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Litigation Committee response to Lord Justice Briggs' *Civil Courts Structure Review: Interim 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 consultations on issues of importance to its members through its 19 specialist committees. This response has been prepared by the CLLS Litigation Committee (the "Committee") and addresses issues raised by Lord Justice Briggs in his *Civil Courts Structure Review: Interim Report*, dated December 2015. The membership of the Committee is set out in the Schedule to this paper.

Introduction

1. The Committee welcomes HMCTS's efforts to liberate the court system from the need to process, store and move paper. While professing no expertise in computer systems, nor underestimating the challenges involved (including those that arise from the scale of the civil court system and the need for proper security), the Committee considers that it should be possible in the 21st century for a court system to handle digitally the documents required for litigation rather than to continue with an archaic paper-based system. The Committee also accepts that, if this goal can be achieved, it will have implications for the way in which courts conduct their business and provide opportunities for greater efficiency. For example, claim forms and other documents might, as the Report suggests, be issued digitally or by post from a central location, in which case court buildings could become primarily hearing centres, with more limited administrative and ancillary facilities than is currently the case.

2. Whilst the Committee accepts the overall desirability of HMCTS's technological ideas, it is essential that HMCTS consults with the users of the system, including solicitors, in order to ensure that whatever eventually

emerges genuinely meets the needs of users as well as of HMCTS itself and of judges. The difficulties encountered in seeking to introduce technology, and the resulting slow progress made, in the Commercial Court over a period approaching a decade demonstrate clearly the need for liaison with users.

3. In this regard, the Committee is concerned about the opacity of the HMCTS's work, both as regards technology and Case Officers. For example, the Report notes the consensus reached on various matters between HMCTS and the members of the Civil JEG and also that projects are being developed by these groups (eg paragraphs 4.22 and 6.2). These are not matters that should be fashioned behind closed doors by judges and the staff who service the courts. A more open and consultative process is required. The use of Case Officers could, for example, be a major departure from existing practice, potentially with constitutional implications, and deserves widespread debate. The Report amply demonstrates the need for this, and is to be welcomed in that regard.

4. Subject to these general points, the Committee responds below to the Report. The Committee does not address all the issues raised in the Report but confines itself to those issues of concern to the Society's membership or which the Committee considers to be fundamental to the administration of justice in England and Wales.

The Online Court

5. The Committee recognises that an Online Court could bring huge benefits. The civil justice system is currently ill-suited to dealing with lower value claims, not least because of the complexity of law and civil procedure, and the resulting difficulty in keeping legal fees proportionate to the sums in dispute. An Online Court that worked in the way described in the Report would constitute a major step towards enhancing access to justice for individuals and small businesses, for whom securing justice can be difficult unless it is feasible for lawyers to act under a CFA or DBA or they are able to secure the pro bono help provided by lawyers and others through, for example, law centres.

6. The vision of the Online Court set out in the Report depends critically upon a computerised "triage" system that will enable litigants in person to produce a document setting out their claims in a manner that can be understood both by defendants and by the court (paragraph 6.8 of the Report). Without this system, litigants in person will remain in the same position that they are in now, and the Online Court will not succeed in its aims.

7. However, this triage system does not currently exist – it is one of the many elements of the Online Court that remains "undefined" (paragraph 6.6). The Committee has no expertise in software development, but it seems likely that it will be a major undertaking to write software that can, through tick boxes and other means, create a legally and factually coherent explanation of each of the vast number of claims (and counterclaims) that a litigant in person may have – from a car accident to a bank's wrongful debiting of an account, from building defects to shade from a neighbour's trees, from water damage from an upstairs flat to recovery of a tenant's deposit, from a faulty washing machine to a trip on the pavement, from software that doesn't meet the user's needs to missold financial products and so on. No indication is given in the Report (or in the Civil Justice Council's Online Dispute Resolution Advisory Group's paper entitled *Online Dispute Resolution*) as to how or when this system might be made available, even for the "relatively simple and modest disputes" referred to in paragraph 6.6 of the Report. The preparation of "commoditised online advice", even if confined to "basic legal principles" (paragraph 6.9), will also be a major undertaking.

8. After this initial triage system, further elements of the Online Court also remain undefined. For example, how is a defence document to be generated? What procedures will follow after that (documents, witnesses etc)? Where does the line lie between mediation being a "culturally normal part of the civil court process" and its being compulsory (and therefore incompatible with the European Convention on Human Rights: *Halsey v Milton Keynes General NHS Trust* [2004] 1 WLR 3002, at [9])? Will the procedure be purely documentary? What can Case Officers decide and what must they refer to a judge?

