JUDICIARY OF
ENGLAND AND WALES

Chancery Modernisation Review: Final Report

by Lord Justice Briggs

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Chapter 1: Introduction

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1.1 The Chancery Modernisation Review was commissioned by the incoming Chancellor, Sir Terence Etherton, shortly after his appointment, in January 2013. Its terms of reference were as follows:

1. To review the current practices and procedures for the conduct of business in the Chancery Division of the High Court, taking into account the changes about to be implemented following the Jackson Report.

2. To consider whether the case management of business in the Chancery Division best serves the needs of court users and, if not, to make proposals for change.

3. To consider whether the current basis for the allocation of judicial resources for business in the Chancery Division makes best use of the available skills and experience of those exercising judicial functions there and, if not, to make proposals for change.

4. To consider the implications for business in the Chancery Division of the imminent reduction in the availability of Legal Aid, and to make recommendations designed to secure the best access to justice for self represented litigants.

5. To report within 12 months.

The Review Team

1.2 I am the judge in charge of the Review. When asked to take charge of it, I had been a chancery Judge for six and a half years, a chancery s.9 deputy Judge for five years before that, and a chancery advocate since 1979. From October 2011until April 2013 I was the chancery supervising Judge for the Northern and North Eastern Circuits, as Vice Chancellor of the County Palatine of Lancaster, responsible for the chancery regional trial centres in Manchester, Leeds, Liverpool and Newcastle. I was appointed to the Court of Appeal in April 2013 but have continued in charge of the Review thereafter.

1.3 I have been assisted in the Review, on a daily basis, by Newey J. He has been a chancery Judge since 2010, and was a chancery advocate for 26 years before that. Notwithstanding his full-time judicial responsibilities Guy Newey has been fully engaged in every aspect of the Review, reading all the materials submitted to and generated by it, and attending most of the many meetings. I am greatly indebted to him for his wise and balanced views on the whole of the subject matter of the review, and for his unremitting hard work in the process of research, discussion and appraisal of the issues.

1.4 I have also been very much assisted by the input, both in writing and at meetings, of the distinguished members of the Review's Advisory Panel. They have been chosen for their particular expertise and experience in relation to particular aspects of the subject matter of the Review. They have each given enthusiastically of their time and wisdom, and I am extremely grateful for their helpful advice. They are as follows:

- Daniel Alexander QC
- Chief Registrar Baister
- Doug Bell
- Katie Bradford
- Tom Coates
- HH Judge Dight
- Tim Fancourt QC
- Lord Justice Floyd
- Robin Knowles QC
- Master Marsh
- HH Judge Pelling QC
- Tim Pollen
- Penelope Reed QC
- Mr Justice David Richards
- Chief Master Winegarten

1.5 Although the contribution of Guy Newey and the members of the Advisory Panel cannot be underestimated, this report is nonetheless mine, and I take sole and full responsibility for it. To the extent that it contains mistakes and errors, they are mine alone. To the extent that it may be of assistance, this report leans heavily upon, but does not in every respect follow, the invaluable advice and guidance which I have received both from Guy Newey and from the Advisory Panel.

Conduct of the Review to date

1.6 The Review was planned, in January, to include three stages of consultation, the first two preceding, and the third following, the publication of a provisional report. The first, written, stage commenced in early February, by my writing individually to substantially the whole of the currently practising Chancery Bar, and to a large number of solicitors engaged in chancery litigation, as well as to accountancy firms with an active presence in insolvency litigation. I also wrote to a large number of associations and groups which may loosely be described as stakeholders in the chancery litigation process.

1.7 My letters included (for the assistance of, but not to control, respondents) a questionnaire: see Annex 1. I also wrote to the serving chancery Judges, Masters, Registrars, District Judges and to former chancery Judges now serving in the Court of Appeal and the Supreme Court.

1.8 The initial consultation sought written responses by the end of March (but unfortunately without stating that time was of the essence).

1.9 From start to finish, feedback has been requested on a basis which permits respondents to avail themselves of a broadly Chatham House level of confidentiality. I consider that this has been a major encouragement to the provision of frank, unvarnished feedback about the strengths and weaknesses of chancery practice and procedure, and that the benefit thereby gained has substantially outweighed the cost in terms of reduced transparency. Rather than distinguish between those who have contributed their feedback on an open or confidential basis, I have decided not personally to identify the providers of any of the feedback which I have referred to in this report.

1.10 In the event, I received about 140 written responses by the end of March, and a further 40-odd between then and July. Some of those responses have been from individual practitioners. Many have been the product of internal discussion within sets of barristers' chambers and the litigation departments of solicitors' firms, and also within stakeholder groups and associations. It is evident to me that a very large amount of hard work and careful thought by a large number of people went into the provision of those written responses, for all of which I am extremely grateful.

1.11 Beginning in April, I convened and attended over 30 meetings with stakeholder groups and associations, including meetings in five of the seven High Court Chancery regional trial centres (Birmingham, Bristol, Leeds, Liverpool and Manchester). I have also held meetings, collectively and, to a lesser extent, on a one-to-one basis, with all the chancery Judges, Masters, Registrars and District Judges in London and in those five trial centres. Again, those meetings involved a substantial devotion of time and effort to this Review by those attending them, for all of which I am, again, most grateful.

1.12 The purpose of those meetings was both to obtain further feedback about the subject matter of the Review, beyond that already obtained in writing, and also to discuss the issues about chancery practice and procedure which had emerged from a reading of the earlier written responses.

Statistics

1.13 Guy Newey and I took the view at an early stage that a proper understanding of the current workload of the Chancery Division, and the effect of its distribution among the chancery judiciary, required something better than a merely anecdotal understanding, gained from discussion and written feedback. Accordingly, we devised a series of statistical forms designed to be used on a daily basis by the chancery judiciary, in London and in two chosen regional trial centres, namely Manchester and Leeds, so as to build, over the three month period March to May 2013, as detailed a picture of the content of hearings and box work undertaken by the chancery judiciary as we felt reasonably possible.

1.14 This task placed a significant burden on the chancery judiciary requested to assist by filling in these forms, and upon the small group of assistants who together uploaded the end-product onto spreadsheets. For all of that I both apologise and am most grateful. I would like to pay particular tribute to Hannah Kennedy of DLA Piper for her skilled hard work on the creation and then interrogation of a comprehensive spreadsheet containing all the assembled information. The result was to create what I believe to be a wholly unprecedented snapshot, over a three month period, depicting the day-to-day detailed work of the Chancery Division, both in and outside London, against which to test anecdotal evidence received during the consultation process, and our own perceptions gained over years of chancery judicial practice. To this material we added the limited statistical material routinely prepared and made available about the chancery workload in London and in the main regional trial centres. The summaries appear in Annex 2.

1.15 The picture presented by the statistical material needs to be approached with some caution, for a number of reasons. First, a three month period is too short to serve as an altogether reliable guide about the chancery workload generally. It was, unfortunately, the longest period reasonably available to us for intensive scrutiny, if any of its results were to be available in time for this provisional report. A longer period would also have placed an undue burden of form-filling upon the judges.

1.16 Secondly, the three-month statistics do not purport to provide a complete description of the entirety of the workload. This is because we considered it unreasonable to impose form-filling upon the chancery judiciary in respect of hearings or box work taking less than five minutes per item. There is a great deal of such work, in particular in the Bankruptcy and Companies Courts. Thirdly, even within the parameters laid down, pressure of work meant that, occasionally, forms were not filled in as requested. Fourthly, the statistical exercise was, as I have said, limited outside London to two regional trial centres, rather than extended to all of them. They were the two main centres within my purview as supervising chancery Judge for the Northern and North Eastern Circuits where (with Judge Pelling's and Judge Kaye's assistance) I considered it reasonable and practicable to mount a statistical exercise.

1.17 Fifthly, we acceded to a reasonable request that the permanent record of this statistical exercise should anonymise the members of the judiciary involved in its preparation, and in the discharge of the workload which it describes. The exercise was in

no sense designed to be a form of 'spy in the cab' about individual judicial productivity or working patterns, and has not been used for that purpose.

Wider inquiry

1.18 Encouraged by the recent co-habitation of the Chancery Division, the Commercial Court and the Technology and Construction Court ("TCC") under one roof in the new Rolls Building, it has been my object from the outset of this Review to look, as it were, sideways at those and other courts and tribunals exercising a similar jurisdiction to that of the Chancery Division, to see what can usefully be learned about how others carry out similar or related work. Indeed, an important section of the questionnaire which launched the process of consultation requested a comparative review of the efficiency and cost-effectiveness of the Chancery Division, as against other courts and tribunals, and this yielded a large and valuable amount of comparative assessment by contributors.

1.19 In addition, we have conducted our own researches and enquiries as to the comparable work of the Commercial Court, the TCC, the Mercantile Courts, the Patents County Court and the Central London County Court. We have also briefly reviewed some of the practices and procedures deployed by arbitrators and, but only to a limited extent, some foreign courts, including the USA and Singapore.

1.20 Our research into the work carried out in the main regional chancery trial centres, and in particular our consultation with the District Judges there (none of whom do exclusively chancery work) has also enabled us to benefit from an understanding of certain related practices, for example, in the Family Courts which, as will appear below, has been of substantial value.

Advice

1.21 In addition to the frequent occasions upon which I have sought and received the advice and comment of individual members of the Advisory Panel throughout the progress of the Review to date, I explained and sought their collective advice upon an outline of the views later expressed in the provisional report at a meeting of the Advisory Panel on 8 July and again, upon a draft of the final report, on 22 November. As I have already made clear, it is not to be assumed that the contents of this report accords entirely with the advice which I have received, invaluable though their contribution has been. The Advisory Panel bear neither collective nor individual responsibility for any parts of this report, and nor does Guy Newey.

Provisional report

1.22 I delivered to the Chancellor, and published, a provisional report at the end of July. Its purpose was to make public the provisional views which I had formed thus far in my conduct of this Review, about the matters identified in the Terms of Reference. It was, like

any judicial view about the merits of a case while it is being heard, provisional in every sense. No element of my views was, as yet, set in stone, and I was anxious to receive, and determined to take fully into account, further written feedback from the whole of the chancery stakeholder community, about matters described as facts about the Division as it is, about my perception of the Division's current strengths and weaknesses, and about all my proposed recommendations. The provisional report contained express requests for further feedback throughout it, and a summary of them may be found in at Annex 7. But it was not in any way intended to constrain feedback about anything contained in this report and it did not indeed do so.

Further consultation and feedback

1.23 The relatively tight timeframe for the completion of this Review, coupled with the time of year at which the provisional report was published, unfortunately made it impracticable to receive substantial further feedback orally, rather than in writing. Written feedback was sought by no later than the end of October 2013, time on this occasion being strictly of the essence, in order to enable the final report to be completed by Christmas. I am most grateful to the many contributors of further feedback that it was almost all delivered on time.

1.24 As previously, the further feedback was sought on a Chatham House basis, so that I shall not identify particular contributors when referring to it. Nonetheless I shall where relevant try and reflect the gist of the feedback as I go along. I received perceptive and helpful comment from a wide range of judges, from professional associations (representing both the Bar and solicitors), from leading firms with chancery and commercial litigation experience and, (but to a lesser extent than before), from individuals. It is evident that a great deal of collective thought and discussion went into the preparation of the written responses, and the collective basis upon which most of it was prepared undoubtedly added to its weight. When aggregated with the two stages of consultation which preceded the publication of the provisional report, I am satisfied that I have now received a reliable guide as to the views of the whole of the judicial and court user communities about the strengths and weaknesses of the Chancery Division, and about the recommendations made in this report.

Final report

1.25 This is my final report. It will appear to readers of the provisional report as, in substance, a second edition of it, rather than as a wholly new document. I have taken this course for two main reasons. The first is that I hope that having a single document expressing the whole of the outcome of the Review will be more convenient in the future than having to gather it from two, as has been necessary in the case of recent judge-led procedural reviews. The second reason is that, subject to one exception, the further feedback following July has not caused me to make substantial changes to the conclusions and recommendations in the provisional report. This is not because I have chosen to ignore it, but rather because the feedback has, taken as a whole, been broadly supportive of those conclusions and recommendations.

1.26 There are nonetheless many respects in which this final report differs in detail from its predecessor, in particular because the feedback has enabled me to make considerable further progress on matters about which I remained uncertain in July. It also contains a detailed re-consideration of the merits of fixed ended and rationed trials, in the light of the serious concerns expressed by some judicial consultees. This is the exception referred to in the previous paragraph. I fear therefore that diligent students of the provisional report will not be able to avoid the further task of reading the final report, merely because it takes the form of what looks like a second edition.

Glossary

1.27 This report is written mainly for those with a reasonable familiarity with the jargon of civil proceedings in England and Wales. Particular difficulty arises in the concise description of the varying categories of chancery judiciary. Where I refer to judges and judiciary using a small 'j', I intend to refer collectively to all categories, including High Court judges, Circuit Judges, Masters, Registrars and District Judges, together with their salaried and fee-paid deputies. Where I refer to Judges using a capital 'J', I intend to refer to High Court and s.9 Judges only. By s. 9 Judges I mean all those with authority under s. 9 of the Senior Courts Act 1981 to sit in the Chancery Division, including both salaried Judges and part time fee-paid deputies.

1.28 I will try to explain my use of other jargon and abbreviations as I go along.

Overview – Where we are now

1.29 It is convenient to begin with a potted description of the Chancery Division and its workload, as it now is. A fuller description of it will be found in the January 2013 edition of the Chancery Guide. I will have to examine specific parts of it in much more detail in due course, but it is essential to understand and keep in mind the nature and workload of the Division as a whole when considering the modification of any part of it. It is also useful to have in mind the recent history of the Division, from the time of its last major review in 1981. This chapter will conclude with a short overall analysis.

Courts and Judiciary

1.30 The Chancery Division is centred at the Rolls Building in London. Typically 16 to 18 Judges will be sitting there in court every day. About 3 will be s.9 deputies, filling in for those of the 18 full-time chancery High Court Judges who are away, whether on circuit, taking compensatory leave, sitting in the Competition Appeals Tribunal ("CAT"), as additional judges of the Court of Appeal Civil Division, in the Administrative Court, or judgment writing.

1.31 This contrasts with 8 courts a day in the Commercial Court and 3 in the TCC. Thus, although the number of full-time commercial Judges is only two less than the 18 chancery

full-time Judges, their availability for Commercial Court work is very much less, due mainly to their large parallel commitment to sitting in the Crown Court, on circuit and in the Court of Appeal Criminal Division. In addition, the Chancery Division in the Rolls Building will typically have 6 Masters sitting each day, and 5 Registrars. These numbers are equivalent to the full time complement of chancery Masters and Bankruptcy Registrars and gaps in their availability due to holidays and any illness or other absences are filled by deputies. Thus the workload of the Chancery Division in London is typically discharged in no less than 27 to 29 courts every day, which is slightly less than 75% of the available court rooms in the Rolls Building.

1.32 Outside London there are chancery trial centres in Birmingham, Bristol, Cardiff, Leeds, Liverpool, Manchester and Newcastle. In all of those, case management and some lower value trials are conducted by teams of District Judges who do chancery work for part of their time (about 25% on average and rarely more than 50%). All those centres except Liverpool and Newcastle have resident chancery ticketed s.9 Circuit Judges who do most of the High Court trials, with occasional assistance from the two chancery supervising High Court Judges. The s.9 Judicial teams in Manchester and Leeds serve Liverpool and Newcastle respectively as required.

1.33 There is, in addition, a large measure of cross-ticketing in each of the regional chancery trial centres, between chancery, mercantile and TCC s.9 Judges. This enables peaks in the workload of each specialist civil jurisdiction to be accommodated by the occasional use of s.9 Judges from the other two jurisdictions. In Manchester, the most recent s.9 Senior Circuit Judge appointed has a 50/50 allocation of chancery and mercantile work. In Leeds the specialist civil jurisdictions are administered under a shared list, but with each group of specialist Judges being assigned primarily to work within their specialist field.

Relations between different courts

1.34 The move to the Rolls Building means that the Chancery Division in London is now located under the same roof as the Commercial Court, the TCC, the London Mercantile Court and the Patents County Court (now the Intellectual Property Enterprise Court, or "IPEC"). There is nonetheless no merger of the operations of any of those courts, nor any sharing of judicial resources between the Chancery Division, the Commercial Court or the TCC. The Masters and Registrars occupy separate working space, with separate hearing rooms, from the chancery Judges, although the latter use offices (including open plan clerking facilities) together with their commercial and TCC colleagues on the 4th and 5th floors. Similarly, the chancery, commercial and TCC back-office staff share open plan office accommodation on the ground floor, but work in separate teams, in separate parts of that area.

1.35 The links which the Chancery Division in London has with other courts may be summarised as follows. First, a significant amount of general chancery business is transferred to the Central London County Court, where it forms the largest part of the trial workload for the two chancery specialist Circuit Judges at that court. Secondly, as the

result of the move of the Chancery Division to the Rolls Building, a slice of the Division's bankruptcy work (namely creditors' petitions up to £50,000 and debtors' petitions up to £100,000) was transferred to a newly formed section of the Central London County Court in the Thomas More Building. But this transfer of work does not at present involve a significant element of co-operation between the two courts, each being solely responsible for its share of the bankruptcy workload.

1.36 Thirdly, two chancery Judges spend approximately half their sitting time acting as chancery supervising Judges in the regions. One judge, the Vice Chancellor of the County Palatine of Lancaster, supervises the Northern and North Eastern Circuits, sitting at Manchester and Liverpool (in the Northern Circuit) and Leeds and Newcastle (in the North Eastern Circuit). The other supervises the Midlands, Western and Wales Circuits sitting at Birmingham, Bristol and Cardiff. None of those sittings involves the supervising Judge being present at a single trial centre for longer than two weeks at a time. They are available for important, but short, chancery cases and, to the extent available, otherwise assist in the discharge of routine chancery and occasionally mercantile, TCC and even county court work in those trial centres.

1.37 The Chancellor is the supervising judge for the South Eastern Circuit. This involves no separate sitting commitment, but is an administrative and leadership role which includes supervision of the chancery work of the Central London County Court.

1.38 The chancery s.9 Judges in the regional trial centres also sit regularly as Deputy Judges in the Rolls Building, as do the chancery s.9 Circuit Judges based in the Central London County Court.

1.39 Finally, chancery Judges based in London are occasionally sent to conduct high profile trials in the regional trial centres, which are estimated to last longer than the two week maximum sitting time of the supervising Judges. This arrangement serves the important principle, welcomed by consultees, that no chancery case is too big to be conducted in a regional trial centre.

Chancery Business – The Workload

1.40 The Chancery Division undertakes a uniquely varied workload, the only common feature of which may fairly be described as its complexity. In the "Unlocking Disputes" guide to the Rolls Building, the work of the division was summarised as follows:

1. Asset recovery.

2. Business contract disputes.

3. Reconstruction of companies (as well as Limited Liability Partnerships and other investment vehicles).

4. Patents and Intellectual Property (including confidential information, copyright, trademarks and passing off).

5. Financial services, security, banking (including charges and guarantees).

6. Insolvency and restructuring (including administrations, liquidations and bankruptcies).

7. Competition Law.

8. Pensions.

9. Professional liability.

10. Commercial and domestic property disputes.

11. Fraud.

12. Succession and the administration of estates (including Wills, Probate and claims under the Inheritance Act).

13. Trusts.

1.41 Chancery Judges undertake a substantial amount of appellate work, both within the formal confines of the Chancery Division, and elsewhere. As chancery Judges they hear appeals from Masters, Registrars, District Judges, and also from decisions on interim chancery matters in the County Court. They sit as judges of the Competition Appeal Tribunal, and as judges of the Upper Tribunal, dealing with taxation, financial services, pensions regulation, land registration and charities.

1.42 For all those matters other than the Competition Appeal Tribunal, the chancery Judges use the courts and listing facilities of the Rolls Building so that, even when sitting as Upper Tribunal judges, the work is in practice (albeit not in form) part of the workload of the Chancery Division. Nonetheless, my terms of reference do not extend either to the Competition Appeal Tribunal or to the practice and procedure of the Upper Tribunal. The relevance of the work of the chancery Judges in those Tribunals to this Review is only that it forms a significant part of the typical workload of the chancery Judge, in terms of experience, expertise and time. The rules, practices and procedures of those tribunals have to be added to those of the Chancery Division itself, as part of the procedural regime with which all chancery Judges are expected to be reasonably familiar.

1.43 The best label for describing the chancery workload as a whole is probably 'Business and Property'. In 1981 Lord Oliver had no difficulty in labelling it simply 'Property'. The need to change that label reflects the extraordinary development of the chancery

workload during the last 30 years. The amount and value at risk of the work has grown exponentially, so that much of it now consists of the very largest and most complex business and corporate disputes, frequently with an international element. It is common for the value at risk in a single case to run to many millions, and occasionally even billions of pounds. For my purposes, I have found it convenient to categorise the chancery workload under the following four broad headings:

1. Business and Commercial.

2. Intellectual Property.

3. Company and Insolvency.

4. Individual Property

1.44 There is no simple segmentation of the chancery workload which is objectively correct for all purposes. There will inevitably be types of work, and many particular cases, which straddle whatever segmental boundaries are chosen. Nevertheless I have chosen these four because they best illustrate the differing requirements of the Chancery Division's diverse court users. To some extent (particularly in relation to company, insolvency and patents) they reflect the engagement of different judiciary, practices and procedures. They help focus the analysis of the desirability or otherwise of the adoption of ticketing and special procedures for particular areas of chancery work. They also reflect clear differences in feedback from the chancery stakeholder community in terms of their perceptions about the strengths and weaknesses of the Division's practices and procedures as they currently are, and about what might be done to improve them.

1.45 In later chapters I will focus in some detail upon each of these areas of chancery work. Subject to one caveat, I will devote the rest of this chapter to an overview of those aspects of the practices and procedure of the Division which are common to all, or at least most, of its work. The caveat is that the separate rules and (at the Registrar level in the London judiciary) practices affecting the company and insolvency work mean that many of the generalisations which follow do not apply to that segment, which has strengths and weaknesses of its own. As will appear, this is less true of the regional chancery trial centres, where the District Judges perform the functions carried out in London by both Masters and Registrars. In the same way, the patent and registered design litigation conducted in the Patents Court has its own distinct rules and, because all case management is by ticketed judges, distinct practices. Nonetheless the remainder of the intellectual property business (e.g. trade marks, copyright and passing off) is undertaken in much the same way as the rest of the chancery workload, under the broadly uniform regime established by the CPR and the Chancery Guide.

Distinguishing Features of Chancery Practice

1.46 The single feature which most clearly sets chancery practice apart from that of the Commercial Court, TCC and Mercantile Courts is that most case management is done by the specialist case management teams of Masters, District Judges and (to a lesser extent) Registrars, whereas in those other courts all case management is done by Judges. The chancery practice is how most case management has been done in all Divisions of the High Court for well over a century, but it now sharply distinguishes the Chancery Division (both in and outside London) from the other, much smaller, specialist civil jurisdictions. I shall have much more to say about the pros and cons of this system of case management in due course, compared with docketing and case management by Judges. The question whether and if so how far to move away from case management by Masters, Registrars and District Judges is one of the single biggest issues which has arisen on this Review

1.47 For present purposes, the principal advantages of the current practice may be summarised as follows. First and foremost, it frees up and reserves Judicial time for trials and the determination of substantive rather than procedural applications, thereby maximising the workload undertaken by the Division. Secondly, it enables most chancery cases to be managed by docketing (by allocation to individual Masters), but only prior to the trial. Thirdly, it preserves the maximum flexibility in the Listing Office, for the purpose of the allocation of Judges to trials and substantive applications, by comparison with a system in which, from the outset, Judges are pre-booked to hear cases many months ahead of the chosen trial date.

1.48 The main disadvantages of this case management system are as follows. First, it reposes case management in the hands of judges who do not (in London at least) have significant trial experience of their own. In short, they manage that which they do not try. Secondly, it substantially (but not completely) rules out full docketing, that is management and trial of a case by the same judge. Thirdly it entrusts to judges without significant trial experience the determination of strike-out and summary judgment issues, leading to what many perceive to be a relative lack of rigour in the application of those cost-saving techniques, by comparison with the placing of that jurisdiction in the hands of Judges with trial experience.

1.49 Fourthly, the cessation of docketing in advance of trial deprives the trial Judge of the advantages of the docketing process carried out until then, all the more so because of the absence of any meaningful communication, either in writing or orally, between the docketing Master and the trial Judge.

Specialisation

1.50 Many of the specialist areas of work undertaken by the Chancery Division are, for practitioners in those areas, exclusive fields of practice. This is true now to a very much greater extent than it was 30 years ago when, at least at the Chancery Bar, a practitioner might be expected to advise and appear in court across the whole range of chancery work. To a large extent this increase in areas of exclusive specialisation has been the result

of the ever-increasing complexity of the law. But it also reflects a changing perception among the users of, and commentators upon, professional legal services that specialist skill and experience is, almost by definition, a good thing in its own right.

1.51 At present, the following areas may fairly be described as giving rise to exclusive or near exclusive specialisms among practitioners: Civil Fraud, Company, Competition, Financial Services and Regulation, Insolvency (including Bankruptcy), Intellectual Property, Partnership, Pensions, Professional Negligence, Tax and Trusts. There are practitioners' associations for at least 8 of those specialisations, and others for specialisations which I have not included such as property litigators and contentious probate practitioners.

1.52 With two important exceptions, the Chancery Division has at the level of its judiciary and court staff, and in terms of its procedures and practices, resisted dividing itself into exclusive or near-exclusive units, even though certain specialist areas of work have from time to time been hived off into the tribunal system, such as Tax, Charities, Land Registration and part of Competition. For the most part, these hive-offs have occurred at the appellate rather than first instance level, where the work previously assigned to the Chancery Division consisted entirely of hearing appeals. The hive-offs have given rise to separate administrative staff, practices and procedures, but all chancery Judges remain available as members of the relevant tribunals for the continued discharge of those types of work.

1.53 The two exceptions are Patents and Company/Insolvency. Patent cases are now both case managed and tried by 8 ticketed Judges in the Patents Court, with an optional recourse to the IPEC, formerly the Patents County Court, with its own specialist judge for low value cases, where advantage may be taken of a fast track procedure with limited costs shifting, and also of a small claims procedure. The original justification for making patents a ticketed specialist subject was probably the requirement in many (but not all) patent cases for special scientific expertise. Nonetheless, only a minority of the presently ticketed patent Judges have that expertise, or even substantial experience as patent practitioners while at the Bar. The only judge exclusive to patent work (as part of Intellectual Property) is the Judge in charge of the IPEC.

1.54 The High Court jurisdiction of the Patents Court is concerned only with patents and registered designs. The remainder of the intellectual property workload (including trade marks, copyright, passing off and confidential information) is undertaken by the Chancery Division as a whole, on a non-specialist basis, save that one Master is specifically assigned to the case management of trade mark cases.

1.55 Since its reform in 2005 the Patents County Court had, and still has, a broader jurisdiction which includes trade marks and copyright, and extends to intellectual property generally. It has just been re-named the Intellectual Property Enterprise Court, and is now part of the Chancery Division.

1.56 The company and insolvency (including bankruptcy) work of the Chancery Division is assigned exclusively to the Companies Court (which deals with company and corporate insolvency matters) and to the Bankruptcy Court (which deals only with personal

bankruptcy). Although having those two separate names, it is in reality one court, served by the same team of 5 specialist Registrars (and their deputies), and by the same support staff. Insolvency matters, both corporate and personal, are governed by the same set of separate rules (namely the Insolvency Rules) and similar practices. Administratively, the Registrars and supporting staff use separate IT, separate filing, separate accommodation and, in almost all respects, conduct themselves as a separate and distinct exclusive court, for the specialist work which they undertake.

1.57 Work requiring the attention of a Judge (rather than a Registrar) is nonetheless assigned to the generality of the chancery Judges and deputies, with neither ticketing nor special experience required. Furthermore, once a company or insolvency case is transferred to be heard by a Judge it falls within the general listing jurisdiction of the chancery Listing Office.

1.58 In the regional trial centres there is no corresponding specialisation in practice, although the Insolvency Rules govern the procedure just as in London. Chancery District Judges deal with all company and insolvency matters as part of their chancery workload. The extent to which insolvency matters are dealt with by separate staff varies from region to region. Until very recently, bankruptcy and corporate insolvency work was regarded, outside London, as not even meriting description as a chancery specialisation, and was commonly assigned among all available District Judges prepared to undertake the work. This in part reflected the fact that, outside London, bankruptcy and insolvency jurisdiction was (and still is) given to many county courts whereas, until recently, that jurisdiction was concentrated in London upon the Chancery Division of the High Court.

