CITY OF LONDON LAW SOCIETY
LITIGATION COMMITTEE

MINUTES OF MEETING

Date: 11 October 2016, at 4pm
Location: 4 Coleman Street, London EC2

Present:

Simon James (Chairman)	Clifford Chance LLP
Patrick Boylan	Simmons & Simmons LLP
Tom Coates	Lewis Silkin LLP
Tim Hardy	CMS Cameron McKenna LLP
Gary Milner-Moore	Herbert Smith Freehills LLP
Jonathan Isaacs (for Stefan Paciorek)	DWF LLP
Patrick Swain	Freshfields Bruckhaus Deringer LLP

In attendance: Kevin Hart (City of London Law Society)

Apologies: Jan-Jaap Baer, Duncan Black, Jonathan Cotton, Andrew Denny, Richard Dickman, Angela Dimsdale Gill, Geraldine Elliott, Gavin Foggo, Richard Foss, Iain Mackie, Michael Madden, Hardeep Nahal, and Kevin Perry.

Minutes of previous meeting

1. The minutes of the previous meeting, held on 14 June 2016, were approved.

Matters arising

2. The Chairman reported that Richard Dickman was the Committee's representative on the group set up by Gloster LJ following the judicial seminar on disclosure in April 2016. One meeting of the group had been held, and Richard was awaiting consent to distribute the minutes of that meeting to the Committee. Richard had indicated that the consensus at this meeting was that CPR 31 should be modernised, and that this was likely to require a complete re-write of CPR 31. Tom Coates, who is also a member of Gloster LJ's group, confirmed that the feeling within the group was that it was necessary to be radical. The menu approach to disclosure embodied in the Jackson reforms assumed co-operation between the parties or that an informed judicial decision as to the scope of disclosure could be taken at an early stage in the proceedings. These conditions were seldom present, which led to a tendency to default to standard disclosure and to treat any subsequent applications for specific disclosure as fishing expeditions.

3. The Chairman said that the Committee's response to the Civil Procedure Rules Committee's consultation on appeals to the Court of Appeal had been submitted. He noted that the Civil Procedure Rules had been amended with effect from 3 October 2016 to remove the right to renew orally a paper application to the Court of Appeal

for permission to appeal. The Civil Procedure Rule Committee had, however, not raised the test for granting permission to appeal to the Court of Appeal, which remained that the appeal must have a real prospect of success.

4. The Chairman said that the Society had submitted a lengthy response to the SRA on the SRA's proposed new Code of Conduct. The response had included the comments made by the Committee.

Modernising Judicial Terms and Conditions

5. The Committee considered the Ministry of Justice's consultation paper entitled *Modernising Judicial Terms and Conditions*, dated 15 September 2016. The Committee did not feel strongly about any of the proposals, but decided to respond in order to make the point that none of the proposals was likely to increase the number of applicants for judicial posts from solicitors at firms in the City of London. It remained difficult for solicitors in private practice to take these posts, not least because of the requirement to set aside blocks of time. Single days might be easier to fill. Greater publicity for posts in "junior" tribunals might also encourage more applicants.

Brexit and the English courts

6. Kevin Hart reported that shortly after the referendum of 23 June 2016, the Society had written to Oliver Letwin, then the Minister in charge of Brexit, saying that there were numerous experienced negotiators in City firms, and offering assistance. The Society had not received any response. The Society had recently received a request from the Ministry of Justice for the names of experts in the private international law aspects of specific areas (such as competition, employment law, consumer law and insurance law) to whom the Ministry could talk informally. The Society had responded with names, but had yet to receive any response or other acknowledgement. Patrick Boylan and Patrick Swain indicated that they would be happy to talk to the Ministry about the impact of Brexit on litigation.

7. The Committee discussed the draft paper circulated by the Chairman on the potential impact of Brexit on the English courts. The Committee agreed with the approach in the paper, namely that the UK should try in negotiations with the EU to retain as much of the current system of jurisdiction and the enforcement of judgments as possible. This was consistent with the approach being taken by other groups for as "soft" a Brexit in this area as was possible to achieve.