9. In view of these wide-ranging areas of uncertainty and ambiguity, the Committee considers that it is premature to seek to prescribe now what form the Online Court should take, including whether it should be part of the County Court or an independent court, whether its jurisdiction should be compulsory and the many other issues identified in paragraphs 6.16 and 12.25 of the Report. In order to decide these issues, it is necessary first to understand in significantly greater detail what the Online Court, including the systems it relies on, can do and how it will do it - indeed, whether it can do it at all.

10. Linked to this point, the court system (and, indeed, Government as a whole) has a chequered history in the implementation of large scale information technology projects, such as the Online Court. The Online Court and the systems on which it depends will require extensive testing and piloting to ensure that they are effective as well as genuinely useable by the layman (both non-lawyers and non-computer specialists). Indeed, in practice the

Online Court is likely to require one or more small scale pilots, followed (if the pilots are successful) by a limited initial roll-out, which could then be expanded, whether geographically and/or by subject matter, as confidence grew that the systems actually work and are able to handle the necessary volume of cases and that the staff involved have the requisite training and expertise to bring cases to a satisfactory conclusion.

11. Subject to these general reservations, the Committee has a number of more specific observations on the issues regarding the Online Court raised in the Report.

12. The Committee currently has no clear view on whether the Online Court should be an independent court or part of the County Court. In particular:

    (a) The Committee is opposed to the merger of the High Court and the County Court because merger would damage the international standing of the High Court. Some members of the Committee are concerned that the creation of the Online Court as an independent court could be used as a reason, or excuse, for that merger. Having two separate courts could also create confusion as to where claims should be commenced. If a claim in the Online Court goes to "trial", it will in any event be decided by a judge from the County Court.

    (b) Other members of the Committee see the benefits in the Online Court being culturally and otherwise distinct from the existing court structure, with different procedures and a different approach. Any teething difficulties may also have less of an impact on the existing courts.

13. The Committee has no objection in principle to the Online Court having jurisdiction up to £25,000 (though it may be that the figure should be lower until practice shows that the Online Court is truly effective and provides an acceptable standard of justice). Similarly, the Committee has no fundamental objection to the Online Court having exclusive jurisdiction for claims within its remit (though claims currently handled by the Bulk Centre in Northampton should, perhaps, be excluded rather than the Online Court's systems containing "bypasses" (paragraph 6.8)). The types of claim that could be included within the Online Court may be dictated by the capabilities of the triage software rather than whether a claim is for a debt or damages. It seems unlikely that the software will – at least initially – enable litigants to produce through digital interrogation satisfactory particulars of every kind of claim. The Online Court might, therefore, need to start with the types of claim that are currently most common in the small claims and the fast tracks, and then expand its horizons over time.

14. If the Online Court is intended primarily for litigants in person, it may be logical to confine costs shifting to court fees. However, even for litigants in person, whether individuals or businesses, the cost of the time that will be required to conduct litigation should not be underestimated, whether that cost is financial or otherwise. There should be a means in appropriate cases to compensate litigants for the cost of their time, as is currently the case under CPR 46.5 for litigants in person.

15. This leads on to issues that could arise if the Online Court is too successful (though this could also be left over for consideration until and if that event occurs). If the Online Court becomes seen as an easy way of extracting money for losses perceived to be the fault of someone else, litigation could become the first resort rather than the last, and the volume of litigation in England and Wales could mushroom. This could have a deleterious effect on business and on other relationships. Perhaps there should be a lower limit on the value of claims as well as an upper limit, fees should be set at a level to deter the frivolous and/or successful defendants should receive a fixed allowance in lieu of costs.

16. The current court system is rightly open to the public, and it is important that an Online Court should, to the extent practicable, be similarly open and transparent. The "pleadings" in the Online Court should be available for public inspection as under CPR 5.4C, but any mediation should be confidential. Practicality may make it difficult for "hearings" that are not conducted in person to be open to the public, but these should probably be recorded, both to provide a proper record of what has happened and, ultimately, for public access if a suitable case can be made out.

17. Access to justice cannot depend entirely upon access to the internet. There must be support, whether at court buildings or elsewhere, to ensure that those without computer or internet access or who lack the language and other skills necessary can still use the Online Court. This support will have to continue throughout the life of a case.