1.59 A major issue arising in this review is whether the very limited and entirely London-based specialisation which I have described strikes the right balance between two main competing imperatives. One is that flexibility and productivity are best achieved by avoiding internal divisions and barriers, a major reform achieved pursuant to the Oliver Report in the 1980s. The other is that in a world of increasingly complex law, consistency and the saving of time in individual specialist cases may better be achieved by assigning experienced specialist judges to do the work. The gist of the debate may be gathered from the description of greater sub-division by its proponents as specialisation, and by its opponents as balkanisation.

Information Technology ("IT")

1.60 An unfortunate feature of the Chancery Division, particularly in London, is that it is the most poorly served of any court or tribunal in the United Kingdom by IT. This is despite the fact that its workload is as technical and document-heavy as any other, if not indeed foremost in that respect. In relation to IT, the Chancery Division in London lags behind the Commercial Court and the TCC, and also behind the Chancery Division's operation in most of the regional trial centres. All filing is currently physical rather than electronic. There are in London no individual judges' diaries, still less software upon which they could satisfactorily be constructed.

1.61 In chapter 43 of his final Report, headed Information Technology, Jackson LJ said this: (at page 434):

> *"An effective 'Information Technology' system in the Courts is essential to proper case management. The courts need up to date IT in order (a) to process cases and (b) to communicate effectively with the outside world.*
>
> *Lord Woolf's recommendations: In proposing an active case management role for the courts, Lord Woolf emphasised the importance of introducing effective IT systems: see chapter 13 of his interim report and chapter 21 of his final report.*
>
> *13 years have now elapsed since Lord Woolf published his final report. 10 years have elapsed since the introduction of the Civil Procedure Rules (the "CPR"). The courts still do not have an IT system which is adequate to the delivery of civil justice at proportionate cost. Instead we have a patchwork quilt of different IT systems which have evolved without proper co-ordination.*
>
> *The IT systems currently existing within our civil courts compare unfavourably with those existing overseas."*
>
> *Jackson LJ went on at page 436 to describe the seven essential features of an IT system fit for purpose in the civil courts, none of which are presently available within the Chancery Division.*

1.62 The Jackson final report was published in December 2009. Four years have elapsed since then, and no progress at all has been achieved in relation to the provision of effective IT for the Chancery Division, at least in London. Meanwhile overseas courts with similar caseloads to that of the Chancery Division are gaining a competitive advantage from their development of IT.

1.63 I agree with Lord Woolf and Jackson LJ that full and effective modernisation and reform of practice and procedure is simply unachievable without the design, provision, installation and satisfactory proving of up to date and efficient IT along the lines outlined in the Jackson Final Report. I profess no sufficient expertise of my own in IT to be able to recommend particular solutions, nor is there any IT expertise on my advisory panel. IT is not, indeed, a specific part of my terms of reference, and I am aware that steps are under way to address this problem as a matter of urgency. I am nonetheless in no doubt at all that its almost complete non-availability to the judges and staff of the Chancery Division is likely to prove, for as long as it lasts, a very serious obstruction to modernisation. This view is widely shared by consultees. The recommendations which follow in this provisional report all assume that this state of affairs will be remedied before they are, or could be, fully and satisfactorily implemented.

Overall Analysis

1.64 The written responses to the consultation (both before and after July) displayed an almost universally high regard for the quality of chancery decision making. The appreciation related more to the determination of trials and substantial applications than

to case management but, even in that regard, there was widespread appreciation of the quality, consistency, economy and predictability of case management by the Masters, albeit some occasional concern that this was not always reflected in case management by District Judges in some regional trial centres. This is understandable, having regard to the fact that Masters are, but District Judges are not, full-time chancery case managers.

1.65 Furthermore, the appreciation for the quality of judicial decision making at trials and substantive applications was not confined to the full time High Court Judges. It extended to the s.9 senior Circuit Judges mainly discharging the chancery workload in the regional trial centres and, in particular, to the quality of the company and insolvency work of the Registrars, who are clearly regarded nationwide and resorted to as a national centre of excellence in relation to those matters, and who conduct trials to a significantly greater extent than do the Masters.

1.66 Subject to certain specific exceptions, there was also a widespread, almost uniform, level of acceptance (albeit sometimes less than enthusiastic) of waiting times for chancery trials and applications, both in and outside London. Waiting times in the regional trial centres are, for the most part, so short that they rarely exceed the time necessary for the relevant preparation. Waiting times in London are inevitably longer but still generally within the bounds, albeit at the outer edge, of the periods regarded as acceptable, although significantly longer than would be hoped for in an ideal world. There is at Annex 2 a summary of current London waiting times.

1.67 The achievement of these waiting periods, particularly in London, where the pressure of the workload is at its highest, is critically dependent upon the current flexibility of the system for chancery listing, which is based upon the offering of floating dates within windows rather than fixed dates, and upon the selection of Judges only a very short time before the commencement of trial. This flexibility, which is a cardinal feature of chancery practice, carries with it weaknesses to which I shall shortly refer. In short, it is bought at a high price.

1.68 These waiting periods also critically depend upon the ready availability of s.9 deputy Judges, deputy Masters and deputy Registrars. Deputy judges are of two main types. First there are the salaried full time Circuit Judges with s.9 chancery tickets, whose assistance to the discharge of the workload in the Rolls Building imposes no extra burden upon the taxpayer, but whose absence from their usual court leaves a gap in sitting time which has to be bridged by local listing. Their availability in London has to be pre-planned, so that they do not constitute an emergency reserve for unexpected peaks and troughs in the workload.

1.69 Secondly there are the fee-paid senior specialist chancery practitioners who (whether or not also Recorders) have to be paid for out of the deputy budget. They constitute both a vital specialist resource and a very useful emergency reserve, since they can on occasion be made available at much shorter notice than can the s.9 Circuit Judges. Although in one sense deputy budgets can be seen as obvious targets for cuts in hard financial times, the disproportionate effect of such cuts upon waiting times, and therefore upon the general efficiency of the Chancery Division, should not be underestimated.

1.70 Deputy Masters and Registrars are at present mainly of the fee-paid type, vitally needed to cover for the Masters and Registrars in holiday and other periods of absence. Again, there are increasingly serious budgetary constraints upon their availability.

1.71 The need for substantial assistance from deputies in maintaining waiting times is less true of the chancery regional trial centres, where the availability of early hearing dates is commonly the result of a lower (and in some areas reducing) workload. In addition, the arrangements for cross-ticketing between the specialist Chancery, Mercantile and TCC Circuit Judges in most of the main regional trial centres adds flexibility to meet peaks and troughs in the workload which is lacking in the Rolls Building as between the Chancery Division, the Commercial Court and the TCC. Finally the ability of the Chancery Division in London to supply High Court Judges to hear major cases in the regional trial centres is an added strength, albeit one which is, save in Manchester, currently little used.

1.72 There are two exceptions to this reasonably satisfactory picture in relation to waiting times. The first is that the current waiting time for a chancery trial of significant length, namely about 14 months from the obtaining of a date, which is as applicable to the Patents Court as any other part of the chancery workload, is longer than the time limit applicable to similar patent litigation, for example in Germany, in a competitive regime where litigants have a wide choice between several European jurisdictions.

1.73 The second exception consists of the unacceptably long waiting times for the obtaining of hearings (other than first or urgent hearings) before the Registrars. This is a specific problem dealt with in detail in chapter 11. It constitutes much the most serious matter of complaint about the work of the Bankruptcy and Companies Courts.

1.74 Next, the re-location of the whole of the Chancery Division in London within the brand new and purpose built Rolls Building has undoubtedly contributed to its efficiency and attractiveness as a business and property court. The courts themselves are now of a range of different sizes suitable for allocation to widely different types of case. Their acoustics, lighting and air conditioning are generally excellent, and there is for the first time a satisfactory provision of publicly available conference rooms within the building, together with wiring for paperless trials, albeit not the hardware, which still has to be provided by the parties. There is also a much better (but still not perfect) provision of video conferencing facilities for cases with an international element. Furthermore, the grouping of all the chancery Judges' rooms and staff on one and a half floors of the same relatively compact building enables co-operation and collegiality between them at a level not achievable within the previously unsatisfactory spread of facilities within the Royal Courts of Justice.

1.75 It must be acknowledged that the provision of court facilities for High Court chancery business in the regional trial centres is much more variable, the jewel in the crown clearly being the new Civil Justice Centre in Manchester.

1.76 There is wide praise for the flexibility, accessibility and general helpfulness of the chancery Listing Office, a deserved tribute to its staff and to the leadership of the current Listing Officer. Its qualities are achieved without IT, rules or standing orders, but it must

be recognised how dependent they are on the continued loyal service of its present staff, and how vulnerable to accident, ill health or retirement.

1.77 More generally, the Chancery Division has been widely described by consultees as an institution which is not in need of radical reform or improvement. There have been many proposals for change, but they do not either individually or in the aggregate come near to outweighing the generally high regard which the operations of the Chancery Division as a whole, in almost all its aspects, commands amongst its users. There was no hint at all of the old 'Bleak House' criticism of the Chancery Division in any of the voluminous feedback which I received.

1.78 Everything which follows in this report needs to be viewed and understood in that light. It is easy when conducting a review with terms of reference that encourage recommendations for change to lose sight of the fact that, because of the quality of the judiciary and staff, and the substantial flexibility of its practices, the Chancery Division provides a modern, efficient, productive and high quality dispute resolution service to a wide variety of litigants, large and small, rich and poor, over the whole of the range of specialist work which is either assigned to it exclusively, or which litigants choose to bring to it for resolution.

1.79 In the written responses to consultation, the only serious rival to the Chancery Division as a venue of choice was the Commercial Court. But it needs to be borne in mind that the Chancery Division undertakes a volume of business and property litigation which is several times larger and much more varied than that conducted by the Commercial Court. Furthermore the attraction of the Commercial Court in relation to large scale business disputes which could as easily be brought in either forum is not so great as to give rise to queues (and therefore waiting times) which are longer there than in the Chancery Division.

1.80 The most obvious way in which the Chancery Division could be improved is the provision of modern IT. The absence of it operates as a serious brake upon its efficiency and productivity, for example in the need to use physical files and obtain them from storage, and in the inability to operate individual Judges' diaries. The detail of the methods by which this deficiency may be remedied is outwith my competence or experience, and my terms of reference. It is being actively addressed by HMCTS as a high priority, and this is very welcome. I am advised that It is likely to take the best part of a year to implement.

1.81 A second important weakness is that the very flexibility which enables the Chancery Division in London at least to maintain acceptable waiting times and the requisite judicial productivity has, at least until now, militated against any significant increase either in docketing or case management by Judges, and even the early identification of trial Judges.

1.82 There are in fact a number of areas where the perceived overriding need for flexibility comes at a price which causes identifiable weaknesses. I will briefly enumerate a few of them, but the more detailed analysis of them and of the possible solutions to them is to be found in subsequent chapters.

1.83 First, the need to maximise judicial trial time (and thereby prevent waiting times extending beyond what is acceptable) means that neither pre-reading time nor judgment writing time is built into the timetable as a matter of course. The judges regard pre-reading as essential, but the consequence of it being unplanned (outside the IPEC) frequently means that a trial begins on the second rather than the first day of its window, or takes longer than it otherwise would. The Listing Office tries to accommodate judges' requests for judgment writing time where possible but, where other demands make that impossible, this inevitably impacts on the predictability and length of the time between hearing and Judgment. There has been an overwhelming recognition by consultees (by no means limited to the judiciary) that the current culture in which judges have to fit their judgment writing into spare time around their many commitments, and into time begged from the Listing Office, is no longer sustainable. Judgment writing is a (if not indeed the) central part of their work. Productivity in judgment writing is critically dependant upon having time at least to break the back of it very soon after the end of a trial or hearing. Delays in the timely delivery of reserved judgments caused by the unavailability of such time seriously detract from the quality of the service provided by the Chancery Division.

1.84 Secondly, maximum flexibility involves deferring the selection of trial Judges (including deputies) to the latest possible moment in the run up to trial. The cost of that degree of flexibility means, in particularly specialist areas, that the parties do not know, for example when preparing skeleton arguments, whether they will be allocated a Judge who is experienced in the relevant field, or a relative novice. Furthermore, late selection narrows the pool of specialist deputies who may be available to undertake the case.

1.85 The single aspect of chancery practice most frequently criticised in the written responses to the initial consultation was the drawing and sealing of chancery orders. Complaint was made as to the unacceptable delays involved and the absence of effective means of communication between solicitors and the Associates, exacerbated by them being located on the 5th floor of the Rolls Building, far away from the remainder of the chancery court staff. My own enquiries tended to confirm that these criticisms were, for the most part, well founded. As will appear from chapter 8, specifically devoted to this subject, I do not consider that the failings can fairly be laid at any particular person's door, least of all blamed upon the Associates themselves.

1.86 The move of the Chancery Division, lock stock and barrel, to the Rolls Building in late 2011 created a major opportunity for modernisation of its practice and procedure. The move of the whole of the chancery judiciary and staff under one roof in a modern purpose-built building, from its earlier distribution around various buildings on the RCJ site, represented a once in a lifetime opportunity to re-think the whole of the Division's activities.

1.87 It was sensibly recognised that to split the operations of the Chancery Division geographically, on separate sites with judges, staff and filing facilities in each, would be a recipe for disaster. That having been avoided, the concentration of the judges, staff and filing systems of the Chancery Division in London on one compact site created opportunities for improvement in efficiency and service, many of which have still to be realised.

1.88 In anticipation of this opportunity, Norris J and Mr Stephen Fash of HMCTS were commissioned to report on the impending move, under these terms of reference:

> *"To consider, in the light of the current and anticipated business of the Division and in the context of its relocation to the Rolls Building, what (if any) changes should be made to the Judicial and administrative practices and procedures of the Chancery Division to maintain a just and efficient disposal of its business at the Royal Courts of Justice."*

1.89 They reported in August 2011, just prior to the move, and made 30 recommendations. Some, but by no means all of these were implemented. A number of those which were not implemented will be found repeated or reflected in this report.

1.90 To some extent therefore, the large opportunity represented by the move still remains there for the taking. By that I do not mean that the move was mishandled. The continued service of the London part of the Chancery Division, an efficient entity before the move, was maintained and in many respects enhanced. Above all, there was no break in delivery of the service during the move.

1.91 In one respect the work of the Chancery Division did not transfer lock, stock and barrel to the Rolls Building. It was decided, notwithstanding the considerable misgivings of the Registrars that, for the first time, a substantial jurisdiction in bankruptcy work should be given to the Central London County Court, or rather to an outpost of it which took up occupation of part of the Thomas More Building after the Chancery Division's departure. I shall describe how what appeared to be a sensible reform, correcting a largely historical anomaly, did not fulfil the hopes which had been reposed in it. In outline, the result was to leave the Registrars over-burdened and the bankruptcy District Judges of the Central London County Court relatively under-burdened. I shall propose a remedy for this in chapter 11.

1.92 Closely related to that challenge is the opportunity represented by the planned move of the Central London County Court to the Thomas More Building in the RCJ. The CLCC has for a long time been a major recipient of 'overflow' trial work from the Chancery Division, and its chancery specialist Circuit Judges report that, indeed, the single largest block of the chancery trial work there consists of such cases. They tend to stand up (rather than settle) to a greater extent than the territorially based work of that court, or the work of the other London county courts which is routinely transferred to the CLCC for management and trial.

1.93 Bringing the CLCC into much closer proximity with the Chancery Division in the Rolls Building plainly increases the opportunities for co-operative sharing of the chancery litigation burden in London, provided that the CLCC is sufficiently resourced to take a greater share of that work.

1.94 It has been suggested that the move of the CLCC to a building only a few hundred yards from the Rolls Building should be treated as an opportunity to create in London the very close working relationship between High Court and County Court for chancery

business that exists in the main regional trial centres, at least in Birmingham, Bristol, Leeds and Manchester. In those centres, listing, filing and other aspects of administration have virtually merged. The District Judges are the same and the Circuit Judges are usually qualified to sit both in the relevant Chancery High Court District Registry and in the adjacent County Court. So (now) is the relevant chancery supervising Judge.

1.95 The suggestion has been made that the listing of all chancery business for the CLCC should be conducted from the chancery Listing Office in the Rolls Building, with the unspoken but necessary consequence that, for example, CLCC chancery filing should take place there as well. There are, apparently, similar proposals on foot between the Queen's Bench Division in London and the CLCC.

1.96 In my view, the potential for administrative streamlining supposedly created by the move of two courts to within a few hundred yards, rather than two miles, of each other should be viewed with real caution. In a world where filing is still physical rather than electronic, any supposed streamlining which leads to the need for constant file transfer along public thoroughfares between buildings on separate sites is a recipe for disaster. Plainly, if and when chancery business receives the benefits of electronic filing, file storage and case management, these difficulties might well be reduced, or even eliminated. Even then, it seems to me to be a retrograde step for judges to be physically separated on different sites from their listing and management staff, and the supposed cost savings are likely in my view to prove to be illusory. It is in any event not clear that there is space in the Rolls Building to accommodate the listing, filing and other administrative requirements of an enlarged chancery section of the Central London County Court, or even its current requirements.

1.97 Finally, there is the opportunity for change created by this Review. It is the first of its kind for over 30 years. It has led to the statistical analysis of the work of the Division in London (and in two regional trial centres) over an admittedly short three month period in a level of detail never previously attempted. It has given rise to reflection by judiciary, staff and court users about the effectiveness or otherwise of the Division's activities in a co-operative manner that cannot be replicated, without undue effort, otherwise than very infrequently.

1.98 Nonetheless the opportunities created depend in my view critically upon there being put in place systems for the implementation and monitoring of such of the recommendations of this Review as command acceptance. Consultees have emphasised that an essential part of implementation, if it is to succeed, will need to consist of selling the proposals for change to the court user community, in particular so as to obtain buy-in to the necessary culture changes identified later in this report. Selling may need to contain a mix of demonstration, education and exhortation, rather than merely the publication of revised rules and practice directions. Monitoring may benefit from outside assistance, like the monitoring of the Manchester hot-tub expert evidence pilot recently carried out by University College London.

1.99 The recommendations of the Oliver Report were implemented, but in relation to a Division only a modest fraction of its present size, with a smaller amount and narrower

range of work. Whether or not aggregated with its regional branches, the Chancery Division now is in my view much too large, too varied in its work and too widely distributed geographically to be sensibly capable of being managed by one person, not least because of the substantial number of other management and other responsibilities vested in the Chancellor. The following chapters will reveal numerous areas in which the work of the Chancery Division is currently hampered by the absence of any structures, guidelines or sense of responsibility for intermediate management, it being apparently assumed that, provided each member of the large chancery team of judges and staff gets on with his or her individual job then, under the benign guidance of the Chancellor, the chancery ship will continue to steam majestically on its course.

1.100 It is a tribute to the skills of the last Chancellor during his long tenure of office that the Division has done and continues to do so, doing its work to very good effect and, for the most part, within just about acceptable waiting times. Although I will develop them in more detail in later chapters, it is convenient to mention at the outset some examples of this lack of joined up management within the Chancery Division. The first is a lack of regular co-ordination and communication between the Masters, Registrars and Judges. It was roundly criticised in the Norris Report, but nothing has yet been done about it.

1.101 The second is the absence of any real planning, discussion or agreement of common principles about the application of particular judicial skills to particular types of case. This is all left in the undoubtedly supremely competent hands of the chancery Listing Officer, but such principles as are applied are not formally written down. Thirdly, there is little communication of any kind between the Associates and the rest of the staff of the Division. This is largely a consequence of the geography of the Rolls Building, but that should not be an insuperable obstacle to better management.

1.102 Next, there is no consistent process for the undertaking of case management by Judges, by way of exception to the normal regime for management by Masters and Registrars. It consists of two elements. The first occurs when a Judge thinks, at the end of an interim application, that it would be sensible to give case management directions, to avoid an unnecessary further appointment before a Master. The second is that parties to large scale or group litigation may obtain a Judge for case management or full docketing by joint written application to the Chancellor. Sometimes they do so on their own initiative. Sometimes they are advised to do so by a Master. The only consistent aspect of these procedures is the now established rule that case management of patent cases is to be by ticketed Judges of the Patent Court. Even then, there is no mechanism for deciding when such cases should be docketed, i.e. managed by a single Judge or by their prospective trial Judge.

1.103 The single biggest anxiety facing the Chancery Division, mainly in London, is that it will not be able to maintain waiting times for trials and hearings at an acceptable level. This very real risk arises from a combination of factors, each of which may be regarded as a separate threat. Some of them have already started to occur. The effect of others has yet to be measured.

1.104 The first factor is the downward pressure on resources for the Chancery Division,

and upon its judicial resources in particular. Over the last thirty years, the Chancery Division has largely managed to maintain acceptable waiting times in the face of an increasing workload by a steady increase in the number of its full-time Judges, and by the management of peaks and troughs by the recruitment and use of deputies (both section 9 Judges, deputy Masters and deputy Registrars). From time to time the proportion of cases being tried by deputy s. 9 Judges has attracted adverse comment from court users but, generally speaking, that proportion has been maintained at an acceptable level by occasional increases in the complement of the full-time Judges.

1.105 The requirement for retrenchment by the Ministry of Justice has, this year, led to substantial cuts in the deputy budget, in particular for the Masters and Registrars. There is no reason to suppose that this year's cuts will be the last, since the deputy budget is the easiest item to cut without incurring significant redundancy or other costs. The effect of the reduction in the number of full time Registrars from six to five, without the anticipated proportionate reduction in the volume of bankruptcy work, has already manifested itself in terms of unacceptable waiting times for Registrars' appointments. This is dealt with in more detail in chapter 11. Pressure on the Masters' lists has already begun to lead to requests to the Listing Officer that urgent applications be dealt with by Judges. It is the frequent experience of the Judges sitting in the Interim Applications Court that matters which could be dealt with by Registrars are listed in the Judge's court because the parties consider that it is the only way to get those matters heard within a reasonable time.

1.106 The Listing Officer has to navigate between Scylla and Charybdis. On the one hand he has to guess, about a year in advance when listing cases for trial, what the pressure of work on his Judges will then be. This is a process of skilled guesswork which relies heavily on assumptions about the settlement rate for trials which frequently (and inevitably) confounds the estimate by substantial margins. On the other hand he faces the obligation to pay compensation if listed trials which do not settle cannot be brought on within the specified five day window.

1.107 At present, the Listing Officer's safety valve is the ability to draw upon the assistance of fee-paid s.9 deputies at relatively short notice. Constraints on the deputy budget critically cut down that resource, all the more so because the s. 9 deputies who are already chancery Senior Circuit Judges in the main regional trial centres cannot be booked at short notice, due to their own trial diaries. S.9 deputies who are practising barristers can often be recruited at much shorter notice, but they represent a greater burden on the deputy budget because they are not already engaged elsewhere in salaried judicial work.

1.108 The second factor likely to increase waiting times is the inexorable and continuing increase in the chancery workload in London. In the 5 years 2008 to 2012 the number of trials listed has risen from 953 to 1146. Although waiting times for trial are still generally competitive internationally, they have slowly increased during the same period from 38.8 weeks to 47.9 weeks, and now exceed 1 year. Annex 2 shows that the rate of increase in waiting times has accelerated sharply in the last 2 years. All this has occurred during a period of economic stagnation. I can think of no reason why these trends should not continue.

1.109 The picture in the regional trial centres is more mixed. Some areas show similar increases, some are steady and one or two in slight decline. There has been no significant increase in waiting times in any of them, all of which remain very attractive.

1.110 The third factor is the substantial increase in the judicial time now requiring to be spent on each case occasioned by the coming into force of the Jackson reforms. In outline, those reforms impose a wholly new regime for costs budgeting upon judicial case managers, as well as a renewed focus upon hands-on case management, likely to be reflected in a much greater proportion of cases requiring oral CMC hearings than previously, as well as a substantial increase in case management box work.

1.111 I was advised that the best pre-estimate was that the impact of the Jackson reforms is likely to increase the box work time per case by a factor of four, and the length of CMCs per case by a factor of two. It is too early to tell whether this estimate will prove to be correct, and whether, even if it occurs, the effect will be more than temporary, as the new regime beds down. A statistical exercise on this question by the Masters in London was not completed in time for the publication of this report, but the early indications are, both in and outside London, that the Jackson reforms will indeed substantially increase both the overall number and the length of CMCs. No additional resources have, thus far, been allocated to meet this concern, nor has the IT which Jackson LJ regarded as necessary for the implementation of these reforms yet been provided.

1.112 Chancery judges need to be recruited from the most successful specialist members of what is still, for most of them, a very well paid profession. Historically, the quality of the chancery judiciary has benefited to a large degree from a perception among most chancery practitioners that an appointment to the bench is the pinnacle of a chancery career. Judicial remuneration and pensions are not within my terms of reference. It is important to ensure for the future, as in the past, that the Chancery Division continues to attract as its judges the most successful practitioners.

1.113 The combined effect of the threats which I have identified needs to be regarded as a matter of real concern. The implementation of recommendations for the modernisation of the practices and procedures of the Chancery Division, and in particular any significant increase in docketing and case management by Judges, will be very difficult to achieve without any increased application of human and financial resources, all the more so during the continuing absence of the requisite IT. It is clear from the feedback thus far obtained during this Review that, however desirable these recommendations may be, chancery court users will be reluctant to approve or participate in them if the inevitable price is an extension of waiting times.

1.114 The onset of seriously increased waiting times might in theory be alleviated if it could be predicted that the combination of the Jackson reforms and the recommendations in this report will produce, within a reasonable time, very substantial savings in trial times, or if there exists a sufficiently resourced safety valve in the form of the county courts or other tribunals capable of undertaking part of the work of the Chancery Division, so that its over-stretched resources can be concentrated on the remaining hard core of its work.

In my view, neither of those possibilities yet offer a solution which can prudently be relied upon.

1.115 Notwithstanding real reservations expressed by some consultees, I do regard it as reasonable to expect that, in the long term, trials will be shortened by the application of Jackson inspired case management, and by the implementation of the recommendations in this report. But for that decrease to match the increase in judicial resources necessary to bring it about, it must on a case by case basis exceed the increased case management time by a least a factor of four. This is because at least three out of four cases which receive case management directions to trial (at a CMC or other hearing or on paper), already settle before trial. In 2012, of the 1119 trials listed (after CMC) during the previous year, only 255 were heard. Of course, the beneficial effect to the parties of better (but judicially more labour-intensive) case management will not be lost by a settlement, because they will in the meantime make substantial savings in the cost of disclosure, witness statements and expert evidence. But no corresponding benefit will be reaped by the Court Service itself. It is, plainly, a case of increased judicial work leading to savings for the parties.

1.116 It is not at present clear that the Central London County Court or any other courts or tribunals have the resources with which to undertake any significantly increased part of the chancery overflow workload. As I have already described, the chancery specialist Judges in the CLCC are already heavily engaged in the trial of cases transferred from the Chancery Division. There is scope for the transfer of more bankruptcy work from the overloaded Registrars to the District Judges in the Central London County Court, but this will only address waiting times which are already beyond acceptable limits. There is some scope for an increased transfer of work from London to the main regional trial centres but, again, they have their own funding constraints, and if the consequence would be significantly to increase waiting times there (as seems likely) those centres would lose their main attraction, as against instituting proceedings in London.

1.117 There is also the problem of the human resources version of cash-flow, which I will call 'work-flow'. Most of the additional judicial case management work required to implement the Jackson reforms and any recommendations in this report has to be done up-front, at the early stage of each case. Such benefits as may flow from it in terms of reduced trial times are derived at least a year later. If the two are to cancel out, something must be done to fill the resources gap between the increased spend and the anticipated saving.

1.118 The pressure on resources currently being experienced by HMCTS due to long term fiscal difficulties facing the UK arises from the understandable desire of Government to limit taxpayer-funded expenditure. But the civil justice service (and a fortiori that part of it undertaken in the Rolls Building, and by the Chancery Division nationwide) imposes no burden on the taxpayer at all. It is, and has for a long time been, self-funding.

1.119 Furthermore, a number of the respondents to consultation on this Review have made it clear that for the continuation of the quality of service which they receive as court users, they and their clients would be prepared to contemplate much higher court

fees than are currently charged, provided of course that the increase in resources thereby obtained is ring-fenced for the continued and (where appropriate) improved provision of those services. At present, the absence of any such ring-fencing means that the payment of higher court fees by business users of the Chancery Division could simply be used within the general budget of the Ministry of Justice to fund those aspects of its work which are indeed a burden on the taxpayer, such as prisons and the provision of criminal justice.

