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Litigation Committee response to the Chancery Modernisation Review's Provisional Report

The City of London Law Society ("CLLS") represents approximately 15,000 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 19 specialist committees. This response to the *Chancery Modernisation Review: Provisional Report* has been prepared by the CLLS Litigation Committee (the "Committee"). The response focuses on the resolution of business disputes, not other kinds of dispute.

The Committee has the following comments on the issues raised by the Provisional Report.

First, the Committee agrees that it is "anomalous and less than ideal for similar work to be subjected to different procedures and practices in two courts located... in the same building" (paragraph 12.12 of the Provisional Report). Indeed, the anomaly exists not only for two courts within the Rolls Building but any two courts within England and Wales. Like disputes should be handled in a like manner, which should be the manner appropriate to the nature of the dispute in question.

Secondly, the Committee also agrees that the aspiration should be to convert the Rolls Building from the common home of three civil courts into a single, internationally pre-eminent centre for the resolution of business and property disputes (paragraph 12.23). Any reforms within those three courts should be assessed by whether the reforms contribute to this aspiration. (Property work is the historical base of Chancery Division work, but some scepticism was expressed on the Committee as to the extent to which all property disputes could legitimately be included in an international court. For example, many real property disputes are necessarily nationally in nature - see article 22(1) of the Brussels I Regulation.)

Thirdly, the Committee considers that furthering this aspiration requires judges to have expertise in both the law and the general subject matter of the cases that come before them. It is not acceptable for the parties to have "to educate a Judge with no

prior experience in the field" (paragraph 2.26). Any perception that judges require education in this way will detract from the international reputation of the English courts.

Fourthly, the Committee agrees that keeping waiting times for trials to an acceptable level is important but not that it is the "overriding priority" (paragraph 2.74). In business disputes, floating trial dates cause considerable disruption because those involved cannot plan satisfactorily in advance. Fixed starting and finishing dates for a trial are therefore essential. The Committee considers that commercial parties would be prepared to tolerate somewhat longer waiting times in return for this certainty.

Fifthly, in the same way that fixed times for trials are essential, the timetable within a trial should also be agreed or determined at the pre-trial review and then enforced by the trial judge. This includes, for example, the length of openings, when each witness will give evidence and for how long. This could also include consideration at the pre-trial review of what elements of a party's case need to be put to particular witnesses in order to ensure that every aspect is put to an appropriate person (paragraph 7.20).

Sixthly, ideally all business disputes should be heard, both for interim hearings and trial, by a High Court judge (as in the Commercial Court), unless the parties agree otherwise. International parties will not bring litigation to the English courts if their cases will or may come before lower judges.

Seventhly, if it is not practical within the current system for a High Court judge to deal both with interim hearings and the trial, the Committee is somewhat sceptical about expanding the jurisdiction of masters without the consent of the parties. The Committee agrees that masters should not be able to grant freezing injunctions, search orders or interim injunctions, but, despite this scepticism, is not opposed to a pilot to assess the practicability of masters granting, for example, final injunctions on applications for summary judgment.

Eighthly, as to the potential case management tracks referred to in paragraph 4.20 of the Provisional Report, the Committee can see no advantage in a case being managed by one High Court judge but tried by another High Court judge (paragraph 4.20.3). This would only add to the current problem identified in the Provisional Report, namely the reluctance of judges hearing interim applications to make orders that might tie the hands of the trial judge.

Some members of the Committee were particularly attracted by the idea that a High Court judge and a master should operate as a team (paragraph 4.20.5). The Committee would support a pilot study to assess how this could operate in practice. The pilot could, perhaps, take place for business contract and financial services disputes. Even within this team structure, the Committee considered that the person destined to be the trial judge should hear the first case management conference in order to lay out the initial path for the case as well as hearing the pre-trial review.

Ninthly, as to criteria to determine what case management track a case should be placed on, the starting point should be the parties' wishes. If the parties are agreed, the court should generally follow those wishes, subject to any issue of proportionality. In seeking to agree on a track, the parties will take into account the effect this may have on the trial date. If the parties do not agree, the starting point for the court's determination of the proper management track should be the amount at stake, though the court should also be able to take into account other factors, such as the number of parties, the number and complexity of the issues and the importance of the dispute.

Tenthly, in order to provide consistency in approach, to ensure that rules relevant to the type of case in issue are applied and to develop expertise, the Committee considers that masters should be divided into groups according to the type of work that they undertake (paragraph 4.32). If the workloads of the three elements of Chancery Division work are not equal, it might be that the groups will not be of the same size.

Eleventhly, the Committee agrees that both reading time in advance of a trial and judgment writing time need to be built into judicial timetables (paragraph 7.31). An estimate of 50% of the length of the trial to write the judgment is not unreasonable as a rule of thumb, but different judges presumably have different practices and proceed at different speeds in this regard. There should also be an expectation that a judgment will be given within a specific time after the trial has ended - say within one month of the trial ending or, if longer, within a period equal to the length of the trial following the end of the trial.

Finally, the Committee is doubtful about the proposal to transfer certain corporate matters to Companies House (paragraph 11.31). Even, for example, the registration of charges out of time requires proper judicial consideration of the effect on, for example, third parties.

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THE CITY OF LONDON LAW SOCIETY
Litigation Committee

Individuals and firms represented on this Committee are as follows:

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Duncan Black	Field Fisher Waterhouse LLP
Tom Coates	Lewis Silkin LLP
Jonathan Cotton	Slaughter & May LLP
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