Case Officers

18. The model for Case Officers set out in the Report is as follows: Case Officers will not be judges; Case Officers will not be doing judicial tasks which have been delegated to them by judges; Case Officers will be performing functions assigned to them; and litigants will be entitled to have any decision made by a Case Officer taken anew by a judge subject only to a "modest sanction" in the event of "misuse of [this] right" (paragraphs 7.2, 7.3 and 7.38).

19. The Committee is concerned that this model will not achieve its stated objective of pushing down work currently done by (expensive) judges to (cheaper) Case Officers. As the Report recognises (paragraph 7.38), it is likely that many - perhaps most – litigants (whether in person or acting through lawyers) will refer to a judge an adverse decision made by a Case Officer so that the decision can be taken again. It is harsh to characterise this as a "form of abuse"; rather, it will represent a natural tendency to want to have an unwelcome decision made by a "bureaucrat" reconsidered by a judge. The ability to refer a Case Officer's decision to a judge as of right may also be necessary in order to comply with article 6 of the European Convention on Human Rights. If referring decisions to a judge is the norm, the use of Case Officers will not achieve the aim of removing from judges even the "routine end of the case management spectrum". All that will happen is that decisions are taken twice, adding complexity, cost and delay to the system, and, indeed, questioning the utility of Case Officers.

20. In these circumstances, it may be necessary either to be more radical or to reconsider the need for and function of Case Officers.

21. The more radical approach would be to treat Case Officers as judges, with genuine authority of their own (subject to appropriate qualifications, training and appeals). Indeed, if Case Officers are performing what are properly judicial functions, they will be judges whatever title, status or recognition is afforded to them. A case management decision that makes substantive success impossible in practice (paragraph 7.10) is surely a judicial decision, whether it is characterised as administrative, procedural or substantive. Masters in the High Court once dealt largely with procedural issues designed to progress a case to trial before a more senior judge. A Case Officer could be a new form of Master performing a strictly defined and confined range of tasks designed to progress the case to trial before a District Judge. The implications of recognising Case Officers as judges would need careful consideration, including, for example, what is required to ensure their independence and that they provide a satisfactory quality of justice, as well as ensuring that procedures meet the requirements of natural justice.

22. If Case Officers are not treated as judges and do not carry out judicial functions, it casts doubt upon the need for a new cadre of staff within HMCTS called Case Officers. As the Report recognises, HMCTS staff already carry out extensive routine functions (paragraphs 7.1 and 7.4). This may, however, depend upon what exactly Case Officers are to do. If, for example, Case Officers do not exercise any real discretion (save, perhaps, over dates) or legal judgment but merely follow a prescribed procedure (eg if a defence is filed by a particular date, a standard timetable must be sent out; if no defence is filed by that date, default judgment is entered), then a Case Officer will not

be doing any more than court staff already do. The appropriate course may be to investigate the work that District Judges currently undertake, in particular by way of "box work", and to consider which of these tasks could properly be carried out by HMCTS staff, whether by delegation, under supervision or in their own right. Again, the status of Case Officers and what qualifications they should have cannot be determined until there is a clear definition of their role, which in turn may depend upon the procedures to be followed in the Online Court and in other courts. The devil is in the detail, as the Report recognises (paragraph 7.29).

23. The Report tentatively defines what Case Officers should do by reference to the value at stake in a case rather than to the task to be undertaken – whether a case is in, on the one hand, the Online Court or the fast track or, on the other, the multi-track (paragraphs 7.28 to 7.30). This may not offer a sufficient dividing line. The line between the fast track and the multi-track is principally based on the value of the claim. The fact that a claim is of low value (objectively, even if not subjectively to the parties) does not necessarily obviate the need for active and robust control in such a way as to bring the claim to a timely and just conclusion, without disproportionate costs. Indeed, lower value cases may need more robust case management than higher value cases, particularly if one or more of the parties is a litigant in person. As the Report notes at paragraph 7.31, this area calls for much more analysis, but there can also be no doubt that a decision in one area of HMCTS's reform programme will have an impact upon other areas.

24. Subject to these general points, the Committee has the following more specific points on some of the issues raised in Chapter 7 and paragraph 12.26 of the Report:

(a) The Committee agrees that Case Officers should conduct mediations, not early neutral evaluations. Any form of evaluation is both more time-consuming and also requires wide-ranging legal knowledge, which Case Officers may not have. If Case Officers expressed a view as to the likely outcome of a case, this could also potentially open the way for claims against HMCTS by litigants in person who relied on the Case Officer's evaluation in reaching, or not reaching, a settlement.