8. The Committee expressed some nervousness about putting the paper into the public domain. It was not necessarily helpful to express publicly concerns about, for example, the enforceability of English judgments post-Brexit. This might offer ammunition for jurisdictions seeking to secure dispute resolution work that had in the past come to England.

Transforming the Courts

9. The Chairman referred to the statement dated September 2016 issued by the Lord Chancellor, the Lord Chief Justice and the Senior President of Tribunals entitled *Transforming the Courts*. This reflected the work that HMCTS had been undertaking behind the scenes for some time and also, to a significant extent, Briggs LJ's *Civil*

Courts Structure Review: Final Report dated July 2016. The work was aimed at creating an online court and a new, highly simplified procedural code.

10. As the Chairman had previously reported by email, he had attended a meeting of the Civil Professional Engagement Group on 13 September 2016, along with representatives of the Law Society, the Bar Council and others, run by HMCTS and the Ministry of Justice. This revealed that the principal focus of HMCTS's work was on the Online Court for all claims up to £25,000 (not necessarily including the exemptions proposed by Briggs LJ), but any proposals could have implications for the kind of higher value claims with which the members of the Committee were more familiar. HMCTS was also proposing to establish a work stream entitled "RCJ Services", covering all cases in the Royal Courts of Justice and the Rolls Building, but this had not yet been advanced significantly.

11. After the meeting of the Civil Professional Engagement Group, the Chairman had received a list of questions or issues upon which HMCTS would be grateful for answers or information. The Committee considered these questions, while recognising that many of them were directed to lower value litigation of which the Committee had little experience. Observations on the issues raised by HMCTS included:

    (a) The Committee saw no particular difficulty with "unbundled" services per se. If a client now wanted advice on a limited basis (eg an initial view of the merits), solicitors were generally prepared to give that advice, subject of course to making it clear to the client the basis upon which advice was being given. As to the recoverability of costs for this kind of advice, then some system of fixed costs might be appropriate, whether as a percentage of the sums in dispute or a fixed sum (or a combination of the two).

    (b) With regard to decision trees, trying to create them for all possible types of civil claim was a vast undertaking. It would be sensible to start with the most common types of claim (not necessarily "airline claims"). It might be appropriate to approach someone who was prepared to invest in the project as a commercial project, somehow generating a return. It might also be useful for HMCTS to speak to firms that did vast numbers of small claims. If, as was typical, they used paralegals to carry out this work, they were likely to have operating procedures that could perhaps be adapted (though whether they would be prepared to share their operational knowhow was a different question). Seeking to produce both the equivalent of a "pleading" and a legal argument was probably too much at this stage. HMCTS needed to speak to those who provided existing online dispute resolution services and, ultimately, it was for those who advocated and promoted these systems actually to produce one that worked in practice.

    (c) Improving the response rate of defendants was not necessarily possible. If a defendant simply had not paid an indisputable credit card debt, there may be little point in a response.

    (d) Settlements occur late in the day because the door of the court concentrated the minds of the parties. Indeed, some defendants in particular considered that they would obtain better settlement terms later in the day than earlier. Bringing settlement forward would require incentives on the parties to settle

earlier, such as costs incentives (eg a rebate on fees, the need to pay additional fees or increased costs recovery), but it would be necessary to ensure that the incentives affected both claimants and defendants.

(e) Mediation and/or conciliation (in which, presumably, in contrast to mediation the conciliator expressed a view as to the merits) was useful, but it required someone to get to grips the case and the facts. This was likely to be expensive, and it would therefore be necessary to consider the costs and benefits of the process.

(f) Telephone and video conferences were now common, and there was no reason they could not be used by the court.

(g) Security of online systems was important, but so was public access to justice. The assumption should therefore be that, at the least, court documents that were currently available to the public should continue to be so in the online court.

12. The Chairman would send a response to HMCTS.

Any other business

13. The Chairman referred to the email he had received from Stephen Cromie, a former Chairman of the Committee and now in the Government Legal Service, looking for someone to assist Hildyard J as a judicial assistant in a long trial due to start next year. The Chairman encouraged members to circulate the email within their firms and to anyone who they thought might be interested.

14. The next meeting of the Committee will take place on a date to be fixed.