the parties as being a relevant factor to take in to account. (Although it was noted that this is already part of the costs criteria.

Q5: Do you agree the limits on variation (rule 44.18(6))? If not, please give your reasons.

4.10 It was agreed that it was appropriate that once a costs capping order had been made, it should be difficult to vary.

Q6: Do you agree the proposals on how an application for a costs capping order and an application to vary should be made (rules 44.19 and 44.20)? If not, please give your reasons.

4.11 The suggested procedure of an Part 23 application supported by evidence was considered appropriate.

Q7: Do you have any comments on the proposed Costs Practice Direction provisions?

4.12 No other matters were raised.

4.13 LM agreed to prepare and circulate a draft response in due course.

4.14 GF said that the LSLA were also looking into this and might have a wider range of perspectives from their membership. For example, in the case of lower value cases a disproportionate approach may mean that the whole thing could be very uneconomic. GF agreed to inquire as to the LSLA's views o that his could be taken into account in considering our response.

5. A.O.B

None.