1.120 The Ministry of Justice, and the Government more generally, is aware of the very real contribution to UK plc made by the work done in the Rolls Building, of which the Chancery Division is much the largest, but perhaps not the most conspicuous, part. The same is equally true of the chancery, mercantile and TCC work done in the regional trial centres, in the sense that it provides critical underpinning to the legal and accountancy businesses and the general economic health in those cities.

1.121 The very real threats facing the continued work of the Chancery Division, with or without the implementation of the recommendations in this report, could sensibly be addressed by a determination on the part of those responsible to ring-fence increased fee income from chancery court users by the provision of the resources necessary to bring about its modernisation, and to apply the Jackson reforms, without an unacceptable increase in waiting times. In that way the readiness of many chancery court users to pay more for the first class service which they receive could be harnessed, and the modernisation recommended in this report achieved more quickly.

Chapter 2: Objectives

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2.1 It will contribute to an understanding of the thinking behind the detailed recommendations which follow in this report if I explain at the outset the views to which I have come on the main issues which have arisen as to the objectives which chancery modernisation should be seeking to achieve. Secondly, I shall for clarity spell out certain objectives which have given rise to no disagreement between consultees. Finally in this chapter I shall explain my thinking about how, in my view, in the context of static or reducing resources, the inevitable conflicts between the full achievement of those various objectives should be prioritised.

2.2 I make it clear that this chapter is concerned with ends rather than means. An understanding of how the objectives identified in this chapter are to be achieved, in accordance with the identified priorities, will require a reading of the rest of this report.

The Overriding Objective and Proportionality

2.3 The requirement in my terms of reference to take into account (and therefore to assume the implementation of) the Jackson reforms means that it is the Overriding Objective as modified by the recent rule changes that I must treat as lying at the heart of any process of chancery modernisation. CPR 1.1(1) now provides as the Overriding Objective:

> *"Enabling the court to deal with the cases justly and at proportionate cost."*

Sub-rule (2) now provides:

> *"Dealing with a case justly and at proportionate cost includes, so far as is practicable –*
>
> *a.) Ensuring that the parties are on an equal footing;*
>
> *b.) Saving expense;*
>
> *c.) Dealing with the case in ways which are proportionate –*
>
> *i.) to the amount of money involved;*
>
> *ii.) to the importance of the case;*
>
> *iii.) to the complexity of the issues; and*
>
> *iv.) to the financial position of each party;*
>
> *d.) Ensuring that it is dealt with expeditiously and fairly;*

e.) Allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases; and

f.) Enforcing compliance with rules, practice directions and orders."

2.4 As is well known, the introduction of the phrase "and at proportionate cost" in CPR 1.1(1) and (2) is new, as is the whole of CPR 1.1(2)(f). It is that requirement, built in to the Overriding Objective, which introduces a new rigour to the court's enforcement of its rules, as an aspect of the just determination of cases.

2.5 Apart from those additions, the Overriding Objective has been in place for over twelve years and yet there are several respects in which, in my view, its implications have yet fully to sink in to case management in the Chancery Division, particularly in London.

2.6 Two examples will suffice to make the point. First, save only for the exercise of court control of the number and type of expert witnesses, the court's culture still is to leave it to the parties to decide how many witnesses to call, how long to make their witness statements (and about what subject matter), the issues to submit to experts for their opinion, and the length and composition of trial bundles. Although there are exceptions (where particular judges have exercised more rigorous control of these matters) the general tendency has been to leave those matters to the parties, sometimes even because of a perception that to impose limits in those areas would, of itself, unjustly interfere with a party's assumed right to present and pursue its case without restriction.

2.7 The second example is that, again with certain notable exceptions, judges identify the length of trials simply by requiring the parties to provide, and where necessary update, their own estimates of how long the trial should take, without regard to the open-ended commitment of judicial resources to particular litigants which that approach assumes. In short, if parties estimate that a trial will take 30 days, they generally get it. Furthermore they generally get any additional time reflected in revised estimates, even if those have to be extracted from counsel by the listing Office, usually during the week before trial window opens. Even if it overruns, the present culture is that, once a trial has started, little is done by many judges to prevent it continuing for as long as the parties wish it to take, and many judges also allow the parties to choose the time which, after the conclusion of cross-examination, they should have for the preparation of written closing submissions. The result is that a high proportion of trials in London do overrun their estimates, often by substantial amounts. Annex 5 contains statistics about overrunning trials in London during 2013. These statistics record the overruns by reference to the last estimates before the trial. In summary, almost half the trials overran, and those which did exceeded their estimates, on average, by 47.6%. I do not mean thereby to criticise the Judges as being to blame for this. The basic problem is cultural. Although most judges do what they can to keep a trial moving towards its conclusion, the basic underlying assumption usually still is that justice requires the trial to continue for as long as the parties have material to present, or witnesses to cross-examine. I am advised that a similarly high level of overruns affects interim hearings, but these have not been recorded in statistical form.

2.8 There are, of course, many cases in which the court may properly leave these

matters to the parties, in particular where the court is satisfied that the teamwork between the parties and their lawyers and the co-operation between opposed legal teams is informed by a common desire to achieve the objectives of expense-saving, proportionality as to cost, expedition, and appropriately economical use of the court's resources.

2.9 But the sobering fact remains that far too many chancery cases, both large and small, are conducted with so little regard to those considerations that they end up being cases which have become, well before trial, in economic terms, cases about costs rather than about the original issues in dispute. By the same token any case of that kind will, almost by definition, have consumed a disproportionate amount of the court's resources, in addition to those of the parties. Justice is neither accessible nor fair if litigants cannot seek to vindicate or defend their rights without incurring or becoming exposed to liabilities for costs which are wholly disproportionate to the value at risk, or the gravity of the matters at stake, in the litigation.

2.10 There are numerous reasons, some good and some bad, why parties and in particular their lawyers rack up costs. Sometimes this is perceived by the richer party to maximise prospects of success against a poorly-funded opponent. Sometimes it results from an emotional commitment to a supposed just cause, out of all proportion to its economic importance, a commitment sometimes surprisingly shared by the party's lawyers. Sometimes it arises from a party's fear that, if any stone is left unturned, its opponent will be able to outmanoeuvre it and win the day. Sometimes, and in particular where fraud, dishonesty or serious misconduct is alleged, the case is approached on all sides with an unshakable view that the seriousness of the allegations requires that no stone be left unturned, regardless of the consequences in terms of money and other property.

2.11 This is not merely a feature of cases which are small in terms of the economic significance of the real issues. Everyone knows of the tendency for contested probate and Inheritance Act cases to run up costs which engulf the estate. Unhappily, commercial claims for as much as £25 million have, in my own experience, run up equivalent costs (i.e. £25 million), in particular due to the 'no holds barred' approach to a dispute between large commercial organisations alleging, and denying, allegations of serious impropriety.

2.12 It ought not to be a matter of contention that a major objective of chancery modernisation should include bringing about a culture change in this respect. At its heart should lie an unhesitating acceptance that the court is both entitled and required to ration the parties in their use of the court's resources by reference not merely to what the parties regard as the requisite preparation and time for trial, but to what the court regards as a fair share of its limited resources, proportionate to the value at risk, and to the importance and complexity of the matters in dispute. This includes not merely rationing the time to be devoted to trials and heavy interim applications, but also rationing in terms of the seniority of available judge, and the availability of court premises (such as the Rolls Building) where other locations such as the Central London County Court or the chancery regional trial centres may be subjected to less pressure and shorter waiting times, but without undue geographical inconvenience for the parties.

2.13 The continuing debate about this issue is not so much about what I will label the

proportionality principle in the abstract (although even now, some regard it as being incapable of meaningful application), but rather about whether during the last fifteen years the court's attempts to grapple with it have been a more time-consuming and more expensive cure than the malady sought to be treated. In short, the cost of 'front-loading' is thought by many to be greater than the savings sought to be achieved.

2.14 This criticism has been frequently been levelled at the Woolf reforms and, therefore, at the CPR generally. Criticisms of a similar kind lie, often just beneath the surface, in relation to the Jackson reforms and their consequent rule changes, both generally and in relation to costs budgeting in particular. Thus, the £2 million ceiling in terms of case value upon the automatic rather than discretionary use of costs budgeting in chancery cases was predicated upon a real fear that, otherwise, parties and their lawyers with a choice between the Chancery Division and the Commercial Court (which has temporarily obtained a complete opt-out) would choose the latter, out of a disinclination to embrace costs budgeting as a means of saving their clients money and maximising their recovery of costs if successful.

2.15 There can only be one answer to this issue within the confines of this Review. It is that the confirmation of hands-on judicial case management contained in the Jackson report as the preferred means of achieving proportionality (rather than simply leaving it to the parties) must be part of the bedrock of this Review, as my terms of reference expressly require. I make it clear that I do not regard this as an unwelcome constraint. The chancery Judges were in 2012 unanimous in commending the Jackson recommendations, subject to certain specific reservations on matters of detail which Jackson LJ and the Civil Procedure Rules Committee accepted. There is however real concern, especially among the judiciary, about how increased case management by Judges can be accommodated within the resources and other constraints affecting the Division, and without unacceptable inroads both upon waiting times and upon the substantive justice of chancery decision making. I will address these concerns in due course.

2.16 Nonetheless, I do consider that the success of judicial enforcement of the proportionality principle as the best means of bringing the cost of chancery litigation under control is likely to be critically dependent upon its being embraced by chancery court users, and their lawyers in particular, as well as the chancery judiciary, in ways which in several respects will involve real culture change. It will indeed be noted that many of the following chapters contain a prior recommendation of culture change ahead of the specific recommendations which follow.

2.17 In short, I do see it as my job to persuade the chancery court user community to embrace not merely the detail, but also the underlying spirit, of the recommendations in this report. It is only if there emerges a community of understanding and agreement about the underlying objectives that the changes in procedure and practice by which I propose that they should be achieved will be capable of being implemented without the deployment of judicial resources at an unobtainable level in current economic and fiscal circumstances. If the practices and procedures which I propose (together with those already in place as a result of the Jackson reforms) have to be enforced by a war of attrition between the judiciary and reluctant court users, then they will fail. If common ground can

be found, so that both the court, the parties and their lawyers are broadly united in the pursuit of these objectives, then they ought to be capable of being achieved without the increased deployment of judicial resources which, in the current climate, simply cannot be provided. I am happy to note from feedback since July that consultees have generally embraced the spirit of the culture changes recommended in the provisional report. But they have also emphasised the need to extend this to the chancery court user community as a whole, by appropriate education, training, demonstration and encouragement.

Specialisation

2.18 I have in chapter 1 summarised the currently limited extent to which the numerous types of litigation regarded by practitioners as exclusive specialisations command specialised treatment in the Chancery Division, in terms of judicial allocation, or separate procedures and practices. There has been a lively debate during the course of this Review about whether the current level of specialisation should be increased or, indeed, reduced.

2.19 This debate has, inevitably, focused upon aspects of particular specialist work. Nonetheless it has major implications for the Chancery Division as a whole, since any large increase in judicial ticketing to particular specialist work at least reduces overall flexibility, and at worst risks carving up the Chancery Division into a series of small specialist units. I shall therefore grapple with the specialisation issue as a general question affecting the Chancery Division as a whole, now, rather than as a discreet subject affecting particular areas of the workload, in subsequent chapters.

2.20 There have been four specific areas in which respondents to this Review have proposed change. They are:

1. Intellectual property
2. Deputy judges
3. Bankruptcy and insolvency
4. Regional trial centres.

Under headings (1), (2) and (4) there have been proposals for increased specialisation. Under heading (3) there have been proposals for a reduction.

Intellectual Property

2.21 A cogent case was put forward for expanding the jurisdiction of the Patents Court to include not merely patents and registered designs, but also the rest of the intellectual property workload of the Chancery Division, including (but not limited to) trade marks,

copyright, passing off and confidential information. The intent would be to bring intellectual property work within the exclusive purview of ticketed judges (including ticketed deputies), to extend the special rules and practices of the Patents Court to intellectual property generally, and thereby to raise the profile of the Chancery Division's intellectual property work to the status of a single coherent area of specialist excellence.

2.22 The arguments in favour of taking that course are as follows. First, it is said that much of the law relating to intellectual property has now become extremely complicated, so that the quality of judicial decision-making will be raised, and the time taken in making submissions (both written and oral) about the relevant law greatly reduced, if the work is assigned to a sufficiently small group of Judges that ensures their frequent, rather than occasional, immersion in the relevant specialist detail.

2.23 Secondly it is said that the creation of a ticketed intellectual property court, run along the procedural lines of the existing Patents Court, would automatically lead to case management by Judges, and give rise to a strong case for the introduction of full docketing of all intellectual property work.

2.24 Thirdly it is said that the evident success of the Patents County Court in expanding its original patent jurisdiction to include the whole of intellectual property provides a concrete example of why the same reform would be beneficial at the High Court level. It is said that, now that the IPEC is part of the Chancery Division, it would be anomalous for there only to be a specialist intellectual property court for low value work.

2.25 These are powerful arguments. In particular they seek to address the desiderata of speed, economy and predictability in judicial decision-making. Furthermore, the feedback from consultees is virtually unanimous in praising the efficiency and quality of the Patents County Court.

2.26 I have however, on balance, not been persuaded that these arguments justify creating a ticketed intellectual property court along Patents Court lines. The counter-arguments, which I have found compelling in the aggregate, are as follows. First, the feedback which I have received does not suggest that intellectual property law is inherently more complicated or difficult to master than several other areas of law applicable to the chancery workload. Nor is this description of the law applicable to all aspects of intellectual property, although it is undoubtedly true in relation to trade marks, and may in due course become true in relation to copyright. Company, insolvency, competition, financial services, tax, pensions and trusts all spring to mind as areas where the law is as complex and sometimes as inaccessible. They are all areas where it can take time, at least on the first occasion, to educate a Judge with no prior experience of that field.

2.27 It follows that the main justification advanced for the creation of a ticketed intellectual property court would apply equally to a number of the other aspects of chancery work. This may not in itself be a good reason for rejecting the proposal, since similar savings in preparation and hearing time might equally be achieved by the use of ticketed Judges in those areas as well. But the larger picture is that if this reasoning

was applied generally within the Chancery Division, it would tend to lead to its being broken up, or at least stratified into a number of separate ticketed jurisdictions, with all the disadvantages in terms of flexibility, reduced productivity and increased waiting times which any such sub-division is likely to create.

2.28 My second reason is that, taking the written and oral responses to consultation as a whole, there does not appear to be a widespread perception, either in relation to intellectual property or other chancery specialist fields of work, that the full-time Judges deliver anything less than a sufficiently high quality service even though, on occasions when they first address a new field, some extra time may be taken by them in getting up to speed. The general perception of consultees is that the full-time chancery Judges appear to be of a calibre which enables them to master widely different areas of real legal complexity, without the need to become narrow specialists in any particular area or areas. Furthermore it not infrequently happens in intellectual property (and other specialist) cases that some other aspect of the law, familiar to the non-specialist judge but less so to the parties' specialist lawyers, plays an important, sometimes even decisive, part in the outcome.

2.29 Even within the intellectual property field, the much more earnestly expressed wish of consultees was for the recruitment of a third scientifically experienced Judge to assist in reducing waiting times for hearing technical patent cases. Currently, only two of the eight ticketed Patent Court judges have those qualifications. The others are mainly volunteers for patent work, without substantial prior experience at the Bar, and many of them have taken to the work like ducks to water.

2.30 The same cannot be said in relation to the use of deputies for intellectual property cases. Whereas the respondents were, in general, prepared to accept, and even welcome, the involvement of full-time chancery Judges without previous intellectual property experience, there was much greater resistance to the use of deputies for intellectual property cases, without previous experience of their own, either as judges, or practitioners.

2.31 There is in my view real force in this criticism, and a substantial case for the creation of a general principle that complex specialist cases which are deemed suitable for hearing by a deputy be allocated only to deputies with proven experience in the relevant specialist field. That may be treated as proven by reference to their areas of specialist practice at the Bar, or as solicitors, or by their having already established a track record as judges in that field.

2.32 This should nonetheless not be considered a rigid or inflexible rule, and should not be applied to cases at the lower end of complexity in a specialist field. This is firstly because the most flexible use of fee-paid deputies is assisted by encouraging them to develop expertise outside their own practice areas, while sitting as judges. Secondly, the exposure of good fee-paid deputies to new areas of practice may well be part of a proving process in which they do (or do not) demonstrate the aptitude requisite for appointment as full time chancery Judges.

2.33 My final reason for being disinclined to favour the creation of a specialist ticketed

intellectual property court is, quite simply, that there is a very large majority of chancery Judges (including Patents Court ticketed Judges) who are opposed to it, essentially on anti-balkanisation grounds. If I had been otherwise unsure about the question, the existence of that large majority would have been sufficient to resolve the issue.

2.34 I acknowledge that, even after publication of a provisional conclusion to this effect, a significant body of opinion among intellectual property court users would still prefer a fully ticketed intellectual property court for all levels of case. I also acknowledge that there is an element of anomaly in there being such a court for small cases, in the form of the IPEC, but not for larger cases. Nonetheless I still regard the wider implications of such a move as outweighing those considerations, for the reasons given above.

Deputy Judges

2.35 I have already addressed this heading as part of my analysis of the question of specialisation in relation to intellectual property. In short, I do consider that chancery court users with relatively complex specialist cases of any type have a reasonable expectation that they should be tried either by a full time chancery Judge with the ability to deal with a range of specialisations, or by a deputy with significant previous experience in the relevant field. But there will be plenty of cases falling within a particular specialist label which, on their own particular facts, present no such complexity as should be regarded sufficient to prohibit trial by a deputy without prior experience in that area. By qualifying the objective in that way I hope that it will be possible to continue to broaden the range of skills of the existing, and newly recruited, fee-paid deputies so as to maintain flexibility and increase the size of the judicial pool for dealing with specialist cases of real complexity.

Bankruptcy and Insolvency in London

2.36 The existing team of five Bankruptcy and Company Registrars provides a specialist core of judges for bankruptcy, insolvency and company work which has a long-established reputation as a national centre of excellence. There is no suggestion that this should change in relation to their company work, but there are proposals that all, or virtually all, personal bankruptcy work together with a substantial slice of routine corporate insolvency work should be sent to the Central London County Court, for disposal by District Judges there. It is pointed out that District Judges, both of that court and in all the regional trial centres and indeed elsewhere, routinely deal with bankruptcy work without, it is suggested, encountering insuperable difficulties. There has for a long time been a view, which has not thus far prevailed, that it is no part of the work of the Rolls Building judiciary to deal with routine cases of personal or even corporate insolvency involving private individuals or small companies.

2.37 In my view it is important to retain the team of Registrars in the Rolls Building for the purpose of providing, with the leadership of the chancery Judges, a national centre of specialist excellence for company, insolvency and bankruptcy matters. I will set out the

reasons for this in chapter 11 but, in summary, the maintenance of that specialist service is in my view necessary for the consistent and reliable development and maintenance of both bankruptcy and insolvency law, which in many respects run hand in hand, under the same primary legislation and the same procedure rules. That specialist service will not be possible if there is not preserved a sufficient stream of High Court bankruptcy work, starting from the issue of the petition. While that is not inconsistent with the transfer of more bankruptcy work to the Central London County Court, so as to ease waiting times for hearings before the Registrars, its wholesale removal would in my view be destructive of that worthwhile specialist objective. Feedback following my provisional conclusion to that effect has broadly endorsed my view.

Regional Trial Centres

2.38 The very much smaller size (in terms of judicial resources and workload) of the chancery regional trial centres, by comparison with London, means that there is inevitably less scope for specialisation. Thus for example, District Judges perform the functions of both Masters and Registrars. Furthermore, there are no District Judges (at least outside London) with an exclusively chancery workload. In some regional trial centres there is a system for chancery ticketing of District Judges. In others, such as Bristol, the number of District Judges available for all civil and family work is insufficient to permit formal ticketing. Nonetheless my enquiries suggest that, in practice, the chancery percentage of the workload of those non-ticketed District Judges who do most of the chancery work in Bristol is not significantly less than that of the ticketed District Judges in, for example, Liverpool, Manchester, Birmingham and Leeds.

2.39 There was for many years a view in many of the regions that bankruptcy and insolvency work was not even to be regarded as a chancery specialisation, but rather to be distributed among all District Judges prepared to volunteer to do it. It has been fortified by the fact that, outside London, many county courts have an insolvency jurisdiction while being too small to hope to have the services of specialist District Judges. In my view that practice (to the extent that it survives) should end. Insolvency and bankruptcy work is inherently specialist and frequently complex, regardless of the amounts at stake. It requires knowledge of a large corpus of statute and rules, within which procedural and legal matters are distributed with what appears to practitioners often to be a lack of rationality, so that major legal principles (such as the rules about set-off) are to be found in the rules, and procedural provisions (such as those regulating the bringing of derivative claims) in the primary legislation.

2.40 Some consultees have suggested that it would be preferable for county courts generally to retain their insolvency jurisdiction, provided that complex cases were referred to the regional trial centres. I am not persuaded that this is preferable, although I acknowledge that a final choice may have to await a statistical study. It seems to me that complexity (sufficient to warrant transfer) is unlikely to be capable of reliable identification sufficiently in advance of a hearing. The complexity may well emerge during a hearing. The result is that a complex case would need a first hearing in the local court, followed by

a transfer for re-hearing, with an unattractive increase in expense and delay. I therefore recommend that consideration be given to ending the insolvency jurisdiction of the (now national) county court in places where suitably specialist District Judges cannot be made available, and concentrating both the insolvency jurisdiction and the specialist insolvency judiciary in the regional trial centres. Since my terms of reference do not extend to the county court, other than where its affairs impact upon the High Court, I have not carried out the statistical work to be able to know whether the implementation of this recommendation would overload all or any of the regional trial centres.

2.41 I am told, anecdotally, that the practice of distributing bankruptcy and insolvency work among District Judges without regard to chancery specialisation has led to a higher than usual level of appeals. That this is so is by no means surprising, and reflects no personal criticism on the District Judges concerned. It is merely a reflection of the complexity of that work and the need for specialisation.

2.42 It is in my view unrealistic to hope that, even in the largest regional trial centres, it would be practicable to arrange for District Judges to specialise solely in chancery work, even including bankruptcy and insolvency. The increasing demands of family work in particular mean that, in contrast with the Rolls Building, District Judges will inevitably continue to be ticketed in more than one, and sometimes several areas of work, with chancery work being unlikely to exceed fifty per cent of the workload of any particular District Judge. It is also clear that, generally speaking, District Judges do not wish to become focussed entirely on any single type of specialist work.

2.43 The result is that, apart from the need to recognise bankruptcy and insolvency work as part of a general chancery specialisation, and a possible concentration of chancery work in the hands of fewer District Judges in certain centres, I do not recommend the pursuit of any greater degree of specialisation for District Judges in the trial centres outside London. Nor is there a desire among the District Judges who currently specialise in bankruptcy work at the Central London County Court to become full time specialists in that field.

Conclusion on specialisation

2.44 The outcome of this analysis is that, in terms of objectives, I do not recommend any fundamental change towards the creation of more specialist ticketed areas of work within the Chancery Division, either in or outside London. Nor do I recommend that the existing levels of specialisation be reduced.

Docketing and Case Management by Judges

Docketing

2.45 Docketing and case management by Judges are closely related subjects, but they should not be elided. Their advantages and disadvantages are separate and distinct. In sharp contrast with case management by Judges, docketing may also be achieved by a case being managed and tried by a Master, a Registrar or a District Judge.

2.46 Furthermore, docketing itself breaks down into two distinct concepts. The first is case management by the trial judge, which I will call 'full docketing'. The second is the assignment of a case to a judge (or sometimes to a small team) for its case management but not its trial. I will call that 'partial docketing'. At present, as explained in chapter 1, most chancery case management in London (other than company and insolvency work) is given partial docketing, because all cases are assigned at the outset to a particular Master. In some regional trial centres a similar assignment occurs to District Judges.

2.47 Viewed in the abstract, and without regard to the consequences in terms of judicial resources and flexibility, there is in my view an almost unanswerable case for full docketing as the ideal means of case management. The reasons are not hard to understand, and were prominently identified by many respondents to consultation. First, the management of the case in question will, by definition, be carried out by a judge experienced in trying cases of that type. Secondly, and more importantly, the prospect of having to try the case (if it does not settle) is bound to act both as a carrot and a stick by way of encouraging well-prepared, robust and properly focused case management. The single most debilitating restraint on robust case management outside the context of full docketing is the perfectly understandable concern of the management judge "not to tie the hands of the trial judge". If the case is fully docketed, the management judge will (or at least probably will) be the trial judge. My own experience of being subject to that debilitating restraint when occasionally case managing at the end of a contested application, and entirely free from it when case managing large scale litigation as the expected trial judge, for example in the Lehman litigation, fully bears out that basic principle. The overwhelming majority of consultees take the same view.

2.48 Thirdly, full docketing contributes to a deeper pre-trial understanding by the judge of the issues and personalities involved in a case than a judge new to the case is ever likely to acquire during hurried pre-reading immediately before trial.

2.49 Fourthly, and closely related to the third point, a judge conducting full docketing can establish a working relationship with the parties' lawyers well in advance of trial, to their mutual benefit. The parties know what to expect of the judge in terms of trial court-craft, and the judge can make clear well in advance what he or she expects from the parties.

2.50 Finally, and in my view most important of all, full docketing gives responsibility for a

case to a single judge from start to finish. It is in a very real sense, that judge's case. I shall have much to say in a later chapter about the need for case management to be re-focused on dispute resolution rather than merely on preparation for a trial which will probably never take place. In my view nothing is likely to encourage that change in culture better than the firm identification of a single judge as responsible for the management of that dispute from the outset towards its most just and economic resolution.

2.51 I am not the first to be persuaded of the 'in principle' advantages of full docketing as the ideal form of case management. I have in mind Lord Neuberger's lecture on 9 February 2012 (the 9th in the Jackson Implementation programme) entitled "Docketing: Completing Case Management's Unfinished Revolution". Nonetheless there has been some feedback since my expression of provisional views to the same effect which suggests that some consultees remain unconvinced, even though the large majority are in favour. All I can say is that, in my view, experience proves the point, whether by conducting it as a judge or participating in it as a court user.

Case Management by Judges

2.52 The arguments for case management by Judges (as opposed to Masters, Registrars or District Judges) are by no means so overwhelming as the case for full docketing, but there was nonetheless a clear majority, of those consultees with experience of both, in favour of management by Judges. It was striking to find among the responses to consultation how clear and firm was the preference for case management by Judges among those with experience both of the Chancery Division (where it is rare) and of other courts, including the Commercial Court and Mercantile Courts (where it is the norm). A similar preference was expressed for case management by Judges as practised in both the TCC and Patents County Court, but there the norm is full docketing, where that is still only the relatively rare exception in the Commercial Court, and in those Mercantile Courts served by more than one Judge. Single judge courts (like the Patents County Court) case manage by full docketing almost by definition.

2.53 The principal advantages of case management by Judges described by consultees may be summarised as greater robustness and the altogether more rigorous and confident use of the cost-saving remedies of strike-out and summary judgement. When it is borne in mind that these Judges case manage without any expectation that they will (if the case continues) be the trial judge, it follows in my view that this increased rigour and robustness must be the product of regular experience of trying cases of the type under management. Under the current regime in the Chancery Division, this is precisely what the Masters lack, although that trial experience deficit is much less significant (if indeed significant at all) among Registrars in London and District Judges in some regional trial centres.

2.54 There was however nothing approaching a consensus that, in the absence of full docketing, case management in the Chancery Division would be better conducted by Judges rather than Masters. Apart from a perceived lack of robustness in the application of

strike-out and summary judgement remedies (a view not shared by all consultees), there was a high degree of satisfaction with the economy, predictability and general quality of the Masters' case management, particularly among court users engaged in property litigation and other areas of chancery work not prima facie suitable for the Commercial or Mercantile Courts. While this might in theory be put down to those court users' lack of experience of case management by Judges, the content of their responses to consultation suggests that such an explanation would be both superficial and wrong.

2.55 As matters stand, it is undeniable that in any competition for case management qualification by experience, the Masters beat the Judges in the Chancery Division hands down. They do it all the time, and the Judges do it only very occasionally. Furthermore the Masters regard case management as their primary function, whereas some Judges clearly regard it as an unwelcome distraction from their main function of trying cases.

2.56 Although my own considerable experience of case management as a first instance Judge has left me something of an enthusiast, I am firmly advised not to assume that all, or necessarily even a majority, of chancery Judges either wish to be diverted from trial work into increased case management, or that they would necessarily prove to be better at it, or even as good at it, as the Masters. In that context it needs to be borne firmly in mind that commercial and mercantile Judges exist in a court environment in which case management by Judges is already the norm, and has been for many years. They are experienced in it as judges, and became experienced in its implementation as advocates or lawyers while practicing in the same courts.