(b) A Case Officer who conducts a mediation should not otherwise be involved in the case. The principles behind the without prejudice rule apply as much to Case Officers and claims in an Online Court as elsewhere.

(c) The Report comments at paragraph 7.30 that there may be little scope for case management by Case Officers in the High Court. The

Committee considers that there is no scope for case management by Case Officers in the High Court.

Number of Courts and Deployment of Judges

25. The current structure of the High Court is neither coherent nor straightforward. The divisional structure of the civil courts is the product of history, with additional features added on an ad hoc basis to meet perceived needs at a particular time. So, for example, the Rolls Building contains the whole of one Division, various lists from another Division, and a total of nine distinct courts (Commercial Court, Financial List, TCC, Admiralty Court, Mercantile Court, Chancery Division, Bankruptcy and Companies Court, Patents Court and IPEC), some of which have overlapping jurisdictions but different rules, procedures and procedural guides. A claimant can often choose where to start its claim, whether within the Rolls Building or elsewhere, a decision that could even be influenced by whether the claimant would prefer a judge who is knowledgeable about the subject matter of the claim or one knows little about it.

26. Courts should be organised according to the nature of the disputes they determine so that they can provide a proper and efficient service to litigants. Courts should, at a minimum, offer expertise in the subject matter of a dispute and have rules appropriate for the resolution of that kind of dispute. Whether this means a single civil court, with specialist lists for different kinds of case, or a new business and property division ("the X Division"), with additional divisions for personal injury and other kinds of work, may not matter much. However, nothing should be done that could jeopardise the international standing of the High Court in general and the Commercial Court in particular.

27. The Committee recognises that reorganising the courts along coherent lines would require primary legislation. For this and other reasons, reorganisation may not be feasible, at least at this stage. It should, nevertheless, be possible to achieve greater coherence even without formal structural change. For example, a case in Financial List started in the Chancery Division now follows the procedures of the Commercial Court. This commonality of approach could usefully be applied to other areas too. A case in the Chancery Division that falls within the definition of "commercial claim" in CPR 58.1(2) should perhaps also follow the procedures of the Commercial Court or be transferred to the Commercial Court. The numerous inconsequential variations in practice between divisions, courts and lists, whether or not set out in the various guides, could also sensibly be harmonised in order to expunge differences that are not justified by reference to the subject matter of the claim. The move to a paper-free (at least, paper-reduced) environment,

with centralised back office processing, may facilitate - even necessitate - this kind of change.

28. The move to a paper-free environment may also, as the Report suggests, reduce the need for District Registries, with their replacement by hearing centres. This will, however, depend upon the establishment first of a system that allows for the online issue of claim forms and application notices, together with online filing of defences and other documents, backed up in both cases by the ability to act by post. Any such system will need robust testing and piloting before any irreversible changes are made.

29. The Committee notes the desire to increase the number of cases tried outside London. However, as the Report also observes, this will not be suitable for international cases, where the English courts face competition from other forums (eg paragraphs 1.19, 2.9 and 2.49 of the Report), particularly in view of the investment in, and prestige of, the Rolls Building. The location of trials and other hearings should, in any event, be demand led, not driven by administrative fiat.

Rights and Routes of Appeal

30. The Report notes that the pressure currently faced by the Court of Appeal is largely because of an increase in applications for permission to appeal rather than in substantive appeals. The Report comments that 70% of those whose applications for permission to appeal are refused on paper renew their applications at an oral hearing.

31. In order to consider in detail how to address the resulting pressure on judicial time, further statistics would be instructive, including:

    (a) what is the nature of the cases that give rise to applications for permission to appeal (eg immigration, judicial review, family, commercial, housing etc)?

    (b) what proportion of applications for permission to appeal are granted by the first instance judge?

    (c) what proportion of applications for permission to appeal are granted on paper?

    (d) what proportion of applications for permission to appeal that were refused on paper are then granted after an oral hearing?

    (e) what proportion of cases where the application for permission to appeal was refused on paper but then granted orally are ultimately successful?

(f) what proportion of applications for permission to appeal arise from interim decisions and what proportion from final decisions, and what proportion of each category are ultimately successful?

Statistics along these lines would help to identify where the problem really lies, and therefore what an appropriate solution or solutions might be.

