CITY OF LONDON LAW SOCIETY

LITIGATION COMMITTEE

MINUTES OF MEETING

Date: 4 April 2017, at 4pm
Location: Conference call

Present:

Simon James (Chairman)	Clifford Chance LLP
Duncan Black	Fieldfisher LLP
Patrick Boylan	Simmons & Simmons LLP
Karen Birch (for Andrew Denny)	Allen & Overy LLP
Richard Dickman	Pinsent Masons LLP
Angela Dimsdale Gill	Hogan Lovells LLP
Gavin Foggo	Fox Williams LLP
Tim Hardy	CMS Cameron McKenna LLP
Gary Milner-Moore	Herbert Smith Freehills LLP
Joshua Fineman (for Stefan Paciorek)	DWF LLP
Kevin Perry	Cooley (UK) LLP

Apologies: Jan-Jaap Baer, Jonathan Cotton, Geraldine Elliott, Richard Foss, Iain Mackie, Michael Madden, Hardeep Nahal, and Patrick Swain.

Minutes of previous meeting

1. The minutes of the previous meeting, held on 10 January 2017, were approved.

Matters arising

2. The Chairman noted that the Committee had decided at the last meeting to contact the Commercial Court regarding electronic filing at the Rolls Building, which is to be made compulsory. However, shortly after the last meeting, Gary Milner-Moore had circulated an email that Herbert Smith Freehills had received from the Rolls Building that had alleviated the concerns expressed at the meeting. No letter had, therefore, been sent to the Commercial Court.

3. The Committee's paper on fixed costs had been submitted to Lord Justice Jackson's review.

Disclosure

4. Richard Dickman reported that the committee, chaired by Lady Justice Gloster, set up following the judicial seminar on disclosure held in April 2016 at the instigation of the GC100 group, had met three times. The Committee had concluded that CPR Part 31 was not fit for purpose and should be replaced entirely. It had set up a smaller sub-

group to consider in greater detail how that should be done, which had led to the proposals, dated 27 February 2017, circulated to the Committee. Comments were being invited from various interested parties, including the Committee, on the proposals. In due course, there would also be a formal consultation and a pilot of whatever came out of that consultation.

5. The Committee decided to offer comments on the proposals. Comments made included:

(a) The Committee applauded the attempt to concentrate disclosure on the important issues, and recognized that producing alternatives to the current system that would work fairly and more cheaply was difficult. Disclosure was expensive, but it was one of the factors that led parties to litigate in England.

(b) Many of the concepts used were new and hard to apply (eg documents with a "direct relationship" with the Core Issues or of "probative value"), and could lead to satellite litigation. Requiring the parties to take difficult, potentially subjective, judgments as to whether a document was required to be disclosed would increase costs rather than reduce them (eg assessing whether a document was likely to be of probative value could not be left to a tier 1 reviewer).

(c) The proposals were likely to lead to more front-loading and, potentially, higher costs.

(d) Placing control over disclosure more in the hands of the judiciary, diminishing party autonomy, was not necessarily the appropriate route. Further, if the parties agreed on what disclosure was appropriate, whether in a dispute resolution clause in a contract or subsequently, it was not clear why the court should overrule their agreement, save perhaps in extreme cases.

(e) If a case went through a full pre-action protocol procedure, the parties were meant to provide significant documents at that stage. Basic disclosure might not be very different. Similarly, documents had to be produced at the outset in a Part 8 claim.

(f) A pilot limited to the courts in the Rolls Building would be a very wide pilot, perhaps too wide.

(g) The preparation of a list of Core Issues (in addition to the List of Issues required in the Commercial Court?) was bound to be contentious since the List would have important consequences. It risked increasing costs rather than reducing them. Experience showed that reforms which, for laudable reasons, added extra steps to litigation procedure tended to increase costs rather than reduce them.

(h) Generally, reducing the size of the data set would reduce the cost of disclosure. But if the reforms retained the same size of data set but added a subjective test for disclosure, the cost was likely to increase.

(i) The test for basic disclosure was unclear. Was it just documents mentioned in the pleadings or, if not, how much further did it go? Nor was it clear whether a party was obliged at the initial stage to produce all the documents upon which it might want to rely or whether it could produce more documents later. It could lead to more cost by requiring parties to consider what documents they wished to disclose initially and those they wished to hold back.

(j) If the process of disclosure was court driven, it was not clear why costs sanctions should be applied. If the court considered that particular disclosure was necessary for the fair resolution of the dispute, then prima facie the successful party should recover the costs of the disclosure involved. Nor was it obvious why the requesting party should pay up front in these circumstance. The discussion on costs in the proposals almost seemed to assume that the court would not apply the rules.

(k) It might be more cost effective overall to disclose a large number of documents produced by an electronic search without assessing whether each individual document was, for example, of significant probative value or there was a real likelihood of its having significant probative value (though the discloser might still need to consider privilege and redaction for irrelevant confidential issues mentioned in the documents). The recipient could then decide how much it wanted to spend on looking at the documents, applying its own electronic tools.

(l) The four enhanced disclosure models were complicated, leaning towards the menu approach that currently applied rather than simplifying the process. Models A and B could, perhaps, be combined. What documents would be "narrative or contextual" was obscure.

(m) There could, it seems, be different Models for different issues. Could there be different disclosure obligations for different parties?

(n) It could be that all lower value claims should have limited disclosure obligations. This might be rough and ready, but that might be necessary for litigation to be proportionate in cost.

Membership

6. The Chairman reported that Tom Coates had resigned from the Committee in view of his imminent retirement from Lewis Silkin. The Committee thanked Tom for his long and committed service on the Committee and for his valuable contribution to its work.

7. The Committee considered an application for membership of the Committee from Mark Lim. The Committee would be delighted to welcome mark as a member of the Committee.

Any other business

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