2.57 That does not of course mean that chancery Judges could not acquire a similar experience of and taste for case management over time, so that the same tradition as now prevails in the Commercial and Mercantile Courts could not eventually be established in the Chancery Division. But it gives rise to a real need for caution in treating any rapid move toward case management by Judges as a desirable objective. This need for caution is well supported by a number of judicial consultees.

2.58 Finally, I have yet to mention an alternative case management technique not currently to be found in the Chancery Division or in any comparable court or tribunal in England and Wales (except under Group Litigation Orders), namely partnership case management. By that I mean the management of a case by a team consisting ideally of the trial Judge and a single Master, with a flexible sharing of the management burdens between them, on the basis of principles derived by discussion between them as to the overall management objectives to be achieved for that case. This probably was how most chancery case management was conducted in the nineteenth century, and the layout of what are now the Judges' and clerks' rooms in the original part of the Royal Courts of Justice still bears witness to the fact that each Judge had his Master, working together in a purpose-built suite of rooms. There was an isolated but very successful chancery use of it in the Barings litigation in the 1990s. Something similar appears to be practiced in the Federal Courts in the USA, where the judges are assisted in their primary responsibility for case management by junior officials variously described as magistrate-judges or special masters.

2.59 I received some encouragement from consultees before July to propose partnership case management between Judges and Masters. Having done so in the provisional report, a clear majority of subsequent commentators agreed, although some would prefer it to be tested first by a pilot scheme. One of the serious disadvantages of the current case management regime in the Chancery Division is that most of the advantages of partial docketing by Masters are lost when the case is transferred to the trial judge. There is (so far as I am aware) never any briefing to the trial Judge by the docketed Master about what he has learned from managing that case until then . The court file is, now, not even sent to the trial Judge. Even when it was, the Master's contribution to its management was reflected either in a bundle of orders, or in the Master's own manuscript notes on the file, written for his own purposes, and frequently difficult for the Judge to decipher.

2.60 Nor is there any sufficient communication between Masters and Judges generally so as to enable Judges to assist Masters in a better understanding, from the Judges' experience, of what improvements might be made to case management, or communication by the Masters to the Judges of the thinking behind the management techniques which they currently employ. Apart from a termly tea party, the Judges and Masters hardly ever communicate with each other, either individually or en bloc, and the Chancellor only meets the Chief Master formally once a term, albeit holding himself available for consultation at any time.

Conclusions on docketing and case management by Judges

2.61 In my provisional report I suggested that there was a powerful case for increasing full docketing, both by assigning case management to the trial Judge, and by an increased trial role for Masters, so that full docketing can be carried out by both. I suggested that those objectives should only be applied to appropriate cases, rather than across the board, not least because of the prohibitive consequences in terms of judicial resources that would otherwise follow. Feedback since then has broadly concurred, but there have been real differences of view as to the extent to which a large scale change away from the current regime of partial docketing by Masters is necessary, desirable or practicable. I shall address this question of degree in detail in chapter 4.

2.62 I consider that the case for a large-scale move from management by Masters (currently partially docketed) to case management by Judges who are not to be the trial judges is much less strong, and I would not recommend, even as a long term objective, a wholesale move within the Chancery Division to non-docketed case management by Judges. My provisional view to that effect has since been firmly endorsed by most consultees, both judges and court users. Nonetheless there will also be some types of case which are suitable for case management by Judges rather than Masters, even on a non-docketed or only partially docketed basis. Patent cases are an established example, although this may be no more than the consequence of full docketing by Judges only being available until now in a very few exceptional cases. Finally, I do regard the establishment of case management partnerships between Judges and Masters as a worthwhile objective, on a pilot basis in the absence of any recent empirical experience of that technique, at least within England and Wales.

2.63 The overriding need in this context is to devise a method of early appraisal (or triage) of incoming cases which reliably identifies those suitable for full docketing or case management by Judges, at the earliest practicable stage, to the extent which the then available judicial resources permit. This is in my view a major objective in itself, to the achievement of which I devote a significant part of Chapter 4 below. One of the main hurdles to be surmounted arises from the fact that, in the Chancery Division at least, cases calling for full docketing or management by Judges do not always identify themselves by readily ascertainable characteristics, such as the amount of damages claimed, the value at risk, or the general type of case. Many high value cases need little judicial management, in particular where there are sophisticated litigants and lawyers on both sides. Many small cases, especially those involving litigants in person, cry out for robust and consistent management by a single judge from start to finish.

Convergence and Mutual Assistance

2.64 A large number of respondents have suggested that it is unnecessary, inefficient and confusing to court users for there to be different rules and practices applied by each of the Chancery Division, the Commercial Court and the TCC in the Rolls Building for dealing with a large volume of essentially similar business-related work. The same point can be made in relation to the practices of the Chancery Division, Mercantile Courts and the TCC in the main regional trial centres, but common listing and cross-ticketing arrangements in those centres mean that those differences are in practice much less important.

2.65 There are, and have for many years been, proponents of a full-scale merger between at least the Chancery Division and the Commercial Court. It was proposed in the mid-1990s by the Bar / Law Society working party on Civil Justice. The proposal was noted in the Woolf Report, but regarded at that stage as being perhaps a bridge too far. Various proposals for common divisional management within a new "X Division" were mooted thereafter, in particular in anticipation of the move to the Rolls Building, but nothing came of them. In the meantime, cohabitation within the new building has at least developed a measure of collegiality and mutual respect between the Judges of each of the three units, although nothing approaching the measure of mutual cooperation and assistance in dealing with peaks and troughs in the workload which is routinely achieved in the main regional trial centres, notably Birmingham, Manchester and Leeds. In London, save for a memorable occasion when a chancery and a commercial Judge sat together to case manage very large scale related cases proceeding concurrently in those two courts, there has been no cross-sitting at all. There is a very limited arrangement designed to enable a particular chancery Judge to sit regularly in the Administrative Court, with the provision of a Queens Bench Judge to replace him in the Chancery Division during those periods, but this arises as the one-off result of the special public law skills of the Judge concerned.

2.66 Superficially, all three specialist civil units (chancery, commercial and TCC in London; chancery, mercantile and TCC elsewhere) have common procedures laid down by the CPR and associated common practice directions. The more fundamental differences at the level of rules lie mainly within the Chancery Division, between the Insolvency Rules on the one hand and the CPR on the other. Even within the field of insolvency, there are

an increasing number of almost identical sets of Special Administration Rules, about which I shall have more to say in chapter 11.

2.67 It is the differences in practice rather than procedure which are the most significant, and which have led to the publication (and inclusion in Volume 2 of the White Book) of separate Guides for each unit. Much the most significant differences lie in the sharply differing methods of judicial deployment for case management, which have led to full docketing in the TCC, non-docketed case management by Judges in the Commercial and Mercantile Courts, and case management mainly by Masters and District Judges in the Chancery Division (and, incidentally, also in the Queen's Bench Division).

2.68 In some ways, I consider that the ability of these different courts or units to develop their own distinctive practices within the framework of a common set of rules has led to some benefits for court users. To some extent, the particular practices of these different courts have been moulded to suit the requirements of the distinct parts of their workload, rather than the general business work which they share in common. In other respects they have been a response to the expressed wishes of their separate court user communities. Further, the very different sizes and workloads of each of the three units have leant themselves to the large differences in the methods of judicial allocation to case management. Thus in particular, the TCC in London is of a size which, in sharp contrast with either the Commercial Court or the Chancery Division, does easily lend itself to full docketing by Judges.

2.69 The ability of particular courts or units to experiment, try out or pilot particular developments in case management practice can work to the mutual benefit of all those units, since lessons learned have been and can continue to be applied where appropriate in others. Indeed, an important aspect of this Review is precisely to understand and learn from those courts and units with similar types of work how better to deal with the same workload in the Chancery Division. As will appear in later chapters, examples of areas where experimentation in one court can lead to benefits in another include the fruits of the Commercial Court long trials working party, judicial early neutral evaluation in the TCC, financial dispute resolution in the Family Courts and the use of fixed-ended trials and rigorous case management in the Patents County Court.

2.70 My terms of reference do not extend to an analysis of the pros and cons either of a full merger between the Chancery Division and one or more of the Commercial, Mercantile and TC Courts, or (more realistically) of bringing them under common divisional management, by contrast with the present split between the Chancery Division and the Queen's Bench Division, under which the Commercial Court and the TCC are currently managed. My review is directed at the modernisation of the Chancery Division, and therefore assumes that it will continue to have some form of separate and distinct existence.

Conclusions on convergence and mutual assistance

2.71 In the meantime it seems to me that convergence, which is a flexible concept falling well short of merger or common management, is an objective worth pursuing, particularly in relation to the practices for handling essentially similar cases, capable of being brought in two or even three of the separate court units within the Rolls Building, provided that it is not pursued with such rigour that it stifles the imaginative development of practices in particular courts which suit their particular specialist workload, or their very different scales of operation.

2.72 My reasons for regarding convergence as a worthwhile objective are as follows. First, the minimization of differences in procedure and practice between courts undertaking business litigation of the same or similar types under the same roof (whether in or outside London) is likely to beneficial to court users, as many commentators have suggested, both before and after publication of my provisional view to this effect. In particular, many have suggested that the international competitiveness of the Rolls Building as the largest centre for business and property litigation in the world may be compromised if these differences are allowed to persist. I agree.

2.73 Secondly, convergence of practice and procedure makes it easier for the three specialist civil units to share staff, and to provide the mutual assistance of cross-ticketed judges to ease peaks and troughs in their separate workloads. In this respect, the three largest regional trial centres (Birmingham, Manchester and Leeds) provide shining examples of how this mutual support and cooperation can work, and can be facilitated by the much greater degree of convergence existing there, than in London.

2.74 Thirdly, convergence and mutual assistance may pave the way for common divisional management of High Court business and property work if those with a wider brief than mine consider it worth pursuing in the future.

Non-contentious objectives

2.75 The first two stages of the consultation process have thrown up numerous objectives to which there has been no significant opposition. I do not need to deal with them in any detail at this stage, beyond merely identifying them. They include making the Chancery Division more accessible to litigants in person (an objective defined in my terms of reference), making the most efficient use of limited and even reducing resources in terms of judiciary and staff, preserving or shortening waiting times, providing modern IT for issue, filing, case management and trial and, at the highest level of generality, reducing the cost of trial preparation and the length (and therefore cost) of the trials themselves. Feedback following the provisional report has confirmed that these objectives are indeed uncontentious.

2.76 The difficulty with all these non-contentious objectives, and also with those which, despite a measure of opposition, I find persuasive, lies in the inevitable need to prioritise between them, in the allocation of fixed or reducing resources. To that final question in the opening part of this report I must now turn.

Priorities

2.77 Notwithstanding the number and enthusiasm of the proponents of more resource-intensive forms of case management, there was a clear recognition among almost all respondents to consultation, and vigorous assertion by some, that the maintenance and, in certain instances, shortening of waiting times should be regarded as the clear top priority. This must be right. Indeed I would call it an overriding priority, although some commentators on that conclusion in the provisional report have since suggested that the obtaining of fixed trial dates is even more important, especially for cases involving litigants and witnesses from abroad. I agree that fixed starting dates are a very desirable goal, but not to the extent that they significantly lengthen waiting times.

2.78 The clear majority of the Chancery Division's current court users (perhaps in sharp contrast to the position thirty years ago) are business people or business entities of widely varying kinds. The damage caused to business activity by the uncertainties arising from legal disputes is so large and debilitating that reasonable speed in obtaining a fair resolution is more important to most than the obtaining of precisely perfect justice in the outcome. In short, the perfect is the enemy of the good, if the obtaining of perfection causes unacceptable delay. There is much force in the aphorism 'justice delayed is justice denied', in particular in a context where the damage caused to the parties by the prolongation of the uncertainty is greater than a less than ideal outcome.

2.79 To this overriding priority I would make only one significant exception, namely the raising of the level at which access to justice is provided to litigants in person. I shall have more to say in chapter 9 about why, in my view, this basic standard is not currently being achieved.

2.80 A major consequence of the need to prioritise the maintenance and improvement of waiting times in an environment of fixed or reducing resources is that measures designed to achieve other objectives, however desirable, which call for resources at a level which would risk adversely impacting upon waiting times, will either have to be deferred until the necessary resources are available, or introduced on a gradual, cautious and carefully monitored basis, so that the risk of an adverse effect on waiting times can be properly managed. This problem is, of course, at its most acute in relation to the proposals for increased deployment of Judges in case management.

2.81 Some commentators respond to this problem with the bold optimistic view that, since improved case management will lead to shorter trials and a greater level of settlement, it will generate resource savings sufficient to balance the increased resources needed to bring about those improvements. There are three difficulties with that cheerful approach. The first is that it is essentially speculative. By way of example, a fundamental premise of the Woolf reforms was that increased work on the front-loading of litigation would produce net savings for the parties in the long run. It is now beyond doubt, as is illustrated in the Jackson Report, that this premise was not fulfilled.

2.82 Secondly, the increased devotion of judicial resources to case management

necessitated by the Jackson inspired rule changes was designed, not primarily to reduce the burden on the court service of long trials, but rather to reduce the costs to the parties of preparing for them. In other words, the intended beneficiaries of court's extra work were to be the court users rather than the court service.

2.83 The third problem is what I have called 'work flow'. The application of increased judicial resources to case management needs to be applied up front, but benefits in terms of fewer and shorter trials will (if they materialise) be realised anything up to a year and a half later, having regard to current waiting times. No temporary increase in resources by way of pump-priming is being made available in the meantime, to fund that gap. On the contrary, resources are being taken away.

2.84 The only solution to this problem which I can envisage is that judicial resource-intensive changes (such as docketing) will have to be introduced gradually, under close monitoring, and that the release of resources by an experience of fewer and shorter trials be reinvested as it occurs, in an intensification of up-front Judicial case management thereafter. This gradual rolling process will, if properly managed, also enable advantage to be taken of any fall-off in workload that may come along (although none is apparent at present). It will also enable managers of the process to determine over time whether the right cases are being identified for increased active case management, and to devise and improve guidelines for that purpose in the light of experience.

2.85 There are some commentators who suggest that, like any business entity wishing to improve its service but constrained by limited resources, the Chancery Division should simply confine an improved service to a narrower category of high value and/or complex disputes, leaving a substantial part of its existing workload to be dealt with by other courts such as the county court and (perhaps) the tribunal system.

2.86 To some extent this has happened in recent years because significant aspects of the Chancery Division's appellate work has migrated to the tribunal system. Unfortunately (from the point of view of resources, but not in any other way) the chancery Judges have also migrated to those tribunals, on a part time basis, and remain largely responsible for the determination of those cases in that new forum. The real issue is whether a substantial block of chancery business should be transferred to the county court so as to free up the resources of the Chancery Division for the provision of a more resource-intensive and higher quality service for dealing with the workload which remains.

2.87 Radical proposals within this general concept have included the transfer of substantially the whole of the Chancery Division's individual property work (Inheritance Act, contested probate, TOLATA, partnership and family trust work) to the county court. This would, it is suggested, transform the Chancery Division into a pure, high value business court and, incidentally, contribute to an eventual unification of all the work in the Rolls Building under the general 'business court' label. It is suggested that, by this method, the Chancery Division could move swiftly to 100% case management by Judges, and dispense with its Masters altogether.

2.88 In the company and insolvency (including bankruptcy) context, the same approach

would lead to the wholesale transfer to the county court of the whole of the residue of High Court bankruptcy work, and the transfer of all but the highest profile insolvency and company work, again enabling the Chancery Division to function as a referral court for high value or high complexity work of that kind, while in the meantime dispensing with all or at least some of its Registrars.

2.89 More moderate suggestions have focused on the need for a greater and more co-operative use of the Central London County Court as a referral court for suitable low value or moderate complexity cases started in the Chancery Division, the more rigorous sending to regional trial centres of cases started in London, and the more rigorous use in those regional trial centres of powers to transfer work out of the High Court district registry into the adjacent county court.

2.90 In my view there is real scope for alleviating the pressure on the resources of the Chancery Division by the increased use of the more moderate of those proposals, but not the more radical. I shall have more to say in later chapters about how that may be achieved, but it is to be borne in mind at the outset that the process of transferring work to the county court is long established and, at the moment, widely and efficiently used, so that miracles should not be expected from its intensification, despite the imminent arrival of the long-awaited increase in the financial limits of its jurisdiction. More may be expected from the transfer of work from London to regional trial centres, since that practice is less well established, and some of those centres may have significant capacity for extra work.

2.91 As to the radical proposals for wholesale transfer of types of work to other courts, I consider that there are fundamental objections to this course. The first is that there is no evidence that the county courts have either the capacity to receive a wholesale transfer of individual property work or the experience and expertise necessary to deal with more of it than they currently do. The funding of sitting days for civil work in the county courts is inexorably being transferred to support the conduct of the increasing number of family (and in particular children) cases. The recent withdrawal of much of the Legal Aid for these family cases means that they take longer as well, and less of them get dealt with by mediation. In short, the concept of a wholesale transfer of individual property work to the county court assumes unused capacity for doing it which is simply not there.

2.92 Secondly, the Chancery Division is a highly regarded nationwide centre of excellence, and for the consistent development of the law, relating to individual property work in just the same way as it is for bankruptcy and insolvency cases. Although much less heavily dominated by statute, contested probate, partnership and trust litigation are complex areas in which it is necessary and beneficial that cases of higher value or complexity continue to be dealt with by chancery judges, rather than left to be dealt with by non-specialist Circuit Judges who, however skilled at deciding factual disputes, have to undertake both civil and (usually) criminal work over such a wide range that it would be unreasonable to expect sufficient chancery expertise. In respect of a significant part of that work, namely trust litigation, the Chancery Division is also an international centre of excellence, supporting a highly regarded London based specialist trusts legal practice, both by barristers and solicitors.

2.93 Thirdly, it seems to me to be wrong in principle that a process of chancery modernisation should resolve a scarcity of resources by deserting one important class of court users so as to enable the court to concentrate its finite resources on one or more other classes. There is a real difference in my view between sending to less specialist but sufficiently resourced courts work which because of its low value or lack of complexity does not need the experience and expertise of the Chancery Division, and dividing up the work which does, so as to focus available resources on one part of it, to the exclusion of the other.

2.94 For those reasons, I consider that there is no simple solution to the need to prioritise the maintenance and (where necessary) reduction of waiting times other than by engaging in a cautious, step by step, monitored introduction of fully docketed case management by Judges, even though modest savings of judicial resources may be achieved by an intensification of the existing processes of transferring out of the Chancery Division work which really does not need its experience and expertise.

Chapter 3: Jurisdiction

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3.1 Traditionally, the boundaries limiting the kinds of work that may be allocated to different levels of judge in the Chancery Division (and elsewhere) have been set mainly by restrictions at to the jurisdiction of more junior judges (specifically Masters, Registrars and District Judges) supplemented by certain rules set out from time to time in Practice Directions. For present purposes, those boundaries and rules may be found set out in CPR 2BPD. Most of the restrictions apply as much in the Queens Bench Division as in chancery, but provisions particularly applicable to the Chancery Division are set out in paragraph 5.

3.2 Many respondents to consultation, both before and after July, have suggested (or, on being asked, agreed) that these jurisdictional rules are, as a body, old-fashioned, frequently inconvenient and productive of pointless anomalies. I agree with those views.

3.3 More fundamentally, I consider that the concept of allocating work between different levels of judge by detailed jurisdictional and rule-based restraints is by its very nature an outmoded inhibition upon the flexible and efficient allocation of the right level of judges to appropriate cases. In general, but with certain necessary exceptions, seniority is often a less satisfactory criterion than skill and experience, particularly in the specialist fields which constitute a large part of the work of the Chancery Division.

3.4 I shall leave to chapter 11 consideration of the jurisdictional restrictions affecting Registrars. In this chapter I shall concentrate on those affecting Masters and District Judges and, in relation to the latter, in connection with work other than insolvency and company work.

3.5 The most inconvenient of the current restraints upon Masters and District Judges are those which prohibit the grant of any injunctions (or their discharge or variation without consent), those which prohibit the trial of Part 7 multi-track cases otherwise than with all parties' consent, and those which prohibit the grant of numerous types of relief "except in plain cases", and without the consent of the Chancellor: CPR 2BPD 5.1.

3.6 It is convenient to begin with those jurisdictional restrictions which I do not suggest should be modified or removed. They include restrictions on the grant of freezing injunctions or search orders, and declarations of incompatibility. In my provisional report I expressed the view that interim injunctions which involve the application of the American Cyanamid balance of convenience test ought also to remain the preserve of Judges and deputies, and I sought feedback on this question. By contrast, where for example a claimant seeks relief which includes an injunction in a case suitable for determination by a Master or District Judge by way of summary judgment, I could see no good reason why the final injunction which would follow should be outwith the Master's or District Judge's jurisdiction, necessitating a reference of the case to a Judge. Inherent in the availability of summary judgment to that claimant is the proposition that the claim does not need to

be adjudicated upon at a trial. It seemed to me very old-fashioned to think that there is something inherently more grave about granting an injunction against a defendant, than summary judgment for an unlimited sum of money, in debt or in damages.

3.7 Feedback since July has broadly endorsed that view. By no means all consultees took the view that Masters and District Judges lacked the skill or experience for dealing with interim injunctions, although some did. More general was the view, which I share, that the practical arrangements (including listing) in the chancery Interim Applications Court (and on applications days in the regional trial centres) were better suited to applications for the grant, review and variation of interim injunctions than the inevitably less flexible listing and other arrangements for Masters' and District Judges' appointments.

3.8 While I have no strong view whether interim injunctions should be reserved to Judges as a matter of jurisdiction or of practice, I do therefore recommend that the current allocation of such matters to Judges, rather than to Masters and District Judges, should remain.

3.9 It will be apparent from other chapters in this report that I regard a significant body of chancery work as suitable for trial by Masters and District Judges. In fact, District Judges in some of the regional trial centres, and Manchester in particular, regularly try cases which they have case-managed in the High Court, by seeking the s.9 Judge's direction that they be transferred to the county court, for trial by the same District Judge. The result is that the Manchester District Judges have a level of trial experience similar to that of the Registrars in London. This helps in the efficient discharge of the regional workload and, for reasons already given, improves their case management skills at the same time.

3.10 There is in my view nothing more than a purely historical justification for imposing a 'no trial without party consent' restriction on Masters and District Judges, limited to Part 7 rather than Part 8 claims. While it is true that, generally, Part 7 claims are more likely to be fact-intensive, Part 8 claims may be just as large in terms of value, complexity and importance to the parties as Part 7 claims. Masters routinely handle Part 8 matters all the way to a resolution without needing or seeking party consent, and this occasionally requires them to hear oral evidence

3.11 In relation to Part 7 claims, the allocation choice which frequently faces the Masters is whether to leave it for trial in the High Court by a full time or deputy Judge, or to send it to the county court for trial by a Circuit Judge. While there will be many occasions when the case raises purely factual questions for which the Circuit Judge is probably best qualified by skill and experience, there will be others where the issues involve chancery specialisms where the Masters would generally be more experienced and better qualified than a 'general practitioner' Circuit Judge without specialist chancery experience. Again, it seems to me that the making available of the additional alternative of trial by the Masters would be both valuable in terms of flexibility and efficiency, and beneficial to the parties, whether or not they all consent.

3.12 Turning to the chancery-specific constraints in 2BPD 5.1, I consider that each of the sub-paragraphs (a) to (k) should now be subjected to intensive scrutiny on the basis

that they ought not to survive unless justified. From that general recommendation I would except sub-paragraph (k), which reflects the general principle that case management in the Patents Court is undertaken by Judges rather than Masters, subject to exceptions which remain partly under the control of the Patents Judge: see 2BPD5.1(k)(v).

3.13 By that proposed recommendation I do not mean of course that all cases of the types set out in those sub-paragraphs should routinely be dealt with by Masters and District Judges. The question whether they should or should not be is a matter for flexible case by case management, primarily by the Masters and District Judges, but with the sub-divisional supervising Judges (or regional s.9 supervising Judges) laying down guidelines, and having a power of review on the papers, as set out in Chapter 4 in relation to judicial allocation.

3.14 I am in particular unimpressed by the utility of the repeated 'plain case' exception to the restrictions in many of those sub-paragraphs. What is or is not a plain case may appear very differently before or after the papers have been read, or before or after the submissions have been heard. The Masters and District Judges regularly exercise the summary judgment jurisdiction, and it frequently requires the appraisal of written evidence and submissions of significant length before it becomes clear whether or not the case raises a triable issue. The question whether a case is plain or difficult may be a useful guideline for a discretionary decision as to who should try it, but hardly a reliable determinant of jurisdiction.

3.15 I made a request for feedback before writing my final report upon which, if any, of those particular jurisdictional restrictions should be retained and whether, as an alternative, any other forms of restrictions, more rigid in their effect than the flexible application of transparent guidelines for judicial allocation which I recommend elsewhere, should be put in place. Generally, the feedback since July firmly endorsed the proposals set out above (which were set out in the provisional report). Some favoured the retention of the 'plain case' test as a general control on the exercise of jurisdiction but, for the reasons set out above, I would prefer to see a more general 'weight' test as a practical determinant of flexible discretionary allocation of cases between different levels of judiciary, rather than a jurisdictional bar.

3.16 Some consultees did favour the retention of the party consent rule for the conduct of Part 7 trials by Masters and District Judges, in particular in cases where overseas parties brought international disputes to London from abroad. I have not been persuaded that this should remain as a jurisdictional bar, although there will be many cases where the presence or absence of party consent will be a powerful, even determining, factor in a discretionary decision whether to entrust a trial to a Master or District Judge. Nor do I envisage that many international cases will be at all suitable for such treatment. Some may be, but there may in such cases be no reason to suppose that (for example) a continental jurisdiction would provide a more senior or better qualified judge for trial than a Master or a District Judge. At least at the outset it may be prudent that any decision without party consent that a Part 7 trial be conducted by a Master or District Judge should be subject to review (if not already made) by a Judge.

Chapter 4: Judicial Allocation To Case Management And Trial

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4.1 The achievement of the twin objectives of increased full docketing and case management by Judges (as opposed to Masters, Registrars and District Judges) gives rise to three main obstacles. The first is the shortage of Judicial resources, discussed under the heading Priorities in chapter 2. The second is the current inability of the chancery Listing Office to select trial Judges, other than on a very occasional basis, more than one week before the opening of the trial window. The third is the need to construct a new system for selection of cases suitable for management otherwise than by Masters.

4.2 Taking each of those obstacles in turn, the first is one which is likely to be addressed, but only in part, by recommendations elsewhere in this report, such as enabling Masters and District Judges to do more trials, and transferring appropriate cases to the Central London County Court and to the regional trial centres where there is limited spare capacity. Otherwise, increased Judicial resources for case management will heavily depend on the achievement of the objectives of fewer and shorter trials, but only over time. My recommendations for achieving fewer trials appear in chapter 5. Those designed to lead to shorter trials are set out mainly in chapters 6 and 7.

4.3 The second obstacle needs to be addressed in detail. I am advised that the chancery Listing Office faces difficulties in the allocation of trial judges more than a week before the window for the trial, other than in a very few special cases, for the following reasons. The first is that, in the absence of any available IT, there simply are no individual Judges' diaries, and running diaries for eighteen full-time Judges in hard copy form is considered impracticable. Since full docketing by Judges is critically dependent upon identification of Judges for trials shortly after the issue of the case, in time for that Judge to conduct the first CMC, this is at present a virtually insuperable obstacle to the achievement of this central part of my recommendations. Some consultees have suggested short-term solutions to this difficulty but, in the light of the work now in progress to provide the requisite IT within a year (if all goes well) I do not consider that any temporary 'fix' is likely to be worth pursuing.

4.4 It is not however the only one of the Listing Office's difficulties. I am advised that the current system of open-ended trials and heavy interim applications makes it impracticable for the listing office to know with any sufficient degree of certainty what will be the availability of a particular Judge until any current trial or hearing in which that Judge is engaged approaches its conclusion. The statistics about the high incidence of trial overruns fully supports that advice: see Annex 5. In summary, almost half of London chancery trials overrun. Those that do overrun exceed their estimates by an average of almost 50%. Even when trials conclude within their estimates, these are often updated so near to the trial date that the Listing Office has no certainty much more than a week before the trial even as to their estimated duration.

4.5 In sharp contrast, the advance allocation of particular Judges to the trial of particular cases is achieved in most other courts and tribunals, as well as in arbitrations, by the widespread use of fixed-ended trials (or hearings). This is the norm in all the chancery regional trial centres, in the Commercial Court and the TCC, in the Patents County Court and the Central London County Court. It is now also the norm in the Court of Appeal and the Supreme Court. It is standard practice in commercial arbitration.