32. The Committee is, however, opposed in principle to any removal of the right to renew orally an application for permission to appeal that has been refused on paper. Oral argument is a fundamental hallmark of the English court system, and the right to put a case in person should not be taken away without strong reasons. Perceived pressure on judicial resources is not a sufficient reason. Indeed, if the pressure arises from the necessity to determine applications both on paper and then orally, the better course might be to remove the paper stage, though the resource implications of this will depend upon what is shown by the statistics referred to above.

33. Nor does the Committee favour changing the test for granting permission to appeal. A "real prospect of success" is already a high threshold, and the test is even more stringent for second appeals. First instance judges do make mistakes (as do higher judges). Any judicial system must include a robust system aimed at correcting those mistakes. Appeals are not a luxury that can be dispensed with or obstructed for administrative convenience.

34. Subject to what is revealed by the statistics referred to above, it may be that the pressure on the Court of Appeal could be reduced by persuading first instance judges to take a more realistic approach to applications to appeal. The Committee's experience is that first instance judges tend to refuse permission to appeal as a matter of course, presumably because they consider that the Court of Appeal should decide what cases it hears (the Court of Appeal generally takes this same approach for appeals to the Supreme Court, but the position of the Supreme Court is clearly different). If first instance judges were encouraged to consider how hard they had found the decision and whether there was a realistic prospect that a different court could reach a different conclusion, it may reduce the number of applications to the Court of Appeal for permission to appeal (though, perhaps, with a risk that the number of substantive appeals would increase if first instance judges moved too far in the opposite direction).

35. An alternative, or additional, measure might be to go back to the system in force before the implementation of the recommendations of the Bowman Report, namely that permission should only be required for appeals from interim and certain other orders, with substantive appeals being available as of right.

36. The Committee has no objection to some appeals being determined by a panel of two Court of Appeal judges (dissenting judgments seem comparatively rare, but statistics may be helpful to confirm or otherwise that this is so) or by a panel of two Court of Appeal judges and one deputy (whether the deputy is a High Court judge or someone else).

37. There may also be room for the Court of Appeal to improve its procedures. So, for example, it might be more efficient if oral applications for permission to appeal were heard in a concentrated manner on a Friday, with no substantive hearings taking place on that day, as happens in some other courts. While the Committee supports the right to apply orally for permission to appeal, this does not mean that the length of hearings should not be controlled. For example, it may be that applications for permission to appeal should be limited to 45 minutes for any judgment of fewer than 30 pages, with a greater allowance for longer first instance judgments. This would depend upon judges having read the papers in advance.

38. There may also be advantage in encouraging first instance judges to be more succinct in their judgments and to start all judgments with a summary of the decision. Similarly, the Committee sees no objection to putting a reasonable time limit on oral submissions at substantive appeals. An open-ended hearing is merely a licence for the long-winded. The Court of Appeal requires skeleton arguments to be filed, which it is reasonable to expect judges to read and to discuss amongst themselves in advance of the hearing. Oral hearings should not be taken up with a recitation of what is already in a skeleton.

39. The Committee has also heard concerns expressed about the standard of administration within the Court of Appeal. For example, there are instances of documents and bundles being lost (sometimes more than once) and of hearings previously fixed being put off at the last minute without explanation. Problems of this sort impose unnecessary cost and delay on the parties, as well as diminishing the standing of the English courts in the eyes of litigants.

General

40. The Committee also has a number of general points. In particular:

    (a) The Committee would support an expansion in the ranks of judicial assistants to help judges. Whether this followed the US pattern of clerkships or took a different approach, judicial assistants could provide greater help to judges than is, perhaps, currently the case. The tradition in England is for judges to write their own judgments, which should remain the case, but judgments now routinely contain, for example, lengthy statements of the parties' submissions, and there is no reason

why a judge could not be helped by a judicial assistant in preparing those sections, as well as carrying out other tasks.

(b) The Committee supports the greater use of telephone hearings (for example, for case management conferences). Telephone hearings tend to be shorter, as well as not taking up court space and avoiding travelling time, than traditional hearings held in person.

(c) The Royal Courts of Justice Advice Bureau has extensive experience of dealing with litigants in person. The benefits of this experience, along with that of similar services, should be garnered by HMCTS when seeking to design the Online Court and when considering other court procedures and structures. For example, the RCJ Advice Bureau has, with, amongst others, Freshfields, created an online tool, called CourtNav (http://www.courtnav.org.uk/), to assist litigants in person to navigate their way through the court system.

26 February 2016

THE CITY OF LONDON LAW SOCIETY
Litigation Committee

Individuals and firms represented on this Committee are as follows:

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