4.6 In my view, the time has now come for the Chancery Division in London to follow suit, and to institute a system for the listing of trials on a fixed -ended basis. I shall set out a full analysis of the reasons for this, and the detail of it, in chapter 7, and explain the real concerns about this proposal which have emerged during consultation after July. I mention at this stage (with reasons to follow) that I shall also be recommending the adoption of a four day week for trials, a major purpose of which is to free up both Judges and the parties' advocates for conducting and attending case management hearings on Fridays.

4.7 Even if the necessary IT is obtained to run individual Judges' diaries, and the adoption of fixed-ended trials greatly reduces the uncertainty as to Judges' availability, I am advised nonetheless that large scale full docketing, or any other reason for the allocation of judges to trials well in advance, will reduce the flexibility of chancery listing, and the high productivity which that flexibility has achieved since the implementation of the reforms proposed in the Oliver Report.

4.8 The example is given of a three week technical patent trial followed, one week after its commencement, by a two week heavy trade mark trial. The ideal Judge for the trade mark trial may be the Judge allocated to the earlier patent trial, but this would be impossible in advance. Suppose that the patent trial settles in its first week. Under current arrangements the Listing Office can still make available the same Judge for the slightly later trade mark trial, thereby achieving the best judicial allocation for both trials.

4.9 I recognise the force of this flexibility point, but I am not persuaded that it should operate as a deterrent against any serious attempt to achieve a substantial increase in full docketing to Judges, and (which is a separate worthwhile objective in any event) the much earlier allocation of Judges to trials than currently takes place. It is very unsatisfactory that advocates should have to prepare detailed skeleton arguments or opening submissions without knowing to whom they are to be addressed, and equally unsatisfactory that there is no system in place for ensuring, as far as possible, that the trial Judge conducts the Pre Trial Review of a substantial case. This has been universally condemned by consultees, both before and after July, as a very serious defect in chancery practice.

4.10 In my view the flexibility which enables last minute selection of the best Judge for a case is not as important in most chancery business as the fulfilment of these other objectives. This is precisely because (as discussed under the heading Specialisation in chapter 2) most chancery Judges are suitable to try most chancery cases, with only limited exceptions where, for example, scientific experience is necessary for technical patent cases.

4.11 There is, furthermore, no reason in my view why Judges cannot be double-booked for simultaneous or overlapping trials well in advance. It is common in the TCC, in most regional trial centres and in most County Courts for there to be double-booking and, occasionally, even treble-booking. The apparent risks are mitigated by the high settlement rate between allocation of Judge to trial and the trial date. The current settlement rate from CMC to trial in the Chancery Division is more than 75%, and has been for several years.

4.12 Nonetheless, plainly there will be occasions when both trials for which the same Judge has been double-booked stand up. But with a resource of eighteen Judges plus deputies, there is no reason why that should lead to a broken fixture or to the payment of compensation. It would just mean that the parties to one of the concurrent or overlapping trials do not get their docketed judge, but some other perfectly suitable judge. I consider that to treat the undoubted risk that some fully docketed cases will suffer a last minute switch to a different trial Judge as a reason for not seeking to increase full docketing by Judges as far as possible is a counsel of despair. Rather, it seems to me, the risk should be recognised, undertaken and managed, and then monitored so that, in the light of experience, that risk management can either be improved over time so as to minimise the number of broken dockets, or the docketing project scaled down or abandoned in the light of experience.

4.13 There will be other occasions leading to the breaking of dockets in any event. For example, where a fully docketed case leads to the managing judge conducting judicial early neutral evaluation, which fails to produce a settlement, that judge will have to withdraw from further involvement in that case. Again, the possibility that a case may appear to be suitable for early neutral evaluation is not an invariably good reason for declining to apply full docketing to appropriate cases from the outset. Similarly, judges may suffer ill health, be promoted to a higher court, or retire early. Some trials may overrun into the trial Judge's next fixture, even in a fixed ended system, as I shall later explain. All those events may lead to the breaking of dockets, but none of them, even in the aggregate, sensibly justify treating full docketing as an unattainable objective on a much wider scale than at present.

4.14 The result is that I am not persuaded that either the first or the second obstacles are sufficient to prohibit a move toward the much greater use of full docketing by Judges. But the inevitability that neither full docketing nor case management by Judges can be applied to all or even a majority of cases issued in the Chancery Division means that a way must be found to ensure, as far as possible, that the right cases get the right form of management in terms of judicial allocation.

4.15 Leaving aside only case management under Group Litigation Orders (which is routinely docketed to a Judge, even in the Chancery Division), and Patent cases, the current 'system' if it can so be called, for the identification of cases suitable for management by Judges or full docketing is haphazard. Parties may jointly write to the Chancellor to request Judicial case management. Until this year such requests were only very sparingly granted, and full docketing even more sparingly than case management by Judges. Even in the enormously complicated series of cases arising from the administration

of the London arm of the Lehman Brothers Group, I was appointed only as the case management Judge, rather than as the trial Judge as well, although in practice it was possible for me to try all the cases which I managed, except the last. This year has seen a welcome increase in the making of these applications to the Chancellor, sometimes now at the suggestion of Masters and Judges. Furthermore the Chancellor has approved many more of them than in past years. But the Chancellor cannot be expected to go on micro-managing this process on his own, with all his other responsibilities, and regardless of the knock-on consequences in terms of listing flexibility.

4.16 Apart from application to the Chancellor, the only other event which leads to case management by Judges is where, at the end of a contested interim application, the Judge conducts an ad hoc CMC (to save the parties a further appointment before the Master), and occasionally reserves the further management of the case to him- or herself. This occurs by reference to no established guidelines, and usually without consultation with other judges or even with the Listing Office. It is plainly not a satisfactory basis for a large increase in case management by Judges, let alone full docketing.

4.17 Suggestions have been made that the process of allocation could be defined by reference to the amount claimed, or the value at risk, in the pending cases. Thus for example, it has been suggested that cases above £500,000 might be subjected to case management by Judges in one or more of the regional trial centres.

4.18 I have not been persuaded that either value (even value at risk) or any other bright -line form of selection of cases would be at all suitable for this purpose. As already noted, value is a very poor indicator of the need for case management by Judges, let alone docketing. Some very high value cases conducted between parties with an eye to economy and by lawyers with a determination to apply co-operative common sense virtually manage themselves. By contrast, some very small cases, in particular those involving litigants in person, call for rigorous case management if they are not to deteriorate in due course into cases about costs. It is in my view necessary to develop both a corpus of guidelines and a structure for what I shall label 'triage' so as to enable incoming cases to be selected for some form of management other than the current default process of management by Masters and trial by Judges. The guidelines are likely to differ, as between the four main types of chancery business which I have already identified, but I see no particular reason why a structure for triage should not be broadly the same for all four, with the possible exception of insolvency and company business. Leaving that on one side, I now set out what I tentatively regard as a suitable triage structure.

Triage

4.19 Most incoming cases first reach the attention of a judge when they arrive as box work on the desks of Masters and District Judges. A small minority reach a Judge earlier, on the first (or the first effective) hearing of an application for interim relief. In the Chancery

Division, those cases will all, of course, be multi-track, but this says nothing at all about how they are to be managed.

4.20 The first task facing the judge to whose attention a new case first comes (I will call him or her the triage judge) will be to decide whether the case should stay in the Chancery Division at all or, if issued in London, whether it should be transferred to a regional trial centre. Cases which survive that sifting process should then be allocated to one of a range of management tracks, by the triage judge. For that purpose, the parties should be required by practice direction to submit with the other information now required under the Jackson reforms a statement expressing their view as to the appropriate management track, with brief reasons.

4.21 The management tracks potentially available may be summarised as follows:

1. Managed and tried by a Master or District Judge (and either partially or fully docketed).

2. Managed by a Master or District Judge (and usually docketed at that stage) and tried by a Judge.

3. Managed by one Judge and tried by a different Judge.

4. Managed and tried the same Judge (and therefore fully docketed).

5. Managed jointly by Judge and a Master or a District Judge, and tried by that Judge (partnership management).

4.22 It may be, at least at the outset, that to offer as many as five different management tracks for this process of triage is to be over-ambitious and to risk excessive complication. In my provisional report I sought feedback as to which of these five alternatives should be included at the outset of this process. In particular, I asked for feedback on the question whether the as yet untried concept of partnership management is worth piloting and, if so, for what types of case.

4.23 The feedback since July has almost uniformly been supportive of tracks (2) and (4) above and, to the extent that consultees supported an increased trial role by Masters and District Judges, track (1). There was enthusiasm for track (5) in a small range of appropriate cases, but best preceded by a carefully monitored pilot scheme. By contrast there was little support for track (3), outside patent cases where it is currently the norm, save for those who regarded the availability of the largest number of options as inherently beneficial. The lack of enthusiasm for track (3) was because most consultees agreed that, in a world of limited resources for case management by Judges, full docketing should be given a clear priority.

4.24 I recommend that, at the outset, and outside the field of patent cases, tracks (1),(2)

and (4) should be treated as generally available, and a small number of cases identified for a pilot scheme of partnership management, i.e. track (5). These will usually include, but not be limited to, cases managed under a Group Litigation Order.

4.25 It is implicit in this structure that most of the conduct of this process of triage will be conducted by Masters or District Judges. But I do not consider that they should be left to do it on their own, applying their possibly different criteria without consultation and supervisory leadership.

4.26 In most of the regional trial centres, there is already a s.9 Judge with responsibility for supervising the listing of incoming cases. This is automatically so where there is a single chancery s.9 Judge, as in Bristol and Cardiff. I caused it to be instituted in Manchester and Leeds during my time as Vice Chancellor. In trial centres where there is more than one chancery s.9 Judge, this responsibility is or should be undertaken on a rota basis, rather than by seniority.

4.27 The Chancery Division in London is in my view too big for this task to be managed by a single Judge, let alone by the Chancellor, with all his other responsibilities. I propose that, again on a rota basis, sub-divisional Judges be appointed to lead and supervise this allocation process for each of the four areas of the chancery workload which I have identified, namely 1) business and commercial, 2) intellectual property, 3) company and insolvency and 4) individual property.

4.28 I would envisage the functions of these sub-divisional supervising Judges to be as follows, in each Judge's specified area of the workload:

1. Team leading the triage process.

2. Developing appropriate guidelines for management tracking, suitable for that area of work.

3. Acting as a resource for the Masters (and others) who are the front line gatekeepers of the triage process (in cases of difficulty, or uncertainty as to available resources).

4. Liaising with the Listing Office as to judicial resources and impact on listing flexibility, and with the other sub-divisional Judges.

5. Reviewing (on the papers only, not by way of appeal) allocation decisions by Masters and District Judges with which the parties are aggrieved.

6. Generally monitoring the triage process over time.

4.29 I think it inevitable that two areas of the chancery workload, namely business & commercial and intellectual property, are likely to give rise to a greater requirement for case management and full docketing by Judges than the other two, but there will have to be some sharing of the available resources between all four areas and, in the event of disagreement, I can see no alternative but to require recourse to the Chancellor as the arbiter. I hope that cooperation between the sub-divisional supervising Judges and the Listing Office will be the normal solution.

4.30 I do not envisage it to be part of the responsibilities of the sub-divisional supervising Judges actually to choose the individual Judges or Masters to be allocated to manage or try particular cases, although they may be able to provide assistance to the Listing Officer when a complex case calls for a specialist judge. Their responsibility should in my view normally be confined to supervising the allocation of an appropriate management track. Nor do I regard the track allocation, once made, as necessarily set in stone. It is inevitable that the experience of cases as they develop will reveal that some of them have been allocated to the wrong track. Furthermore, as I have already said, events may occur which have the effect of upsetting allocation, in a way which cannot entirely be avoided. The touchstone should, from start to finish, be managed flexibility, rather than the imposition of rigid rules or decisions which are regarded as unalterable, when all the signs show that the choice of track has turned out to have been wrong.

Guidelines

4.31 I had by July yet to develop any detailed guidelines for judicial allocation or choice of management track, either generally, or for each of the four main areas of chancery work. I sought feedback for that purpose, ahead of the final report, and have received a large and fairly consistent amount of assistance. While I consider that the development of guidelines for triage is essentially a matter to be dealt with during any implementation process which follows this report (in which several consultees have offered to assist) I tentatively set out in Annex 6 a list of considerations relevant to the choice of management tracks for particular cases. In outline, the question will always be: what type of case management, and what seniority of managing judge, does each case really require? Value at risk and complexity may well identify the seniority of the required trial judge. Value at risk is unlikely to be decisive of management track although complexity may be, if that of itself gives rise to particularly difficult issues arising during preparation for trial. The propensity of cases to generate large numbers of interim applications will be an obvious pointer toward suitability for full docketing and, if those applications include requests for interim injunctive relief, management by Judges.

4.32 A key issue is likely to be whether a particular case is more likely than most to go all the way to trial and, if so, to be likely to benefit in terms of achieving proportionality by full docketing. Much is likely to depend upon the Master's (or District Judge's) feel for the extent to which particular parties and their legal teams are likely to be economical and cooperative in preparation for trial. Even the largest cases, conducted between and by such persons, may need minimal management, so that a request by the parties for

full docketing may not, on its own, be a sufficient reason for providing it. Parties may understandably want it, but it does not necessarily follow that their case needs it.

4.33 An important consideration pointing against full docketing may be that the case appears suitable for detailed hands-on judicial intervention and assistance in ADR, where that may prohibit the management judge from conducting the trial. These are but a small number of the potentially relevant considerations which will need to be developed into informal guidelines during and after the implementation stage. At all stages, the availability of the requisite judicial resources is likely to be decisive. The parties' wishes, and their reasons, will be persuasive but not decisive.

4.34 In the early stages, the potential for disruption of the existing structure of judicial resource allocation may well mean that every departure from the current norm, namely track (2): (partial docketing to Masters and District Judges, with trial by Judges), will have to be justified. That restrictive principle may be able to be relaxed once, with proper monitoring, the effect of this triage process upon judicial resources is properly understood.

4.35 I have considered, but rejected in the light of feedback since July, the idea that the current team of six Masters should be sub-divided into three teams of two Masters, one team for each of the three areas of the chancery workload with which they all currently deal compendiously. There is already a small element of sub-division, in the sense that a single Master is meant to deal with the case management of all trade mark cases. There may be some management advantages in dividing the Masters in this way, in that it would tend to produce close-knit teams of sub-divisional supervising Judges and particular Masters for each separate area of the workload. But like most consultees I fear that the adverse consequences in term of the flexible listing of the Masters' caseload would probably outweigh this advantage, and the three work areas are not in any event of equal size.

4.36 Finally I consider it important that the guidelines for judicial allocation to case management and trial should be transparent, so that they can be understood by chancery court users. By that I do not mean that they should harden into rules or practice directions, capable of giving rise to satellite litigation and unnecessary rigidity. They should simply be available as an indication of the guidelines which the court is likely to apply for this purpose, so that court users can focus their own choices and reasons in documents submitted to the court, and 'buy in' to, and provide feedback upon, the triage scheme as a whole as it develops. Most but not all consultees agreed with this. One thought that, once published, such guidelines would trigger satellite litigation, however hard it was resisted by judges. In my view judicial resistance will be sufficient for the purpose.

4.37 There are good reasons why this triage process may be inapplicable to a large part of the incoming work of the Bankruptcy and Companies Courts. This is mainly because much of the incoming work consists of a very large number of bankruptcy and winding-up petitions, which have an established and satisfactory management track calling for no triage at all. Furthermore, many of the cases arising under the court's jurisdiction to sanction reconstructions and schemes of arrangement also have well-established management tracks which need little revision, and do not generally need bespoke triage.

4.38 Nonetheless there will still be a body of incoming work, such as s.994 petitions, applications for directions by office holders in large scale insolvencies, and large scale misfeasance and asset recovery applications which will require flexible judicial management and trial allocation by this triage process. It will be necessary during the implementation stage for guidelines to be laid down as to the areas of company and insolvency work which call for the routine application of this triage process. This distinction between the routine and one-off workload of the Bankruptcy and Companies Courts for case management purposes was broadly supported by feedback after July.

4.39 The same exception will probably have to apply (at least initially) to the work of the Patents Court, where case management by Judges is already the norm, and where the current view of its court user committee appears to be that partial rather than full docketing to Judges is likely to strike the best balance between optimal management and flexibility. In any event, the gatekeeper for those cases will be the sub-divisional supervising judge, who may typically be the Judge in charge of the Patents Court for the time being. By contrast, I can see no good reason why the triage process should not be applied generally to intellectual property cases other than patents and (perhaps) registered designs.

4.40 It will I think be within the individual property part of the workload that the greatest scope will arise for full docketing by judges (i.e. management and trial by the same Master or District Judge), as most consultees agreed. The parallel family property jurisdiction of the Family Court is frequently discharged by judges of that level of seniority. It may be, in the fullness of time, that the Masters and District Judges will come to be the main triers of this type of work, (to the extent retained rather than transferred out to the county court) just as are the Registrars in relation to most bankruptcy and insolvency matters. The discarding of the outdated restrictions upon the jurisdiction of Masters and District Judges, which I propose in Chapter 3, should greatly assist this development.

4.41 It will I think be in the business and commercial part of the chancery workload that the greatest scope for choice between different types of case management track and judicial allocation will arise. It is precisely in this area that the parallel experience of the different case management of similar work in the Commercial Court, TCC and Mercantile Courts has led to a widespread view among consultees that the Chancery Division has much to learn, and benefit from, by their example.

Re-investment

4.42 I have mentioned in Chapters 1 and 2 the difficulty caused by what I have labelled 'work flow', namely the time lag between the application of increased judicial resources to case management and the reaping of dividends in the form of fewer and shorter trials. If this investment of judicial resources bears fruit in that way, then it will both enable and justify an intensification of case management by Judges (including full docketing) as increased judicial resources become available for that purpose. Nonetheless the extent to which, if at all, this happens will need to be constantly monitored, and it will be affected by other factors, such as rises or falls in the general volume of incoming chancery

business, and further alterations (upwards or, I fear, downwards) in the judicial resources themselves. The existence of those uncertainties, and the essentially speculative nature of the realisation of dividends from more intensive case management, is a main reason why, in my view, the process needs to be constantly managed and monitored, rather than left to the rigid operation of a set of rules.

4.43 Furthermore, the process of team leadership by sub-divisional supervising Judges should, I hope, of itself remedy what seems to me to be a significant weakness in the functioning of the Chancery Division at present, namely the extent to which its various activities are conducted by its various actors, without any of them taking much time to speak to, or actively cooperate with, each other.

4.44 It may be protested that the introduction of more intensive management of the practices and procedures of the Chancery Division is of itself likely to be a drain upon judicial resources. The more time judges spend talking to each other, the less they will have for the work in hand. But the absence of internal communication and co-operative management within the Chancery Division is at the moment so deep-rooted that some diversion of judicial activity in this direction seems to me to be overdue, and most commentators regard it as likely to be highly beneficial. So do I.

4.45 I should say that these observations about communication are directed at the large chancery operation in London, rather than at the much smaller, and internally more communicative, operations in the main regional trial centres. This may be a consequence of the very different scales of those operations, but my experience as Vice Chancellor leaves me in no doubt that the communication and cooperation which takes place there between chancery judges at all levels of seniority provides a model which the Chancery Division in London would be well advised to follow.

Allocation of Trial Judge to PTR

4.46 Whatever the success or failure of the projected increase in case management by Judges and full docketing, I am in no doubt that the ability to pre-select trial Judges in time for them to be able to conduct any necessary Pre Trial Review is an objective in its own right worthy of being given a high priority, once the IT system necessary to create workable individual Judges' diaries has been developed and tested. In a case which is not already fully docketed, the PTR is a golden opportunity, currently much wasted because of the uncertainty as to who will be the trial Judge, for the re-directing of the final stages of preparation into a form that the trial Judge will find the most appropriate for the purposes of achieving a just and proportionate trial. It will in a fixed-ended trial system be a useful occasion upon which to review the planned duration of the trial and to construct, or perfect, a timetable which fits within the period chosen. It is, at least at the PTR, essential to get rid of the inhibition constituted by the notion: "I must not tie the hands of the trial Judge". Furthermore, the knowledge on the part of the PTR Judge that he or she is very likely to be the trial Judge will add both a carrot and a stick to that Judge's discipline, using the PTR as a real opportunity to get beneath the surface of the case rather than, as not

infrequently happens at present, a largely formal process of rubber-stamping the parties' proposals as to the conduct of the trial.

4.47 I would also recommend that PTRs are directed for more trials than at present and, in appropriate cases, on a date earlier than is customary now. Numerous consultees have commented on the value of a PTR as a means of adjusting the trial period and timetable, before preparation is so far advanced that it becomes too hard to undo.

Chapter 5: Case Management For Dispute Resolution

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The way things are now

5.1 Alternative dispute resolution (that is, in its widest sense, the resolution of a dispute otherwise than by trial) is already very widely used in chancery litigation. Indeed, trial is, and probably always has been, the method of resolution of only a tiny minority of chancery disputes. The settlement rate of cases issued in the Chancery Division in London during the last 5 years ranged between 92.3% and 94.4%, and that excludes settlements taking place after the start of the trial. Traditionally, most disputes have been resolved by unstructured negotiations between the parties or their lawyers, a process involving no management or intervention by the court, save acceding to the occasional last minute request to delay the commencement of a trial while the parties frantically conclude settlement negotiations at the court door.

5.2 The court has, nonetheless, contributed to the successful outcome of ADR (in its widest sense) in three crucial respects. First, the steady management of a case towards trial has provided a deadline for the parties' own attempts to resolve their dispute, before resolution is taken out of their hands and completed by the trial Judge. Secondly, the remorseless increase in the costs burden of litigation towards trial has acted as a spur to ADR. Thirdly, and most importantly, the prospect of a thorough, fair, just and timely trial by a judge skilled and experienced in the relevant subject matter has been a main contributor to the justice of out of court settlements, because of the opportunity afforded to a party to obtain practicable justice if their opponent's settlement offer is inadequate, oppressive, unjust or unfair.

5.3 Structured ADR (by which I mean dispute resolution by processes involving some element of formality rather than simple party and party negotiation) was unheard of at the time of the Oliver Report. During the last 30 years it has come to assume a primary role in dispute resolution, greatly exceeding that of the trial, although still probably falling well short of unstructured ADR. The purpose of this chapter is to focus on the relationship between structured ADR and chancery case management. For that purpose I exclude private arbitration, which is sometimes regarded as a form of ADR. This is because arbitration is unlikely to operate side by side with litigation in court after it has started, or to be an optional way forward at the management stage of an already pending case. The option of private arbitration will by then usually have passed. I do not entirely exclude judicial arbitration, which may be applied to a case already pending in court, although it is at present little, if at all, used in the chancery context.

5.4 Structured ADR may be of an evaluative or non-evaluative type. The main example

of the former which is relevant in the chancery context is early neutral evaluation (ENE). The main example of the latter, in the chancery context, is mediation. Of the two, anecdotal evidence suggests that mediation has been very much the larger contributor to structured ADR in the chancery context. My own experience of six years as a first instance chancery trial Judge is that most trials have been preceded by some form of unsuccessful structured ADR, and usually by mediation.

5.5 The chancery judiciary has played its part, although not a conspicuously leading part, in the encouragement of all forms of ADR. The standard form of chancery case management directions (at Appendix 3 of the 2013 Chancery Guide) contains an optional provision for a one month stay for "the parties to try to settle the disputes by alternative dispute resolution or other means". In that formulation the phrase "alternative dispute resolution" probably means structured ADR. The extent to which oral encouragement is given to parties, at CMCs or otherwise by the chancery judges, is left to individual preference and discretion. No national policy, guidance or training in that regard has been attempted. That said, (and as has been pointed out during consultation) the very high settlement rate in the Chancery Division is by no means unsatisfactory, and may fairly be said to reflect the fact that case management by Masters and District Judges along current lines has been a substantial contributor to resolution of disputes otherwise than by trial.

Financial Dispute Resolution ("FDR")

5.6 By contrast with the TCC, the Chancery Division has not taken it upon itself to offer judicial mediation or other non-evaluative ADR. I am not persuaded that judicial training and experience necessarily leads to serving judges becoming good mediators, although there are distinguished exceptions. Nonetheless there has begun to emerge in the chancery regional trial centres the informal use, borrowed from the Family Court, of Financial Dispute Resolution ("FDR"), in the context of Inheritance Act, contested probate, and TOLATA cases, whereby a District Judge directs the convening of, and presides over, a court meeting aimed specifically at exploring settlement, usually although not invariably with an offer from the District Judge to express a preliminary evaluation of the merits, or of a range of the likely outcomes at trial.

5.7 This welcome and reportedly successful development has not been reflected in any rule, practice direction or standard procedure. It has arisen as a result of the fact that many, if not most, chancery District Judges are also specialists in family litigation, and have naturally borrowed from their experience of the well established FDR process in family money cases, and cross-applied it to the appropriate part of their chancery caseload. It is no coincidence that this technique has most commonly been used in the individual property area of the workload, where many of the disputes are between family members.

5.8 I have very recently discovered that there has also been a small amount of ENE by chancery Judges, again out of London, and also in the Patents County Court, with a high level of reported success. Again, this option is not (by contrast with the TCC) reflected in anything in writing about the Chancery Division.

Culture Change

5.9 By and large, the traditional attitude of the chancery courts (and probably most others) to ADR has been to treat it as an essentially separate part of the dispute resolution process and, save for the occasional word of encouragement, the making of space in a timetable by a stay, and the very occasional imposition of costs sanctions for unreasonable refusal, to let the parties get on with it, or not, as they choose. In particular, the function of case management is perceived almost entirely to be concerned with the preparation and management of pending proceedings to trial, rather than the management of the dispute resolution process as a whole, in which a trial is statistically unlikely to be its conclusion.

5.10 There are several advantages in this cultural approach. First, unwavering case management towards trial imposes a remorseless progress of the case, against which (and the attendant effort and expense) there arises an ever-increasing incentive to settle by alternative means. Secondly, in case managing for trial, the court is managing that which it knows best rather than straying into fields where it has little or no experience. Thirdly, one of the strengths of ADR, and mediation in particular, is the way it empowers the parties to settle disputes themselves, rather than have resolution imposed upon them. Too much intervention in that process by the court could undermine that important feature of ADR.

5.11 Nonetheless, there are in my view compelling reasons why the court (and court users) should at least contemplate the court taking a more active role in the encouragement, facilitation and management of dispute resolution in the widest sense, rather than merely case preparation for trial. First, it will encourage a more widespread appreciation of the need to treat ADR as an integral part of the process, rather than an optional extra.

5.12 Secondly, it enables the court and the parties to build ADR into the process both by identifying the most appropriate time for it to be undertaken and by ensuring that, at that time, the parties are not so heavily engaged in compliance with directions for trial preparation that ADR has to be left on one side.

5.13 Thirdly, the court may be able to adapt its case management directions in ways calculated to maximise the likelihood of a successful outcome of ADR, for example by procedures which more economically lead to the parties having the requisite information for effective ADR, by comparison with the more expensive procedures designed only to produce that result by the time of trial.

5.14 Fourthly, a greater hands-on involvement by the court would be likely to lead to the development of experience as to the choice and timing of ADR with which the court could assist litigants lacking that depth of experience.

5.15 Finally, the court may be able thereby to develop and offer its own forms of ADR,

whether by FDR as mentioned above, or by judicial ENE, as developed below, and perhaps in occasional cases by judicial arbitration.

5.16 This is a culture change which I think should be shared not only between the court and court users, but also with the ADR providers. At present there is little formal or even informal meeting or sharing of views and experiences between the judiciary and the ADR providers, at least within the field of chancery litigation. It seems to me that the shared goal of proportionate, cost effective and timely dispute resolution is one about which the chancery judiciary and the ADR providers should meet and discuss more frequently, and perhaps in a more structured way, than they currently do.

Recommendations

First steps

5.17 The parties to Part 7 and Part 8 proceedings should be required to focus in more detail upon, and inform the court of their views about, the suitability, type and timing of ADR, before the first CMC (or directions hearing of a Part 8 claim). The simple questions in the recently superceded allocation questionnaire are, in my view, inadequate for that purpose. The parties need to be required to focus on, at least, the following questions:

5.17.1 Whether ADR is suitable at all. There will be some types of litigation where it is generally not, but otherwise the cases in which no ADR is attempted should be rare. But it may be that ADR has been tested and found wanting before proceedings are issued, and is not worth repeating.

5.17.2 Whether facilitative or evaluative ADR is preferable.

5.17.3 When, on the time-line of increasing information and increasing cost, ADR would be most likely to be cost effective. The timing issue is one of the most difficult and important questions to address in relation to ADR.

5.17.4 Whether private or court provided ADR is to be preferred.

5.17.5 Whether, ahead of any probable directions by a mediator or evaluator, the court can assist the parties in limited exchanges of the necessary information, so as to enable effective ADR to take place earlier than would otherwise be practicable, and at a more affordable cost.

The CMC or Directions Hearing

5.18 Thorough review of ADR options should be a normal feature of an oral CMC or directions hearing. I envisage that, in keeping with the essentially voluntary nature of ADR, the court's role would be facilitative, that is, encouraging and assisting the parties in agreeing on types, timing of, and preparation for, ADR, rather than imposing ADR management by court order.

5.19 In a case in which, because of its size or complexity, there is to be on-going case management rather than a single CMC, then I recommend that the progress of a chosen ADR option should thereafter be monitored on each subsequent case management occasion (whether orally or on paper) up to and including any PTR. Needless to say, the court's on-going review will need to stop short of invading the confidentiality which is, for example, an essential feature of the mediation process.

Financial Dispute Resolution ('FDR')

5.20 I recommend that the extension of FDR into individual property litigation (by District Judges familiar with this process in the Family Court) be continued and extended, both to any regional trial centres where it is not already practiced, and to London.

5.21 I am advised that in most of the regional trial centres and therefore also in London, there are sufficient chancery District Judges (and Masters) for the recusal of one of them after unsuccessful FDR in a particular case not to cause serious listing inflexibilities, in the allocation of the further case management and, if appropriate, trial of those cases among the remainder. In regional trial centres where there are only single or small numbers of chancery District Judges, then it may be necessary to recruit chancery experienced Deputy District Judges for this purpose in particular. If, as anticipated, a substantial improvement in the settlement rate of chancery litigation for which FDR is suitable takes place as a result of its more frequent use, then this additional recruitment ought to prove self-financing.

5.22 Consideration will need to be given to written guidance or practice directions requisite for ensuring that litigants prepare for discussion of FDR before CMCs, and in suitable types of case assist the court to conduct FDRs by the provision of appropriate position statements and financial information. I address this in more detail in chapter 14 below.

Judicial Early Neutral Evaluation ('ENE')

5.23 Oral consultation with court users in a particular District Registry revealed a high level of satisfaction with the conduct and outcome of two ENEs by a chancery s.9 Circuit Judge. Each took place within a half-day hearing. The first led to a settlement of a complicated Inheritance Act case which would otherwise have taken several days in court. The second moved the parties very much closer to a settlement and narrowed the issues.

I am advised that similar small scale examples of judicial ENE in the Patents County Court were also well received.

5.24 Save for these two examples, and for the evaluative part of FDR procedures adapted by District Judges from their practice in the Family Court, I am aware of no other instances of the use of judicial ENE in relation to chancery work. It is however, expressly provided for in the TCC Guide, at paragraph 7.5. My understanding is that it is at the moment rather infrequently used, but that it achieves a very high level of success when it is.

5.25 I have to acknowledge that feedback about judicial ENE following publication of the provisional report has, generally, been at best lukewarm. Concern has been expressed about the risk that a failed ENE may leave the parties more at loggerheads than previously, making the case even harder to settle. It has been pointed out that there is no shortage of privately available ENE, so that its widespread use by judges may risk diluting a scarce resource. There is no doubt that, in terms of actual use as an ADR method, ENE is very much the poor sister of mediation.

5.26 Nonetheless in my view judicial ENE would be a valuable tool for encouraging settlement in a range of chancery cases, even if not in all or even many of them. Cases where at trial the Judge has to perform a multi-factorial balancing of competing considerations, of which Inheritance Act cases are only one example, may be particularly suitable for judicial ENE. In particular, it provides the parties with a view of the merits from one of a small group of Judges, among whom the trial Judge would in due course be selected, at a fraction of the cost of going to a full trial. If the ENE is conducted with the assistance of some form of abbreviated hearing, then the parties will, in addition, be able to feel that they have had something of a day in court, and thereby feel more empowered to reach settlement than otherwise. I acknowledge however that these are personal views which have yet to attract a large following among court users.

5.27 By contrast, in cases where the outcome is likely to turn on hotly contested issues of fact which depend on oral rather than documentary evidence, judicial ENE is much less likely to be of assistance. Furthermore, it will be necessary when deciding whether to offer judicial ENE to have some regard to the question whether there is a sufficient prospect that the application of additional judicial resources to a particular case is justified by the anticipated increase in the prospect of a settlement which would avoid a full trial. The relevant increase needs to be identified as one flowing from the application of judicial ENE rather than any other form of ADR since, if it is likely that the case would settle anyway, the application of additional judicial resources will not itself have caused any saving of court time overall.

5.28 My enquiries suggest that the successful examples of chancery judicial ENE to which I have referred were achieved without the need for judicial training. Nonetheless it seems to me that training for this purpose would be valuable for all judges prepared to engage in the process, and probably necessary for many.

5.29 It has been possible to conduct some limited debate among stakeholder groups as to whether judicial ENE is best offered by the judge who has managed the case or

by some as yet uninvolved judge. To my mind the pros and cons are, in general terms, evenly balanced, and the choice of one or other route in any particular case is likely to be case sensitive. Generally, judicial ENE by the case management judge will save judicial preparation and pre-reading time and give the judge all the benefit of his or her exposure to that case until then. It may be that the experience of that judge's case management to date creates the confidence between the parties that his or her ENE will facilitate a settlement. But it will, if ENE fails, disable him or her from trying the case and probably from any further participation in its management. Thus the benefits of a particular case having been docketed until then risk being lost, if the ENE fails to produce a settlement.

5.30 I recommend that no decision be taken up front as to whether the management judge or some other judge should provide judicial ENE in appropriate cases. In my view both alternatives should in principle be available. In cases of the second type, there will need to be the development of sufficient co-operation between the chancery judges to ensure that one judge may offer judicial ENE, with confidence that some other judge will be found ready to conduct it.

Feedback from ADR

5.31 ADR is generally regarded as having failed if no settlement ensues, either immediately or within a reasonable time thereafter. In my view this conventional attitude is an oversimplification. It seems to me that, in principle, ADR which fails to produce a settlement may nonetheless cause or contribute to a substantial narrowing of the issues or increased focus on the key issues, capable of assisting both the parties and the court in the economical determination of the dispute at trial.

5.32 The difficulty which at present impedes that outcome, at least in anything other than an informal sense, is the confidentiality which separates the detail of most forms of ADR (and mediation in particular) from the purview of the court. An additional difficulty is that, at least during a mediation, the parties are for understandable reasons so focused upon achieving an overall settlement that the reaching and recording of a partial agreement disposing only of certain issues is unlikely to be given much priority.

5.33 There is little that I can do by way of recommendation to meet these two difficulties save by way of encouraging a measure of culture change. By that I do not mean that the parties should be encouraged to depart from the confidentiality which is a key feature of the success of the mediation technique, or in any way to lessen their focus on achieving, if possible, a complete resolution of the dispute. But a greater perception that an ADR process which just misses that target may nonetheless greatly contribute to the narrowing of the ambit of a dispute, and to the economical disposal of the remaining issues, is worth emphasis. It can be conveyed to parties by judges at CMC's, and to the mediation profession by the endorsement and publication of this report.

5.34 In practical terms, the assistance which a less than completely successful ADR process may provide to the conduct of the ongoing litigation is likely to need to take the

form of a written record, signed by or on behalf of the parties, of those issues which have been compromised or put aside, together with a formal voluntary waiver by them of the confidentiality which would otherwise attach to the creation of that document during a mediation or other ADR process.

5.35 As with judicial ENE, publication in the provisional report of the above views about the potential for unsuccessful mediation to narrow the issues did not strike much of a responsive chord among consultees. The main perceived problems were, as expected, that mediation is usually focussed upon outright settlement rather than narrowing the issues, and that difficulties likely to be experienced in translating a confidential narrowing of issues into anything properly capable of being deployed in court may make the concept impracticable. Nonetheless I continue to think that the idea may be worth exploring further.

Chapter 6: Case Management For Trial

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6.1 Nothing in chapter 5 about a culture change and re-focus of case management upon dispute resolution should detract from an understanding that preparation for, and arrangements for the conduct of, trials will remain an essential and central part of case management. Final determination of disputes by trial if necessary is both the primary and long-stop function of the courts, and underpins the ability of other forms of dispute resolution to provide just outcomes. Furthermore, as already noted, a sufficiently anxious focus by the parties on all available forms of economic dispute resolution is likely to be diluted if the necessary preparation for trial is simply ignored, or put on one side for anything other than specific, short, closed-ended periods. Representatives of the mediation community have acknowledged to me that an open-ended stay for mediation (or ADR) is as much of a dose of cold water upon the mediation process as it is upon the preparation for trial.

Culture Change

6.2 The cultural tradition which has generally (although not universally) prevailed in the Chancery Division with regard to case management for trial may be summarised as follows. The parties should, in general, be given the time they ask for to prepare, at the level of intensity and expense which they each choose. The trial should not take place (even if waiting times would not otherwise prevent it) sooner than after the parties have had all the time they ask for to prepare, and have indeed actually prepared. The parties should be the arbiters of what is included in witness statements and experts' reports. The parties may generally be trusted sufficiently to focus their time and resources on the resolution of the issues disclosed by the statements of case. Compliance with directions is desirable, but may generally be excused where no prejudice follows which is incapable of being put right by an order for costs.

6.3 The reformulation of the Overriding Objective so as to include proportionality and procedural discipline makes it necessary in my view to bring about a fundamental change in the culture of case management for trial. Many other courts and tribunals with a workload which overlaps that of the Chancery Division have already taken steps along these lines, and it is fair to say that most of the chancery regional trial centres are now further advanced along this road than is the Chancery Division in London, not least because their use of fixed-ended trial periods necessitates a greater rigour in the giving of, and compliance with, directions for preparation.

6.4 In my provisional report I suggested that the central elements of the necessary new culture in the Chancery Division should be as follows. First, there should be as early as

possible an identification of the main issues, and the use of the issues so identified as the essential basis for every aspect of case management thereafter. In short, case management should become, as completely as possible, issue based.

6.5 Secondly, proportionality should become an invariable and important consideration in every case management decision. It should lead where necessary to the imposition of constraints (in preparation) and rationing (in terms of trial time and the use of other judicial resources) which are then firmly enforced with serious consequences for those who ignore them.

6.6 Thirdly, and this is an aspect of the previous principle, there should in as many cases as possible be a single case management hearing, in which all the necessary directions for preparation and the conduct of the trial are given, and the trial period set. The trial window should also be identified at, or as soon as possible after, that single hearing. Successive CMCs and partial directions falling short of trial should be the increasingly rare exception, used only in cases where real efficiency and economy is likely to be the result.

6.7 Feedback since July has been generally supportive of this cultural change, subject to some caveats which I now describe. First, commentators in particular from the Bar have expressed concern that statements of case should still remain the primary way of identifying and defining the ambit of the issues to be tried, rather than be replaced or by-passed by any direct move to lists of issues. For the generality of cases I fully agree. There are some types of case, (particularly under Part 8 and applications for directions under the Insolvency Rules), where the form of the issues is defined by the originating process, so that statements of case are often (although not always) unnecessary. But for the generality of chancery cases I agree that properly drafted statements of case remain the first and vital tool both in defining the issues and then for controlling the ambit of the forensic processes for their trial.

6.8 Secondly, concern was expressed as to the extent to which it would prove possible to arrive at a reliable fixed-ended trial period at the first CMC in a large case, before the completion of disclosure and the preparation of witness statements had enabled the parties (and the court with their assistance) to get a reliable grip on the required length of trial, let alone a detailed trial timetable. I agree that there are many cases where this is so under the existing culture, and that there will be some where it continues to be so, even if the culture change which I recommend is fully embraced by judges and court users. But I do not accept that this concern should be allowed to stand in the way of treating the single CMC as a general objective, nor do I accept that the undoubted increase in the accuracy of trial time estimates likely to flow from delaying the fixing of the trial period for as long as possible, even until the PTR, is a good reason for abandoning the objective of fixing the trial period as early in the litigation as is practicable.

6.9 There are a number of reasons for this. First and foremost, one of the reasons why so many cases are disproportionately over-elaborated by the time they come to trial is precisely because the current culture assumes that trial preparation is conducted on an open-ended basis, that is on an assumption that each issue can be prepared in potentially infinite detail, and that the trial period will be whatever turns out to be

necessary for that detail to be examined in full. If the setting of a trial period follows the main stages in the preparation process, then the imposition of any rationing of trial length on the basis of proportionality will come too late to enable the parties to curb their preparation accordingly. Furthermore rationing after preparation will risk wasting part of the preparation cost by then incurred, and is likely to generate a perception in the minds of the parties that they have been short-changed in the provision of court time to air the grievances by then so fully (or over) prepared. By contrast, an early focus on (and fixing of) the trial time really proportionate to the value at risk and to the determination of the real issues will inject a discipline into all subsequent preparation which will itself be likely to reduce the risk of the case degenerating into litigation about costs.

6.10 Secondly, the creation of an objective to deal fully with all case management at a single CMC will contribute to a costs saving culture (because of the heavy costs associated with repeated contested hearings) without depriving the court of the alternative of a step by step (multi CMC) approach where it is really likely to be a better case management option.

6.11 Thirdly, my proposal that the trial period should be set early, at a single CMC, by no means rules out a later review of it in cases where unexpected developments give real ground for a conclusion that a longer, or shorter, period is both necessary and proportionate. The keynote throughout the case management recommendations in this report is managed flexibility rather than rigid adherence to rules, or even to earlier management decisions. In longer cases it may be sensible to require the parties to discuss and agree a provisional trial timetable before the CMC in order to assist in the choice of a suitable trial period. The PTR will be a long-stop date for reviewing a previously fixed trial period, if the parties can persuade the court that it is necessary (and proportionate) to do so. In such a case any provisional trial timetable used at the CMC will provide a useful benchmark at the PTR, for demonstrating what changes necessitate a revised trial period.

6.12 Finally, I was warned that this culture change is something which will need to be fully embraced both by the chancery judiciary and by chancery court users. Both are likely to need encouragement and training, so that the requisite change may be achieved with the necessary degree of consistency, and without resort to expensive enforcement hearings. Again, I entirely agree. I am encouraged by the feedback upon the provisional report from court users (both in writing and at a Chancery Court User Committee meeting which I attended in early November) to think that there does exist a sufficiently broad basis of support for this change in culture to make it workable in practice.

6.13 It is often said that, for the purposes of decision making, judges are and should be regarded as islands entire unto themselves, so that consultation with colleagues and consistency of approach is neither necessary nor appropriate. This is of course true in terms of judicial decisions about the substance of individual cases. It is not in my view appropriate in relation to judicial decision-making about case management. There is at present a wide range of different judicial attitudes, culture and practice in relation to case management, going far beyond the requirements for flexibility and a perception that each case may need bespoke treatment. Where a culture change is required, it is in my view essential, if it is to work, for there to be a large measure of common understanding,

mutual consultation and consistent application of new principles and methods, if court users are to be treated procedurally fairly. I would regard increased judicial consistency in case management as an essential aspect of their contribution to the necessary culture change. As with the guidelines necessary to implement the triage process for judicial allocation, the main elements of this culture change, and the particular means whereby it is to be implemented, ought also to be transparent, at the least by being published in outline on the Chancery Division website, once mutually agreed by the chancery judges.

Recommendations

6.14 For the implantation of the culture changes to which I have referred, I would propose the specific recommendations which follow.

List of Issues

6.15 The parties should, as a general rule, be required to prepare and agree a List of Issues for submission to the court in advance of the first CMC, once the Particulars of Claim and Defence have been exchanged. This need not normally await Replies and other forms of statement of case, still less requests for and the provision of further information, although there may be large and difficult cases where both the List of Issues and the first CMC should be deferred until after a complete close of pleadings.

6.16 The List of Issues should not be a thing of beauty, negotiated at great expense between the parties' lawyers over a protracted period. It should be a short working document, identifying the main issues, for use as a case management tool rather than (like the statements of case) a ring-fence which rigidly curtails what may be produced at trial. The statements of case will remain the primary tool for that purpose, and the List of Issues will be heavily based upon them. It may well be that in some complex cases the List of Issues should be cross-referenced to the statements of case.

6.17 Nor should the List of Issues be treated as written in stone from the moment of its first agreement. The increased use of preliminary issues, and encouragement to parties to resolve issues (even if they do not settle the whole case) by agreement, and the continuing process of disclosure and the exchange of witness statements mean that issues may come and go as the case proceeds. That can be reflected by adjustments to the working List of Issues over time, without the satellite litigation which too frequently attends applications for amendment of statements of case.

6.18 There will be types of case in which the parties may be able to proceed straight to a working List of Issues without a prior exchange of statements of case. This may arise generally after a full participation in pre-action correspondence or, more particularly, in cases under Part 8 or applications by office holders under the Insolvency Rules where the applicant seeks the determination of the court on identified issues, rather than a relief in the form of monetary compensation, transfer of property or injunction. Nonetheless, in the ordinary run of cases, I do not envisage the working List of Issues as obviating the

need for statements of case. In general, it will be the exchange of Particulars of Claim and Defences that enable the parties to focus upon the main issues for the first time.

Disclosure

6.19 The abolition pursuant to the Jackson Reforms of standard disclosure as a general default option means that the selection of an appropriate programme for disclosure will of necessity have to be issue based. The required disclosure reports will need to be drafted by the parties with this in mind. Beyond that, I need say little about disclosure which is specific to chancery cases, beyond that already set out in the Jackson Report and the rule changes which have followed it. It goes almost without saying that the requirement for proportionality should in most cases lead to less, and more focused, disclosure than has been typical to date. There will be many cases, such as those where the issues relate only to construction, where no disclosure at all is required. Feedback after the provisional report emphasised the continuing need for disclosure of documents damaging to a party's case. I entirely agree that this is and should continue to be a cornerstone in the just conduct of chancery litigation.

Witness Statements

6.20 I must under this heading first deal with a proposal by the Bar Council in its discussion document "Reforming Civil Litigation" (2013) that witness statements should in general be replaced by witness summaries, followed by limited examination in chief, but with a discretion to require or permit witness statements in appropriate cases. This well-argued proposal derives from a widely shared perception that the preparation and deployment of witness statements in chancery (and other civil) cases has now reached a stage of such excessive cost, effort and irrelevance that the only workable solution is now largely to get rid of them, leaving them for use only in very fact-intensive disputes where they would continue to provide value for money.

6.21 This proposal received a little support, but met with widespread opposition, during the consultation process in this Review. There were three main objections to it. The first was that examination in chief would cause a disproportionate increase in the duration and therefore cost of trials, by comparison with the current general rule that the whole of a witness's evidence in chief is to be gathered from his or her witness statement.

6.22 Secondly, it was said that the exchange of full, verified witness statements remained a valuable tool in the parties' mutual understanding of the strengths and weaknesses of their opponents' cases, contributing greatly to settlement, even if relatively shortly before trial.

6.23 Thirdly, it is objected that the ever-increasing complexity of modern business life makes it only fair to witnesses to be able to prepare and reflect upon the detailed content

of their evidence, and have it put in a witness statement, rather than to have to be subjected to a memory test in the unfamiliar and hostile environment of a trial.

6.24 I am, on a fairly clear balance, persuaded by the objectors. Although none of the three main objections is individually conclusive, they do seem to me to be sufficient in the aggregate, in particular because of their relative unanimity, to make it a wrong step to recommend general acceptance of the Bar Council's proposal. My reasons follow.

6.25 I accept without hesitation that a limited amount of examination in chief on specific central factual issues in a case may be the best way to a just result, fully justifying the additional trial time involved. This was widely endorsed by the feedback which I have received. My own experience is that, when suggesting this to parties' counsel at the beginning of a fact-heavy trial, the reaction has generally been one of uncomprehending reluctance. Nonetheless others have a different and more positive experience of limited, focussed examination in chief, and I agree that there are many fact-intensive cases where it will continue to be appropriate, and to justify the time spent. On the other hand, time taken for full examination in chief of every witness at a trial attended by numerous highly paid professionals risks disproportionate expenditure at an altogether higher order of magnitude than that inherent in the preparation and reading of witness statements.

6.26 Again, I fully acknowledge, as indeed did Jackson LJ, that a vast amount of unnecessary time and expense is currently devoted to the excessively detailed preparation of witness statements, filled with material which is either irrelevant (e.g. because it is a mere commentary on documents) or otherwise of marginal help. But this can be controlled both by rigorous exclusion of such irrelevant material at a PTR or at the beginning of trial, with appropriate costs consequences or, in advance, by rigorous issue-based directions which limit the content of witness statements and, where necessary, the number of witnesses to be permitted to be called in relation to specific issues. The recent decision of the Chancellor in JD Wetherspoon v Harris [2013] EWHC 1088 (Ch) is an example of the first. My recommendation that, for the future, there should be specific issue-based case management specifying the subject matter of witness statements (and, where necessary, the number of them) should provide the second, up-front solution.

6.27 That said, the Bar Council's proposal of witness summaries and limited examination in chief may nonetheless be a useful case management tool in appropriate cases, either for all the evidence, but more likely for evidence about particular events, or from particular witnesses. My negative recommendation is only that it should not become the norm.

Experts' Reports

6.28 The present rules enable the court to control the number of expert witnesses, and the general areas of expertise within which expert evidence may be called. CPR 35.4(2)(a) does now require the parties to identify the expert issues, when seeking permission to call expert evidence. But it is not yet the practice of chancery case managers to specify the

questions to be put to the experts, or even the specific issues upon which expert evidence is required. Nor is there any practice which requires experts to meet before preparing their main reports.

6.29 This produces a number of expensive and time-consuming disadvantages, all of which may be alleviated by a greater focus at the case management stage upon the issues. The first is that experts in the same discipline often receive widely different instructions from their separate instructing parties, so that their reports, once exchanged, resemble ships passing in the night. The second is that, not infrequently, a large part of the content of exchanged experts' reports is substantially identical, with only small parts dealing with issues about which, after they have met, the experts continue to be in disagreement. The result is that the court is faced with reading slightly differently worded treatises providing substantially the same guidance, at grossly excessive cost to the parties, quite apart from the waste of judicial time.

6.30 Thirdly, once the experts have met, their combined summary report about areas of agreement and disagreement frequently provides most of what the court needs, augmented by much more focused supplementary reports upon the points of real disagreement.

6.31 Other courts and tribunals have already addressed these problems. In particular, it is now standard practice in the TCC for experts to be directed first to meet, to prepare a statement of their agreement and non-agreement, and only then to prepare full reports on the points of disagreement. In the TCC it is generally unnecessary for the court to specify the issues for expert determination, since they will often be sufficiently apparent from the statements of case, and from Scott Schedules in particular. I am advised that it is an increasingly common practice in arbitration for similar directions to be given. Sometimes the Patents Court requires the parties to agree a technical primer, before the experts separately address the issues.

6.32 I consider that it is now time for the Chancery Division as a whole to move decisively in the same direction. By contrast with the subject matter of a typical case in the TCC, chancery cases often give rise to issues requiring the assistance of experts without those issues necessarily being spelt out in the statements of case. A common example is where, for the purposes of quantum, or in the detailed appraisal of a professional negligence claim, it is necessary for accountants to be instructed to prepare forensic reports.

6.33 For that reason, I consider that it will be necessary, much more frequently than in the TCC, for the court at the case management stage to embark upon a prescriptive analysis (with the assistance of the parties) of the precise issues to be put to the parties' experts, so as to enable their first meeting to be fruitful in the way which I have described. This is consistent with, and likely to follow on from, a generally issue based approach to case management and, in my view, likely very substantially to reduce the cost of expert evidence and the time taken by the court both in pre-reading, and (although to a lesser extent) at trial.

6.34 I was warned, and accept, that there are cases where experts may best assist the court without being tied down by an excessively prescriptive list of issues or questions. An Issue as to obviousness in a patent case was a specific example. But more generally the feedback since July has been broadly supportive of this recommendation, as a general principle for the proportionate management of expert evidence.

CMCs and Listing for Trial

6.35 It has for a long time been the almost invariable practice in the TCC for a trial date to be identified at the first CMC, and for all directions for trial to be shaped by reference to that known trial date. My understanding is that the date is actually chosen at the CMC by the case management Judge who will, generally, be the trial Judge and have his own diary available for the purpose.

6.36 There are obvious difficulties in replicating precisely this process in the Chancery Division (at least in London, although it is already widely used in the regional trial centres). Nonetheless it seems to me correct in principle to identify at least the trial window and to have the case fixed for trial as early as possible. Early fixing of the trial helps mitigate the disadvantages of long waiting times, because the parties can do most of their trial preparation while waiting. Early fixture assists the court in the assessment of the balance of convenience in connection with interim relief. The existence of a chosen trial date helps focus the parties on the ever-increasing desirability of settlement, and the need to complete their preparation in time, without having to be disciplined by the court.

6.37 An important advantage of the earliest possible fixing of the trial date or window is that the court and the parties may be able to conduct the whole of the requisite case management at a single CMC, rather than during the course of a series. Nothing increases expense and delay more than repeated hearings. Although they will of course be necessary in some of the largest and most complex cases, I consider it a worthwhile objective to concentrate the whole of the case management necessary for ordinary cases within a single hearing where possible.

6.38 In identifying early fixture as an ideal I do not overlook the need to bear in mind and manage the risk that haste in this respect may adversely affect the accuracy of the parties' trial time estimates, and therefore the proportionality and practicability of any fixed-ended trial periods chosen too early on the basis of them. There may well continue to be cases which justify an early but open-ended fixture, with the choice of a fixed trial period being made later, when estimates of reasonable accuracy can be provided. There may be cases where an early fixing of the trial period is best undertaken on an expressly provisional basis. In other cases the refusal of the court to provide a trial date until the parties provide estimates to which they are prepared to commit may be a salutary spur to their embracing a realistic culture of proportionality.

Rationing and Timetabling of Trial Time

6.39 I deal with this in chapter 7. In my view the decision as to the trial duration and the detailed planning of the trial should be embarked upon as early in the management of the case as is practicable. The detailed preparation of witness statements and expert evidence will be more proportionately done if conducted against the template of a trial of known length, rather than in the abstract. Otherwise the preparatory material will come to govern the duration of the trial, which will be likely to obstruct any real progress in achieving proportionality.

Chapter 7: Trial

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7.1 I have to a large extent foreshadowed the recommendations which I will be making in this Chapter in earlier parts of this report. The main objective is to give effect to the requirement for proportionality, and to maximise available judicial resources, by making trials no longer than is required for a just determination of the case. Other important objectives include:

7.1.1 Making starting and ending dates much more predictable.

7.1.2 Choosing the trial judge and making the judge's identity known to the parties much earlier than is customary at present.

7.1.3 Making better use of IT.

7.2 None of these objectives are, or ought to be, contentious. I have already explained how the introduction of fixed-ended trials will contribute not only to certainty for the parties, but to the ability of the Listing Office to plan Judges' diaries in advance.

Culture Change

7.3 I have already referred to the current traditional assumption within the chancery community (common to most judges and court users) that, once a trial has started, the court is at the disposal of the parties for as long as the trial turns out to take, and the contrast which this displays with the assumption in most other courts and tribunals (including arbitration) undertaking similar work, including most of the chancery regional trial centres.

7.4 I suggested in my provisional report that it is now time for the Chancery Division in London to undergo a fundamental culture change in this respect. I proposed that the new culture should embody the following principles:

7.4.1 Trials should normally be fixed-ended, that is, given a specific ending date which is not, save in the most exceptional circumstances, to be exceeded.

7.4.2 Trial time should be allocated not merely by the court's adoption of the parties' estimate, but by its own appreciation of the amount of the court's resources which ought proportionately to be allocated to each case.

7.5 This proposal received a supportive response from almost all chancery court user consultees, but a mixed response from the chancery judges. I have therefore re-

considered the proposal in the light of all the concerns which have been expressed, which I now summarise.

7.6 Foremost among them is the intensely practical perception that, in the real world, so many accidents can blight the smooth running of a trial timetable that routine compliance with them is just an unattainable ideal. Witnesses may fall sick, miss trains or planes or just take much longer to deal with in cross examination than can fairly have been expected or planned for. Late amendments may be proposed, skirmishes may develop about inadequate or late disclosure, or about the admissibility of the content of factual or expert statements.

7.7 More specific concerns included a fear that overruns during evidence would lead to a curtailment of closing speeches or judicial questioning of counsel, leading to the judge having to prepare a judgment with inadequate assistance.

7.8 Some consultees questioned whether, in the absence of statistical evidence about overruns, the supposed problem justified so far-reaching a change from time-honoured practice, which already included varying degrees of encouragement to the parties to keep moving forward with reasonable speed. Others suggested that the introduction of individual judges' diaries, with closed-ended trials listed back to back, would close off the current gaps and corners in a busy judge's timetable so vital to enable reserved judgments to be prepared within a reasonable time, and prevent the Listing Office providing time for judgment writing on the current ad hoc basis.

7.9 A particular concern was that giving time to the parties to prepare written closing submissions after the close of evidence was a valuable tool which frequently curtailed time in oral closings, and provided better assistance to the judge than an immediate closing speech.

7.10 A more general concern was the undoubtedly correct observation that every judge has a unique approach to trial, leading to widely different trial durations, not easily predicted by a different case management judge at the time when the trial period fell to be fixed.

7.11 Some judges doubted whether court users really wanted fixed ended trials even as the necessary condition for the earlier identification of the trial judge than is possible at present, and for the more frequent obtaining of fixed start dates. Others doubted whether overruns were really a significant problem.

7.12 Consultees with experience of fixed-ended trial arrangements in the regions expressed concern about the risk that an overrunning trial would have to be adjourned part heard, often for months, once it reached the end of its allotted period, and that this would be worse than accepting continuing uncertainty about ending times, as is current in London.

7.13 I have not been persuaded that these concerns militate against the adoption of either of the principles which I have proposed, although they undoubtedly justify care, flexibility and even caution in their application.

7.14 The starting point is that there is in my view nothing basically unjust about either of these principles, as long as all parties have a fair and proportionate time to advance their cases and challenge the cases of their opponents. I am on reflection persuaded that in the first principle I set the bar for departing from the fixed trial period too high, by limiting a permitted overrun to "the most exceptional circumstances". I would rephrase it as prohibiting overruns "save where necessary". Necessity is a tougher criterion than convenience or appropriateness, but 'most exceptional' is, as the cases show, a test which sounds good but lacks purpose or definition.

7.15 I acknowledge that, when viewed from the perspective of the traditional culture, the concept of rationing of trial or hearing time may appear to be invasive of a party's right to present its case as it pleases, potentially unworkable and in any event unwelcome. Nonetheless, my experience, both at the Bar and on the Bench, of being subjected to rationed trial and hearing times has tended to belie those apprehensions of potential injustice. I believe that perception to be widespread among those with similar experience, and it was specifically endorsed by a number of consultees.

7.16 I accept that a change of this magnitude needs to be tested against, and justified by, statistics rather than mere anecdotal evidence, as far as possible. I have therefore obtained statistics from the chancery Listing Office about the incidence of trial overruns during 2013. They are summarised in Annex 5. They show that slightly less than half of all trials overran and, of those that did, the average overrun was itself almost half of the estimated trial period. If one day trial estimates are excluded (where there is an artificially low incidence of overruns, because all estimates of less than one day are included), the proportion of overruns of the remainder rises to a shocking 62.6%. Either way, the statistics do not present a happy picture, and fully justify the advice from the Listing Officer which I received earlier during this review that, without a fundamental improvement in the predictability of trial duration, the earlier selection of trial judges and the provision of fixed dates would be, quite simply, impossible.

7.17 Without that improvement, I consider that substantially increased full docketing by Judges, increased fixed dates and even the routine identification of the trial Judge in time for the PTR, will all continue to be unattainable, otherwise than at the unacceptable cost of seriously increased waiting times. Feedback from court users makes it clear that fixed dates, full docketing and trial Judges for PTRs are very much sought after by chancery court users, and that they are indeed prepared to embrace a fixed-ended trial culture in order to obtain them.

7.18 The high incidence of overruns revealed by the 2013 statistics is more serious than can be explained away just by lack of discipline, by judges or court users, in complying with current rules and directions. It arises from a basic perception that, in the Chancery Division, compliance with a trial time estimate just does not matter that much, compared to the fullest preparation and presentation of the case. Bringing about real predictability

as to when a trial will end calls for more than just doing better. It needs a basic culture change, in which finishing on time becomes the general expectation and firm intention, rather than the exception.

7.19 I entirely agree that the adoption of fixed-ended and (where necessary) rationed trials must not lead either to the curtailment of closing speeches and judicial questioning, still less to any increase in the already unreasonable constraints on judgment writing time. The part of the typical trial that is commonly disproportionate is rather the cross-examination than the closings, and both oral advocacy and judicial questioning should remain a fundamental and distinctive part of English civil trial procedure. My proposals include the setting aside of judgment writing time as an essential part of the trial timetable, and proper pre-reading time. In appropriate cases there is no reason why the timetable should not also include time for the preparation (or completion) of written closings, and an element for contingencies to guard against the unexpected delays that might otherwise wreck a trial timetable. I accept that sitting early or late, and the use of Fridays in an otherwise four day trial week are not a fail-safe solution to every unexpected delay, and may unfairly burden witnesses, counsel, the judge and court staff unless used in moderation.

7.20 Nor is the high incidence of trial overruns in the Chancery Division in London the inevitable consequence of the ordinary vicissitudes of litigation life. I tried to obtain statistics about overruns in Manchester during 2013. The answer came back that there just weren't any. This was not because statistics about frequent overruns were not kept, but rather because, in a court where fixed-ended trials were the norm, they hardly ever occurred.

7.21 I accept that each Judge's unique approach to trial court-craft will introduce some uncertainty into the estimation and fixing of trial length during case management by a different judge, all the more so if the identity of the trial Judge is not known when the trial is fixed. But my proposals, taken as a whole, are designed to address both those problems. More cases will be managed by the trial Judge (including the fixing of the trial duration). Having the trial Judge conduct the PTR as a matter of course will enable him or her then to adjust the trial period if necessary. I also consider that, for reasons given in Chapter 6, that there should be more consistency in case management (including trial management) by the chancery Judges than has traditionally been the case.

7.22 It is no part of my proposals that Judges should be listed with heavy trials back to back. The current listing regime uses only about half of the chancery judicial contingent for trials in any particular week, even in the unusual event that all the listed trials stand up. Although a four day trial week may increase that fraction, there is no reason to suppose that Judges' diaries will become loaded with back to back trials, leaving no room for adjustments to the trial period at the PTR or even during the trial where really necessary.

7.23 Nor is it my intention that the invariable consequence of an overrun should be that the trial gets adjourned part heard. I accept that, even with a fully endorsed culture change to fixed-ended trials, some will still overrun, although I hope and expect on a very much smaller scale than at present. An overrun may happen through no-one's

fault. It may happen through the fault of one party, where it would be unjust to visit the consequences upon the other. Adjournment part-heard is a mischief to be avoided at almost all cost, although there may be some cases, where both parties are equally to blame, where it may be a condign punishment if the Judge is prepared to bear the consequences. My preference would be to accommodate overrunning trials so that they are usually continued to the end without a break, even though this may have adverse consequences for the diary. I have already acknowledged that dockets may get broken from time to time. By contrast with many much smaller trial centres, there will always be scope for replacing a named trial Judge at a late stage where his or her earlier trial overruns beyond any available contingency, and beyond the safety margin between trials which I would expect the Listing Office to be able to build into Judges' diaries in any event. Nor should judgment writing time be the usual or even common victim of overruns although, again, where the overrun is the fault of both parties, they may only have themselves to blame if they have to wait longer for their judgment.

7.24 The essential departure from the current culture which I propose is that the trial period should no longer be just a matter for estimates, with counsel being obliged to update them from time to time, where the automatic effect of a longer estimate is that the trial then takes longer. The trial period should be the subject matter of the court's case management powers, just like directions about anything else to do with its preparation and conduct, and the power to direct what the trial period is to be should, like all management powers, be exercised so as to serve the overriding objective, including proportionality, and with the power to vary where necessary.

7.25 I accept that it is necessary to balance the potential downsides of any proposed change against its perceived benefits, and to ask more generally whether a sledge hammer is being used to crack a nut. Various commentators have asked whether fixed ended trials are really necessary or even justified for the purpose of achieving a particular benefit, such as full docketing. In my view fixed ended trials (in the sense in which I have described the concept) are both necessary and justified as the gateway to a range of benefits, not just one. They include more full docketing, the routine allocation of the trial judge to the PTR, the making available of many more fixed dates and the creation of the requisite platform for rationing. More fundamentally they reflect the basic principle that the trial period is as much part of that which the court needs to manage as anything else about the conduct of litigation, if limited resources are properly to be shared among those in need of them.

7.26 Finally, I accept that where there is real concern about a substantial reform, as there plainly is in relation to fixed-ended trials, it would be prudent to begin with a pilot. The full implementation of the integrated programme of changes which I recommend will in any event have to await the arrival of better IT. The most optimistic estimates are that this will take up to a year. In the meantime a fixed- ended trial pilot should be embarked upon, to test both its effectiveness in achieving proportionality, and any adverse side-effects which some fear that it may produce. It will need to be closely monitored.

7.27 This Chapter, and the analysis of fixed-ended periods, is mainly directed to trials. But I make it clear that I can see no good reason why the same culture should not also apply to interim applications. I am advised that uncertainty as to their duration is

currently a significant contributor to the difficulties in predicting and planning judicial availability. Since they very rarely involve oral evidence, with its attendant uncertainties as to duration, I consider that there should be no real obstacles to achieving a fixed duration culture in relation to interim applications.

7.28 Again, as I have said in chapter 2, the key to making a major culture change of this kind work is to seek by persuasion and discussion, and obtain, 'buy-in' not only from the judiciary and court staff but also, critically, from court users. Once parties accept that trials are to be conducted in accordance with a pre-ordained timetable, and recognise that it is in their mutual interests because it controls the escalation of costs and makes the court more readily available, then my experience and expectation is that the practices and directions necessary to realise those objectives will be accepted, without any war of attrition between the judiciary and court users. Response to this view, expressed in the provisional report, has been very firmly supportive of the need for 'buy in' among court users, and of my expectation that it will be achieved.

Recommendations

Fixed-ended Trial

7.29 My first and main proposal is that, for the future, the general rule should be that chancery trials are to be fixed-ended. That means fixing a trial period rather than merely obtaining an estimate (with counsel's undertaking to update it). It means ensuring that the trial is then completed within the fixed period, save in unexpected circumstances and, if necessary, making moderate use of early or late sittings and Fridays to ensure as far as possible that there is no overrun. It contemplates making modest adjustments to the fixed-period if needed, for example at the PTR, but depends upon a recognition by all concerned that the norm is that the trial should both start and end on time. Much reduced overruns should not lead to adjournments part heard, but rather to diary adjustments where necessary, and the Listing Office should maintain a prudent margin between each Judge's trial fixtures to provide a flexibility buffer.

7.30 Achievement of the objective of avoiding overruns will require that judicial pre-reading time is built into the fixed period, that a specific and limited time for preparation of the parties' closing written submissions (if any) is built in and that, in larger or more difficult to manage trials, an element of contingency is also built in. A fundamental part of the timetable, for the first time in the Chancery Division, should be a specific time set aside, immediately after the end of the trial, for judgment writing. This need not be the amount required for the full task but, at the very least, enough to enable Judges to break the back of the judgment, while the case is fresh in their mind.

7.31 The elimination or substantial reduction in the uncertainty as to when trials are likely to end should, as a quid pro quo for court users, enable the chancery Listing Office to offer more fixed dates than the small number currently made available, in particular in cases where the requirement for attendance by overseas parties or witnesses makes

floating dates very inconvenient. I am advised that the main obstacle to the offering of more fixed dates is precisely the uncertainty as to when existing trials will finish.

7.32 In a very real sense, fixed-ended trials and fixed starting dates are natural partners. The main advantages of fixed-ended trials (in freeing up trial judges for pre-allocation to other cases well in advance) will not be realised if a floating start date causes a floating end date. In my view fixed starting dates should eventually become the norm, rather than the exception, but not on the basis that any slippage within the current 5 days gives rise to compensation, and not until a much better level of predictability about how long trials will last has been achieved.

Rationing

7.33 I am persuaded than an element of rationing is the only way in which the proportionality objective, and the more general need to make trials more affordable to litigants and to the Court Service, can be achieved. This will not mean that the court routinely lops off a percentage of the parties' joint or average estimate. It simply means that the court will be responsible for taking its own view about the amount of trial time (and therefore the court's resources) which the just and proportionate determination of each case actually requires. In many cases this may prove to be no less than the parties' best estimate. This should prove all the more to be the case as and when court users generally embrace the underlying change of culture, of which rationing forms a part, as contributing to the accessibility of chancery justice to court users. But if court users seek to evade the laying down of fixed trial periods by defensively over-estimating, then rationing will be a necessary antidote.

7.34 I make it clear that I regard the need for rationing as applicable not only to trials but also to substantial interim applications including, in particular, strike out and summary judgment applications, and applications for specific disclosure. These often take up wildly disproportionate hearing times. While the Court of Appeal has recently taken the view that it is a denial of justice to refuse an oral hearing of a strike out application altogether, it by no means follows that the parties are to be given unlimited time in which to indulge in them.

7.35 Rationing, and the avoidance of overruns, may be achieved by the appropriate use of timetables or chess clocks. I have no settled views about the attractions of one as against the other, but consultees overwhelmingly preferred the former, at least for trials. Plainly, timetables are generally likely to be more useful in significant trials, and chess clocks in heavy applications, where they can be applied simply to the parties' time for submissions, as is already (in the virtual sense) frequently done in the Commercial Court, in the Court of Appeal and in the Supreme Court. If all the parties to a particular trial or application prefer one or other of those tools, I can see no reason why the court should not concur, subject to its own need to ask questions or to ventilate provisional views for critical appraisal by counsel.

Earlier Selection of Trial Judge

7.36 This (I hope) welcome proposal is likely to be another quid pro quo for fixed-ended trials with minimal overruns. I am, again, advised that the unpredictability as to when trials will end is one of the main impediments to the earlier selection of judges for trials. The other one is the current lack of the requisite IT necessary for running eighteen judges' diaries (and deputies' diaries) in parallel.

7.37 Earlier selection creates the obvious advantage that the parties' advocates will not have to prepare their skeleton arguments or written opening submissions in ignorance of the identity of the trial judge to whom they are to be addressed. Selection of the trial Judge for the conduct of PTRs has advantages which are too obvious to call for description. The ability to provide full docketing on a larger scale than at present is absolutely predicated upon the ability to pre-select trial judges much earlier than at present. All those advantages are likely to contribute to the general objective of shortening the length of trials (including any necessary judicial pre-reading).

7.38 Early selection will also, so I am advised, very much assist the parties' lawyers to estimate the likely duration and therefore cost of trials, both for the purpose of advising clients and in the preparation or adjustment of costs budgets.

Cross-examination

7.39 Now that most trial openings, and an increasing part of closing submissions, are in writing, cross-examination represents the largest part of most trials involving disputes of fact. None of the reforms which began following the Woolf Report have significantly impacted upon the length of cross-examination. If anything, the introduction and constant increase in the length of witness statements has, for no very logical reason, made cross-examination even longer. It is an illogical consequence because in my view, (although one consultee disagreed), the underlying principle which governs cross-examination is the requirement of the party to put its own case to the witness, rather than to engage in a prolix crossing of swords with lengthy and irrelevant passages in the other parties' witness statements.

7.40 Nonetheless, even a conscientious adherence to the underlying principle can lead to unnecessarily long cross-examination where, for example, the same detailed case is perceived as needing to be put to a number of successive witnesses able to give admissible evidence about a complex event as to which there are factual issues.

7.41 My experience, which consultation suggests is widely shared, is that in heavier cases counsel very frequently abridge the full rigour of that convention by unwritten agreements or understandings that the full case will either be put only to certain primary witnesses, or parts of it to each of a succession of witnesses, so long as every aspect of the case is put to someone. This frequently reduces the length of cross-examination to a proportionate level, without compromising the fairness of the process in any way.

7.42 The trouble is that this useful process is unwritten, is not the subject of any practice direction or general principled analysis, and is not applied across the whole spectrum of cases in which cross-examination forms a significant part of the trial. Beyond a clear perception that this process of abridgement of the traditional underlying principle is welcome, and contributes to proportionality, I have no specific proposal to make about how a new and more proportionate cross-examination principle might be formulated, so as to be of general application without the need for specific conventions between counsel in particular cases. I sought feedback on what a new general cross examination convention might contain, but none was forthcoming, beyond the view of several consultees that the problem was too fact specific to admit of anything more than the current de facto arrangements on a case by case basis.

Four Day Trial Weeks

7.43 The use of four day trial weeks in courts where there is a significant level of case management by Judges is rapidly becoming the norm. It is, for example, standard practice in the Commercial Court, the Mercantile Court and in some of the regional trial centres. It is at first sight a practice which might be thought adverse to maximum judicial productivity, since it would lead to the same number of judges disposing of twenty per cent less trial business in any given week. Nonetheless I consider that this prima facie impression is misguided. I am advised that in any typical week, only half of the full complement of chancery Judges (including deputies) is likely to be engaged in trial work. The remainder will be undertaking applications, appeals, tribunal work and case management, spread throughout the week. Thus, the apparent loss of trial productivity occasioned by a four day trial week could easily be made up by allocating more Judges to trials during Monday to Thursday, but leaving all of them free for non-trial work on Fridays.

7.44 The benefits of a four day week, fully realised in the Commercial Court, include the following. First, in an environment of greater case management by Judges, it enables a Judge engaged in one case to be available for case managing other cases on Fridays, and for counsel engaged in trials to be available to attend the case management of other cases in which they are retained, again on Fridays.

7.45 Secondly (and this advantage was widely supported during consultation), a four day trial week enables the parties and their legal teams to keep pace with the frequently heavy on-going burdens of preparation and assimilation during a long trial. It enables cross-examination to be better prepared, closing submissions to be embarked upon before the end of the evidence, and essential work on other cases to be done without disrupting the necessarily intense focus on the trial in hand. It also enables parties and their managers to keep in touch with the rest of their business activities for one business day a week. It also enables the trial Judge to take stock, and to keep up with other duties (such as judgment writing) which can be difficult to fit round the edges of a trial day.

7.46 A four day trial week will also enable post judgment hearings (which can last up to

a day in some types of case, particularly within the intellectual property field) to be more easily listed at a time, soon after handing down, which both the trial Judge and counsel can attend.

7.47 More generally, consultation on this question yielded broad, although not quite unanimous, support for a move to a four day trial week. I must however address a concern expressed during feedback. This was that heavy case management applications on Fridays could unfairly burden a trial Judge, who might need Friday to re-group as much as did the parties to a heavy trial, and who would have to do the pre-reading for the Friday hearings earlier in the week, and any reserved judgment writing during the week-end. There was some anecdotal evidence that this was a problem in the Commercial Court. In my view the answer to this concern is that there is unlikely to be anything like the same burden of Friday case management in the Chancery Division because, at least for the foreseeable future, most case management will still be done by the Masters. The object of triage is to focus case management by Judges only on that small proportion of cases likely to go all the way to trial, and only on that part of it needing, and likely to benefit from, full docketing.

7.48 I therefore propose that a four day trial week be adopted in London. I deal with its adoption in the regional trial centres in chapter 10.

Use of IT

7.49 There is little that I can usefully contribute from my own experience (or consultation) beyond a general recommendation that everything which can contribute by way of IT to the reduction or elimination of paper at trials should be implemented. Enormous trial bundles and (to a lesser extent) bundles of authorities are the bane of modern medium or large chancery trials. The proliferation of bundles arises primarily from the hard economic reality that, in an age when business counterparties rarely do anything other than in writing, parties' solicitors find it prohibitively expensive to apply real thought to the selection from the huge volume of disclosure of the documents which are either necessary, or even likely, to be used at trial. They simply find it cheaper to arrange the entire disclosure in some form of chronological or other convenient order, to photocopy it numerous times and to enclose it in large numbers of lever arch files. Constant criticism by the judiciary of this process is, understandably in my view, met with the response that the inconvenience thereby occasioned to the court is less of a burden than the cost to the parties of a more discriminating approach.

7.50 The endless proliferation of bundles of authorities is the consequence of the combined effect of the current reporting of nearly every judicial decision, coupled with the almost invariable habit of the parties' lawyers in ignoring repeated practice directions about confining citation to leading cases.

7.51 The simple solution to both these problems seems to me to be to move as fast as possible to accommodating this explosion of material within an electronic format.

This is indeed very occasionally directed and achieved, in relation both to trial bundles and authorities. It has proved to be possible with the use of the IT wiring infrastructure within the Rolls Building, subject of course to the provision by the parties of the necessary hardware and underlying material.

7.52 In the current economic climate it is I think unrealistic to assume that progress will be at all fast towards paperless trials becoming the norm, rather than the occasional exception. Nonetheless, that outcome seems to me far more likely to provide the long-term solution to the endless proliferation of trial bundles and bundles of authorities, than insistence upon a non cost-effective discrimination in their preparation, or repeated but historically futile repetitions of practice directions about economy in the deploying of authorities.

Judgment Writing

7.53 The time taken for the preparation of judgments is a constant source of anxiety both to the judiciary and to court users. By contrast with what is at least meant to happen in the Commercial Court (where Judges are meant to be given half the estimated hearing time as judgment writing time after trial) no specific allocation of judgment writing time is provided in the Chancery Division (save only for trials by Registrars). Judges are expected to fit their judgment writing and their box work around their allotted hearings. In practice, the supreme level of flexibility which characterises the management of the Listing Office means that judges frequently do obtain time after trials in which at least to break the back of the judgment writing, while the case is still fresh in their memory and productivity therefore high. Nonetheless, there is no system or even convention as to the time within which the parties to a trial or heavy application can expect to receive a reserved judgment, and the waiting times actually experienced are notoriously different in length, ranging from days through months and, occasionally in the past, even to more than year. Three months is now likely to be the longest that most parties will have to wait, but even that is worth trying to improve upon, if the means can be found to do so.

7.54 A striking contrast to this lack of consistency is provided by the Patents County Court (now the IPEC), in which a practice of specifying in advance of trial the probable date for hand down of the judgment (usually six weeks after trial) is routinely provided. Of course, the relative brevity and modest complexity of trials in that court make this a practicable solution in a way unlikely to be capable of being replicated in the Chancery Division generally. Nonetheless, it is the waiting time to judgment rather than merely to trial which causes the uncertainties which adversely affect businesses engaged in litigation. Although the trial may provide an element of catharsis, it is the judgment which determines the dispute.

7.55 In my view there is good reason to propose, as a general rule, the inclusion of an appropriate period for judgment writing at the end of trials and heavy applications. I consider that the 50% of trial time allocation supposed to be available to Judges in the Commercial Court is too inflexible. Furthermore I am advised that it is only infrequently

realised in practice, the time allocated frequently being used as a contingency for other purposes such as the accommodation of overruns and other urgent applications. I suggested in my provisional report that it would be sufficient to allocate judgment writing time on a 25% basis and, even then, subject to the proviso that inroads may be made upon it for substantially the same purposes as in the Commercial Court. I intended that this should enable the Judge to break the back of the judgment, rather than complete it.

7.56 The general thrust of the feedback which followed (not just from judges) was that 25% was a miserly allowance, and that 50% was a better starting point, subject to variation on a case by case basis by the case management judge, or at the PTR by the expected trial Judge. Furthermore, the shorter the trial, the greater percentage of the trial time might usually be needed for the judgment, so that the confining of judgment writing time to trials lasting over one week, suggested in my provisional report, was probably too restrictive.

7.57 It is no adverse reflection on judicial skills and abilities that there are wide differences between them as to the time taken to write reserved judgments. Some are fast, some are slow, and this usually has nothing at all to do with the quality, or even length, of the end product. In the light of the feedback I am inclined to accept that the Commercial Court's 50% may well be a better starting point than my 25%, and I agree that, within reasonable limits, the case management judge or, if different, the trial Judge at the PTR should be able to adjust it. It is really a matter between the Judge and the Listing Office, but satisfactory time for judgment writing immediately after a trial or heavy application is likely to be instrumental in realising court users' hopes for an improvement in the length and the predictability of the time between the end of the hearing and the handing down of judgment.

7.58 It has been suggested that the judiciary might consider a change in culture in favour of shorter judgments. Recommendations to this effect occasionally emerge from very senior Judges, but there is a wide difference in practice among the full time chancery judiciary. Again, I have no magic solutions to offer. In fact-intensive cases a trial judge often has to deal in much more detail with the factual issues than strictly necessary on that judge's analysis of the law, in order to avoid a re-trial if the Court of Appeal should adopt a different legal analysis. One re-trial causes delay and expense greater than almost any number of long judgments. Nonetheless lengthy analysis of authorities might usefully be replaced with a succinct statement of the trial judge's understanding of the relevant legal principles, leaving higher courts to provide the in-depth legal analysis when necessary.

Seating Patterns

7.59 It has been suggested that advantage should be taken of the flexible design of the court-room seating arrangements in the Rolls Building to relax the traditional formality of seating patterns in court. I agree. I consider that the parties should be encouraged to adopt whatever seating arrangement they mutually agree, for the enabling of the most useful lines of communication between counsel (leading and junior), solicitors, experts and parties.

Chapter 8: Orders

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The Problem

8.1 The drawing and sealing of chancery orders is the only aspect of chancery practice which can fairly be described as having broken down. The responses to consultation revealed a virtually unanimous view that the drawing and sealing of orders was, by the beginning of this review, subject to wholly unacceptable delays, amounting frequently to as much as 6 weeks, by comparison with 3 to 5 days in the Commercial Court and an even quicker turnaround in the QBD. This was, in the view of respondents, exacerbated by the inaccessibility of the chancery Associates, hidden away on the 5th floor of the Rolls Building, out of reach of any effective means of party contact, and further exacerbated by a commonly experienced failure to ensure that Judges' orders are even placed on the Court File for the case in question.

8.2 My enquiries of the Associates' line manager, and of those responsible for the drawing and sealing of orders in the Commercial Court and QBD, broadly confirmed that these criticisms were well founded. Although the time-lag varies from time to time, the typical delay between the sending of the file for the drawing and sealing of an order by the Associates, before it reached the top of the waiting pile, was 9 working days, that is almost two working weeks. To that must be added the time taken for the Master or Judge to check any minute provided by the parties, usually by having to obtain the physical court file, and the time taken by the Associates to draw and seal the order, once it reaches the top of the pile. It is then invariably dispatched by second class post. In fairness the Associates have during the currency of this Review managed to bring the delays under temporary control. However, for as long as the present system remains unchanged I fear that it is probable that serious delays will build up again.

8.3 There is no service counter which connects with the Associates. The only means of access to them is, on the 5th floor, through the office responsible for management of ushers. There is no senior or duty Associate charged with providing an interface with court users, and the difficulties encountered in making contact with the particular Associate responsible for drawing up the relevant order are formidable. In any event, the relevant Associate may well be in court, deputising for an usher, and equally disabled from phoning out to a relevant court user if some matter requiring contact with a party arises in the process of drawing the order.

8.4 It is worth summarising how this unfortunate state of affairs has come about. In the distant past, each Judge had allocated while sitting in court a fully trained Associate well versed both in the drawing of orders and in providing occasional advice on procedure and practice to the Judge. At the same time each court was also staffed by an usher so that, however prima facie unsatisfactory the Associate's desk in an active court hearing might be thought to be for the productive drawing of orders made in other cases, at least the Associate was not disturbed by the requirement also to act as an usher and look after the needs of the parties, the swearing of witnesses, and other routine work arising during the course of the hearing.

8.5 A beneficial consequence of the invariable presence in court of an experienced Associate was, at least in relation to orders made by Judges, that the Associate responsible for drawing the order was present in court when it was made.

8.6 In that distant past, the service provided by the chancery Associates to court users in terms of the drawing and sealing of orders may properly be described as having had a Rolls Royce quality about it. This reflected a perception that, in general, chancery orders tended to be more complicated than most other orders, and that the drawing of a suitably framed order was an intrinsic part of the service provided by the Chancery Division to its court users.

8.7 It is ironic that complaints about delays in the drawing and sealing of orders appear to have been as loud to those conducting the Oliver Review as they are now. Furthermore, it is noted in the Oliver Report that those delays could often last for several months, largely due to the extraordinary detail of the recitals about the case which were commonly included, after a painstaking assembly of relevant documents, and in the absence of the current type of court file. In those days orders were drawn by legally qualified persons called registrars and assistant registrars. Lord Oliver said, at paragraph 265, about the complaints then being made that:

> *"This problem has constituted the most difficult and the most worrying part of our review, not least because we are conscious of the human problems which inevitably arise as a consequence of effecting such a re-organisation. It is right that we should say that the registrars and assistant registrars strive conscientiously to produce the results required of them. But after much anxious consideration we have been compelled to the conclusion that, however conscientiously they carry out their duties, they are the prisoners of an inherently unsatisfactory and wasteful system. Indeed, in seeking to identify what individual features of the present arrangements were at fault we were driven to the conclusion that the basic flaws lay in the system as a whole".*

8.8 The Oliver Report contained a blueprint for a complete reorganisation of the drawing and sealing of orders, but it was still essentially based upon the assumption that it was for the court, with minimal assistance from or reference to the parties, to draw chancery orders, that apart from a small circle of experienced firms, solicitors could not in general be trusted to get the drafting right, so that the solution therefore lay in the internal reorganisation necessary to ensure that shorter orders were drafted (without the cumbersome recitals) based upon readily available court files, as far as possible by a person present in court when the order was made.

8.9 I have been unable to ascertain the extent to which Lord Oliver's reforms achieved their objective. There is no record of the average delays encountered, still less of complaints received by court users, between then and now. Nonetheless it appears to be common ground both among court users and indeed court managers, that the system has again broken down, and needs radical review. The Norris report made certain proposals for improvement, but they were still based on the assumption that the Associates needed to be involved at every stage. It is not clear whether his recommendations were implemented.

8.10 The causes of the breakdown appear to be as follows. First, a system which depends upon judicial approval of the form of a party's minute of order and then its re-typing, drawing and sealing in another department within the Rolls Building on a different date, in both cases by reference to a physical rather than electronic court file, contains inevitable built-in delays, however long, short or non-existent may be the queues of orders waiting to be dealt with at any particular time.

8.11 Secondly, there has for several years been pursued a policy of reducing staffing in court from the traditional two (Associate and usher) to one, i.e. Associate or usher. Save in the Interim Applications court, single person staffing is now the rule, and even that has only been secured (as opposed to nil staffing) by rigorous and occasionally vociferous monitoring and complaint by Judges left unattended.

8.12 Two disadvantages flow from that arrangement. If the single staffer in court is an Associate, they will be distracted from their ordinary work of drawing orders by the need to act also as an usher. Otherwise, including the time when orders are made, there will be no Associate in court at all to record the order pronounced by the Judge, but only an usher.

8.13 Thirdly, financial stringency and the increased standardisation of forms of order have led to a progressive down-grading of the seniority and experience of the staff used as Associates. There are now only 6 band D Associates experienced in the work, assisted by a larger number of band E Associates who are, at least when recruited, entirely untrained for the job and who need then to be trained and closely monitored by their band D colleagues. The result is that, quite apart from having to divide their court time between acting as Associates and ushers, the band D Associates, who are the only ones with the experience to draw orders (other than of the most routine kind) quickly and efficiently, have also to divide their out of court time between that task and the training and monitoring of their more junior colleagues.

8.14 Fourthly, the location of the Associates' office on the relatively inaccessible 5th floor of the Rolls Building, far from the judges they serve and from the file storage and other court staff to which and to whom they need to have recourse for performing their work, has been the final straw in the burden upon them that has, in effect, broken the camel's back.

8.15 In the meantime, the cultural assumption that the drawing and sealing of orders remains no part of the judiciary's responsibility, and by no means the primary responsibility of the parties' lawyers, means that reliance continues to be placed on a system which, however effective it may have been in the past, is no longer fit for purpose.

8.16 In sharp contrast, as both commentators and court staff have pointed out, the Commercial Court, the TCC and the QBD all place primary responsibility for the drawing of orders upon the parties' lawyers, under systems which (although not identical) reduce the role of the court staff to the bare minimum necessary to have them sealed, after the necessary judicial scrutiny.

8.17 Those courts have encountered no reluctance in the parties' lawyers to assume this responsibility. Leaving aside litigants in person, the lawyers for the party with the carriage of the order habitually produce not merely counsel's minute, but sufficient copies of an engrossment which, if approved by all parties and/or by the judge (including the Master for this purpose) is then available as the drawn order, ready for immediate sealing, so that a copy can be filed and the remainder returned for distribution by the party with carriage. Sealing is commonly done by the clerks to the relevant judiciary, a simple process requiring no special training or skill, and involving minimal delay.

8.18 Subject to certain qualifications and limited exceptions, I have reached the clear view that it is time for the Chancery Division also to transfer primary responsibility for the drawing of orders to the parties' lawyers. This is indeed what those respondents who have suggested solutions have almost unanimously proposed. In fairness, this already takes place in numerous chancery cases. Minutes of order are commonly attached to application notices and skeleton arguments. Draft orders are commonly prepared and agreed by counsel or solicitors at the invitation of the judge at the conclusion of hearings. Various ad hoc time-saving solutions are employed by particular judges, such as a direction that an order, once initialled by counsel for both sides, can be sealed without further judicial approval, or that approval may properly been given by a judge without needed to obtain the court file. Other ad hoc solutions include imposing a tight time limit for the return of approved minutes and engrossed orders, to receive judicial approval before the court file is returned to storage, thereby avoiding the delays occasioned by it having to be obtained again.

8.19 None of these ad hoc solutions have become standard practice. In many cases, Masters make notes of their order in manuscript on the file itself, leaving it to be deciphered and converted into a fully fleshed out order by the Associates, still with no party involvement at all, on the basis that it remains part of the Court's ordinary service to litigants.

Recommendations

Culture Change

8.20 In my view, a change of culture under which the parties are invited or (if reluctant) required to assume primary responsibility for the drawing of orders should lead within a reasonable time to a situation where the vast majority of chancery orders require no attention from the Associates at all. The process of drawing, approval and sealing will take place between parties' representatives, the judge who made the order and that Judge's clerk (or, in the case of Masters and Registrars, clerking team). Special arrangements would need to be made for deputy Judges, who do not have their own clerks. This would broadly replicate what already takes place in the other courts in the Rolls Building, and in the QBD generally.

8.21 I am, in particular, not persuaded that anything special about the chancery

workload justifies the continuation of its traditional radically different approach, save for certain limited special cases, to which I shall refer. For the most part, chancery orders are not inherently more complicated or difficult for the parties to draw (with any necessary judicial assistance) than any other orders. Indeed, examples of the most difficult types suggested to me included committal orders, which are of course made by all these different courts, in substantially the same form.

8.22 There are, it is true, certain types of traditional chancery business which give rise to quite complicated orders: e.g orders for the specific performance of contracts for the sale of land, some third party debt orders, charging orders and some orders made in probate or administration proceedings. But other chancery orders of great complexity, such as those for the approval of a corporate scheme, or insurance or banking transfer scheme, are commonly drawn by the parties' experienced specialist lawyers, who have entirely taken over that process to the exclusion of the Associates. There are, in any event, readily available forms, both in text books and online, for the drawing of almost every conceivable type of chancery order, and there is no reason to suppose that even a small solicitors' firm cannot, with the occasional necessary assistance from counsel, draw such orders as efficiently and as well as a typical band E Associate.

8.23 I recognise that the change of culture which I propose needs to be embraced by the judiciary as much as by the litigants' lawyers. For as long as the judiciary continue to rely upon a specific drafting section of the court staff to prepare and scrutinise orders before they are sealed, they may continue to be dissuaded from the application of the requisite preparation and scrutiny of orders which, after all, they have themselves made. It is likely to be a matter of judgment and feel in each case as to the extent to which the parties before the court can be trusted to agree an order corresponding with that made by the judge, without further intense scrutiny by the judge of the minute approved by the parties. Furthermore, the approval of minutes of order by judges is capable of being seen as part of what may be regarded as distracting and generally unwelcome box work, when the judge is hard pressed with the preparation for and conduct of hearings, and with judgment writing. Nonetheless, the elimination of unnecessary delays in the conversion of the expensive process of hearings and trials into the orders which the parties have come to court to obtain is one which will call for increased judicial discipline as well as greater party involvement.

Exceptions

8.24 Turning to the qualifications and exceptions, I must first mention the by no means as unsatisfactory position in relation to Registrars' orders in company and bankruptcy matters. Our enquiries reveal a much speedier turn-around of sealed orders, particularly in routine cases, (such as bankruptcy and winding-up orders). Generally it appears that routine orders of that kind are commonly turned round on the day they are made, and that in general 99% of the Registrars' orders are turned round within 5 days. Registrars' orders are already dealt with by them and their clerking team, with some assistance from their ancient Bacchus computer system, without recourse to the Associates. Accordingly,

it appears that no recommendation for change needs to be made there.

8.25 By contrast, orders made by Judges in company and insolvency matters are processed through the Associates in the ordinary way, and are therefore subject to the same delays which arise from the problems which I have identified. My experience is that the higher value and high complexity corporate and insolvency work sent to the Judges is handled for the most part by lawyers who already undertake primary responsibility for the drawing of the orders which result from those hearings, so that a culture change which treats that as the norm will be easily assimilated by practitioners in that field.

8.26 The main qualifications to the changes which I propose relate to three residual areas where it will I think be necessary to retain a significant 'in house' drafting capability of a type which the experienced Associates perform very well, if not always quickly. The first is the Chancery Interim Applications Court. There, a recent reform has been implemented, designed to achieve as far as possible a 'while you wait' drawing and sealing service, supervised by an experienced band D Associate sitting in court. I asked for feedback as to the extent to which this is in practice achieving the objective which I have described. Not much was forthcoming but, even if it is not, I consider that it offers sufficient promise of the achievement of that objective to be well worth pursuing and, if necessary, refining, rather than leaving all orders made in the Interim Applications Court to be drawn entirely by the parties and sealed by the Judge's clerk.

8.27 There are two reasons for this which I find persuasive. The first is that the intensity of the pressure on the Judge and the Judge's clerk in processing applications (including without notice applications arriving on the day) so as to ensure an efficient and orderly discharge of the workload effectively prohibits Judicial scrutiny of orders as they are drawn by the parties, and would make the process of sealing by the Judge's clerk less efficient, on that day, than sealing by the Associate in court.

8.28 The second reason is that this process makes the very best use of the old concept that the best and speediest route to an accurate sealed order is to have an experienced Associate in court, ready to draw it as soon as it has been pronounced by the Judge. Although that theoretically efficient concept has largely been destroyed in relation to most other court hearings, in particular because of the prevalence of single manning in court, it is still the rule in the Applications Court that there must be both an experienced Associate and an usher, so that the Associate can concentrate undisturbed on the very task for which he (or she) is qualified.

8.29 The second area which will still call for the contribution of experienced Associates is the drawing of orders made in cases involving litigants in person. By this I do not mean that every case involving a litigant in person requires that the order be drawn by an Associate. There will be many cases where the judge is sufficiently able to trust the other party's lawyers to do the task in a way in which fairly and neutrally reflects the precise terms of the judge's order (without putting a partisan slant on it), where carriage of the order can be given to the represented party in much the same way as if all parties were represented. No doubt the represented party will be directed to explain the draft order to the litigant in person, and to pass on to the court any comments which the litigant in

person wishes to make about it, and the presence of any litigant in person will require greater judicial scrutiny of the party-drafted order than in a case where there are lawyers on both sides capable of giving it a thorough check. Nonetheless, those cases do not in my view require the further participation of the Associates.

8.30 The cases where such participation will still be necessary include, of course, those few cases where there are litigants in person on both sides. In such cases, it may be possible for the judge to draft the order, but there will be others where the assistance of an experienced Associate will be more efficient than leaving the drafting to the judge, and cases where pressures on the judge's time will make that essential. By contrast, case management orders where there are litigants in person (even only on one side) will, for reasons set out in chapter 9, have to be drafted in detail by the judge, so as to ensure that litigants in person know precisely what they must do to prepare their case. Finally there will be a residuum of cases where there is a litigant in person on one side, but where the court may feel that it cannot rely upon the represented party to have carriage of the drafting, or where the need to ensure that justice is seen to be done requires the court, rather than the represented party, to undertake that task. Feedback following my provisional report suggests that this may more often be appropriate than I had envisaged.

8.31 Finally, there remain areas of particular chancery expertise in the drafting of certain kinds of order which are better done by experienced Associates rather than either the parties or the judge. By that I do not mean highly complex search or freezing orders which require intense judicial scrutiny, and which give rise to complexities which are by no means chancery specific. I have in mind, as noted earlier, orders for the sale of land, charging orders, orders for the taking of complicated accounts and orders in connection with proceedings about the administration of estates and for the execution of trusts.

8.32 There are also some orders routinely made on applications made by post rather than by personal attendance, where it may often be quicker and more convenient for the judge (usually a Master) to prepare an order in manuscript for typing by the Associates than to leave it to the parties. This should become less frequent if and when IT enables applications of this kind to be made and responded to on-line or by email. Furthermore the extent to which it remains necessary may be reduced if the Masters keep electronic rather than paper precedents and templates for routine types of order, so as to render drafting in manuscript unnecessary.

8.33 The cumulative effect of these qualifications is that it will in my view be necessary to retain a small team of experienced Associates for these purposes, but not the larger team of band E Associates who currently deal with the bulk of those orders which I consider should in the future be drawn by the parties, approved by the judge and sealed by the judge's clerks.

IT

8.34 As always, the provision of up to date IT is likely to prove to be a vital ingredient in achieving this change. The drawing and sealing of orders can be achieved far more efficiently if incoming drafts from the parties can be submitted in Word format, and then amended, electronically to the stage where they can then be printed for sealing, filing and distribution. There should indeed be a system for electronic sealing sufficient to enable orders once sealed to be distributed electronically as well. None of this is anything approaching rocket science, and it is unfortunate that it has not been put in place many years ago.

Chapter 9: Litigants In Person

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Introduction

9.1 Paragraph 4 of the Terms of Reference requires me to consider the implications for business in the Chancery Division of the reduction in the availability of Legal Aid, and to make recommendations designed to secure the best access to justice for litigants in person.

9.2 The changes introduced by the coming into force in April 2013 of the relevant parts of the Legal Aid Sentencing and Punishment of Offenders Act 2012, and the further changes under consultation, will inevitably lead to a substantial increase in the number of litigants in person involved in most forms of civil proceedings, but the scale of their effect upon the work of the Chancery Division is much less clear than, for example, the Family Court. This is largely because Legal Aid has already been withdrawn (or was for other reasons unavailable) in relation to most of the work of the Chancery Division. Litigants in person are, and have for many years been, frequent participants in the chancery courts although, save in specific areas, it is unlikely that they will soon become a majority of the court users, as they have already become, for example, in many county courts.

9.3 Nonetheless, the 2013 changes serve as a valuable wake-up call in relation to the provision of access to justice in the Chancery Division for litigants in person, not least because, as far as I am aware, there has never been a specific focus upon the difficulties facing litigants in person in the Chancery Division or, for that matter, upon the challenges facing the chancery Judges and court staff in providing satisfactory practices and procedures for addressing those difficulties.

9.4 This is not a task which I need to, or should, perform in a vacuum. The April 2013 changes have brought about, or at least coincided with, an unprecedented range of studies, working groups and publications aimed at understanding and ameliorating the difficulties facing litigants in person. Many of the proposed remedies, and most of the newly available publications, are as relevant to civil litigation in the Chancery Division as elsewhere. Although I shall have to summarise particular aspects of their conclusions, I intend to take as read the ground-breaking November 2011 Report of the Civil Justice Council 'Access to Justice for Litigants in Person' and the recently published report of the Judicial Working Group on Litigants in Person led by Hickinbottom J.

9.5 This Review has however received the benefit of a large number of responses to the initial questionnaire with specific advice and recommendations focused on the work of the Chancery Division, in the Rolls Building in particular. In addition, Guy Newey and I held a very useful and informative meeting with representatives of a number of pro-bono and other organisations devoted to assisting litigants in person. I am particularly grateful to

Robin Knowles QC, the member of the Review Advisory Panel most closely involved with litigants in person, both for his wise advice and for his work in co-ordinating that meeting.

9.6 It is too early to tell to what extent the 2013 Legal Aid changes will alter the frequency and pattern of involvement of litigants in person in High Court chancery work. At present they form a large proportion of the participants in bankruptcy cases, where 35.5% of the hearings currently involve litigants in person. They are frequently to be found as respondents to various types of regulatory proceedings, for example, for the disqualification of company directors and in proceedings under the Financial Services and Markets Act 2000. They form a very high proportion of appellants in bankruptcy appeals to chancery Judges, and a significant number of litigants in person also appear in the Chancery Interim Applications Court, for example seeking last minute stays of execution of possession orders in relation to residential property.

9.7 Although not parties, individuals frequently seek permission to appear in person as representatives of small companies, in particular in insolvency cases, for example seeking validation of on-going business transactions where there is a pending winding-up petition, and where the obtaining of professional representation is either impossible or uneconomic.

9.8 Beyond that, litigants in person appear, albeit less frequently, in many different types of chancery litigation, but not (yet at least) in such numbers as would justify a root and branch re-modelling of practice and procedure on the basis that litigants in person were the main class of court user.

9.9 The result is that, both now and for at least the medium term, litigants in person are and will remain a small minority of court users in the Chancery Division, save in relation to a few particular areas. In a larger number of specialist areas, there are no, or virtually no, litigants in person at all. Nonetheless the generally high level of legal complexity in chancery business, by comparison with most other areas of civil justice, means that litigants in person are at a larger than usual disadvantage in participating effectively, so that the challenges facing the judges and court staff, and their professionally represented opponents, in minimising that disadvantage are more than usually formidable.

Change in Culture

9.10 During times when Legal Aid was readily available, there was a widespread view within the chancery community (judges, court staff and practitioners) that litigants in person in the higher value business and property work of the Chancery Division were persons who elected to do without professional representatives, who could therefore be regarded with the limited tolerance due to those who were the authors of their own misfortune. As a class, they tended to be regarded as a potentially expensive and time-consuming obstacle to the smooth running of complicated litigation and, all too frequently, as vexatious litigants, obsessively pursuing lost causes.

9.11 The virtual disappearance of Legal Aid in chancery-type civil litigation years before 2013 has only slowly led to a general understanding that the vast majority of litigants in person are those for whom professional representation is simply not an available option, who therefore face the choice between appearing in person or foregoing justice altogether, whether as claimant or defendant. Even now, it is not difficult to find the entrenched attitude that litigants in person are a problem to be managed away, rather than a group of court users with as much right to an intelligible and usable process as the majority who are professionally represented. This attitude was apparent even in a small number of the contributions made in response to the initial questionnaire, for example in the recommendation that, as far as possible, litigants in person ought to be sent to the county court.

9.12 A commitment to the completion of that change in culture is both a necessary predicate for, and part of, the recommendations made in this chapter. The provision of practice and procedure which is both intelligible to and usable by litigants in person (in the cases in which they are involved) needs to be recognised as an essential element in the provision of access to justice for them.

9.13 In that respect, I consider that three common misconceptions need to be put to one side at the outset. The first is that a shared concern about the unfairness of current practice and procedure vis a vis litigants in person can be properly addressed merely by taking steps on the periphery to ameliorate them. Access to justice is not provided by making practice and procedure only moderately unfair to litigants in person, rather than (as at present) seriously unfair to them.

9.14 The second misconception is to think that the unfairness to litigants in person inherent in practice and in procedure can be satisfactorily addressed at trial (or at some significant interim hearing) simply by the patience, courtesy and investigative court-craft of the experienced judge. In many cases, if not the vast majority, it will by then be too late, because the cumulative hurdles which litigants in person will by then have failed satisfactorily to overcome will have left them with insuperable disadvantages by the time they get to trial or to a hearing. Furthermore, the judge will be constrained when seeking to redress those disadvantages at a hearing by the need to give fair treatment also to the represented party and to ensure that the expensive professional assistance in which that party has invested is put to economic good use, rather than wasted.

9.15 The third is that written descriptions of practice and procedure truly intelligible to the average litigant in person can be satisfactorily formulated by lawyers. This was, with the benefit of hindsight, perhaps a misconception which undermined the CPR. Complex practice and procedure is not made intelligible to the average lay person merely by the removal of Latin and legal jargon and the use of short sentences. The text needs to be written, or at least closely reviewed, by those with a day to day experience and understanding of the way in which litigants in person approach the courts. There are agencies which, subject to real resource constraints, can now offer that assistance. I consider it unfortunate that there has been no such experienced resource available to the Civil Procedure Rules Committee, even though it has lay representation. The result is that, despite the exceptional skills of the drafting service provided to that committee,

its product has been, and continues to be, a body of rules prepared by professionals and intelligible only to professionals. I say this as a past member of the CPRC, and fully accept my share of responsibility for that outcome.

The present status quo

9.16 Effective litigation in the Chancery Division by litigants in person has if anything become significantly more difficult during the last 10 years. There are a number of reasons for this.

9.17 First, the substantive law has become ever more complicated. Not only has the parliamentary desire to legislate about every aspect of life become more consuming, but substantive law has now to be found in an increasingly bewildering mixture of domestic legislation, European legislation and domestic implementing regulation, as well as the constantly developing jurisprudence about Human Rights which sometimes supplements and at other times replaces domestic law. There is of course nothing which a review of practice and procedure can do about that, save to be responsive to the difficulties which it presents to self-representing parties.

9.18 Secondly, despite a persistent and well meaning attempt to put the rules into plain language in the CPR (and in the Insolvency Rules) those rules have, due to ever increasing complexity, and a tendency to cure faults by adding provisions rather than simplifying them, now reached a stage where many commentators say that they are more difficult for litigants in person than were the Rules of the Supreme Court which preceded them.

9.19 Thirdly, and again despite originally good intentions, the Chancery Guide provides no litigant in person friendly alternative route to an understanding of the complexities of practice and procedure. On its first page, under the heading "About this Guide" it provides at paragraph 1.5:

> *"Litigants and their advisors are expected to be familiar with the CPR and the PDs. This guide should be used in conjunction with them. It is not the function of this Guide to summarise the CPR or the PDs, nor should it be regarded as a substitute for them".*

9.20 There is in fact no current substitute for the CPR and the PDs as a rule book for litigants in person, or even as a summary of that rule book. Anyone who has recently studied the almost 7000 pages of the current White Book, in which references to chancery practice and procedure are distributed in an almost random fashion, will need no persuasion that it is unintelligible to the average litigant in person, and likely to be misunderstood even by the most diligent and intelligent of them.

9.21 Fourthly, compliance with the rules has just recently, by amendment, become part of the Overriding Objective, with no special dispensation for litigants in person. They must comply with the rules and practice directions, in a new regime, modelled on the civil courts of Singapore, which imposes stringent sanctions for non-compliance.

9.22 Fifthly, the move of the Chancery Division from the Royal Courts of Justice to the Rolls Building has, unfortunately, separated litigants in person from ready access to bespoke advice and assistance, since none of the advice and assistance agencies with a permanent presence at the RCJ have (yet at least) established a permanent presence within the Rolls Building. I say this not in any sense by way of criticism. Those agencies have their own very real constraints upon their resources, and the gestation of the move to the Rolls Building was, at least for a time, designed around an assumption that those parts of the Chancery Division which generated large numbers of litigants in person would be left behind in the RCJ.

9.23 Finally, even if the 2013 changes in Legal Aid have little direct effect upon the Chancery Division, they will still operate in a manner adverse to the prospects of chancery litigants in person, even if only by increasing the overall number of civil litigants in person without providing any significant resources with which to address their needs by other means. Pro bono and charitable resources must now be rationed among a much larger class than previously, even if the number of litigants in person in the Chancery Division remains the same.

9.24 One of the particular difficulties in framing intelligible written guidance suitable for litigants in person is their very large spread of different ability. They range from persons for whom English is either inaccessible in written form, or not their main language, through those of an ordinary ability, to highly articulate men and women with both the time and the ability to master the complexities of chancery law and procedure. Litigants in person also display a very wide range of computer skills, from nil to a level higher than most judges.

9.25 I have already described in broad terms the types of chancery litigation in which litigants in person participate. They are for the most part defendants or respondents in the relevant cases, but are frequently applicants whether for interim relief, setting aside judgments, and appeals from Masters, Registrars, District Judges and from some interim orders made in the county courts. The fact that they are usually defendants reflects the large barriers facing them in making their own claims.

9.26 Litigants in person in the Chancery Division come from a very wide range of ethnic and social backgrounds, in sharp contrast to the limited diversity found amount professional representatives. Litigants in person are at least as diverse as is typical of society in general. All that can be said to bind them together as a class is that they are 'non-lawyers', a form of classification commonly used by professionals engaged in litigation (including judges) which was rightly criticised by pro bono representatives at the meeting to which I have referred.

9.27 A result of this diversity is that it is very difficult to devise standard practices, procedures or written guidance that will be suitable for litigants in person generally. If measures are adopted on the basis of maximum accessibility, they will fail to serve the more literate and business-experienced litigants in person, and in many cases unnecessarily prolong hearings to the disadvantage of professionally represented opponents. If the assumption is made (based upon the typical function of the Chancery Division in resolving

relatively high value business and property disputes) that even litigants in person will be at least average in literacy and experience in business dealings, then the many who fall below that average will still be left without a fair measure of accessibility to justice.

9.28 It is (at least anecdotally) the common experience of judges in the Chancery Division that litigants in person usually lose their cases, applications and appeals. It is the frequently depressing experience of judges that the fair conduct of hearings involving litigants in person is more to do with the gentle management of impending (and often very expensive) failure in a way that does not forfeit the litigant in person's respect for the justice system as a whole, rather than the creation of a reasonably level playing field upon which the litigant in person has a real prospect of success.

9.29 This is not usually, in my view, because litigants in person lose potentially winnable cases due to shortcomings in their preparation and their advocacy, but rather because they lack legal advice at the outset. The result is that they bring, defend, pursue and appeal cases which a professionally advised litigant would either never have brought or defended, or have settled on the best terms available. They lose not because of any inherent tendency to abuse the process, or because they are inherently vexatious, but because, without advice, they are simply unable to perceive the weakness, and often hopelessness, of their cases.

9.30 There is much which, with proper training, resources and time, judges and court staff can do to alleviate the forensic disadvantages facing litigants in person, as I shall shortly describe. But there is little or nothing which judges or court staff can do to remedy the deficiency in legal advice, save for ensuring so far as is possible that the available sources of pro bono or affordable advice are identified and made accessible to litigants in person. As will appear, this also calls both for training and the provision to judges and court staff of constantly reviewed and up to date information about available free or affordable legal advice, and a level of co-operation, even informal partnership, between the courts and the advice agencies which is, at least in the Chancery Division, not currently to be found.

Recommendations

Principles

9.31 I consider that the provision of the best access to justice for litigants in person within the Chancery Division calls for a culture change, both in attitude as well as in practice and in procedure. If it is to yield worthwhile results, it needs to be conducted in accordance with a small number of basic principles. I would tentatively identify them as set out below, but would emphasise that they need to be principles which are shared between all those with a stake, or a duty, in achieving a best access to justice outcome for litigants in person. They include, plainly, judges, court staff and the pro bono and similar agencies, but also the legal profession. Although in individual cases those professionals'

duties lie mainly to their clients, it has long been recognised that they owe a prior duty to the court, and both a duty to serve, and a stake in the achievement of, justice.

9.32 Even in individual cases, it is well recognised that the interests of represented parties in the speedy, proportionate and economical disposal of their cases is more likely to be served by the efficient provision of access to justice for their litigant in person opponents. Inefficiencies in that provision will merely increase delay, costs and frustration for the professionally represented parties.

9.33 The basic principles are:

- Maximising available free or affordable legal advice
- Maximising free or affordable representation
- Bespoke and early case management
- Increased judicial robustness in the identification and dismissal of hopeless cases
- A more investigative judicial approach to cases involving one or more litigants in person
- Use of professional assistance from qualified agencies in the drafting of standard forms and directions for use in connection with litigants in person

9.34 I have already mentioned the importance of making available as far as possible the limited supply of free and affordable advice to litigants in person at the earliest possible stage in the development of their disputes. I would identify it as a first principle because it addresses the most fundamental of the litigant in person's disadvantages. I deliberately do not confine that principle to the making available of free advice. There are many forms of legal advice, falling short of the provision of a full litigation team of solicitors and counsel, which may be obtainable at an affordable cost, even if the use of a full team is prohibitively expensive or disproportionate. This is particularly so in relation to chancery litigation which, because it is usually about business and/or property, commonly engages litigants who (unless bankrupt) have some assets of value to preserve or obtain, upon which modest expenditure may be perceived by them to be worthwhile.

9.35 The second principle, closely allied to the first, concerns the making available of the equally limited supply of free or affordable representation. Again, this addresses at the root another basic disadvantage suffered by litigants in person. There are forms of affordable as well as free representation falling well short of the full traditional litigation team.

9.36 The third principle is that cases involving litigants in person need bespoke, and early, case management. The inaccessibility (or opaqueness) of the Court's rules and

practices to litigants in person means, in my view, that the Court should use its case management powers to prescribe a detailed and intelligible set of case preparation instructions tailored to the particular litigants in person in each case, rather than leave preparation to be governed by rules, or by directions which incorporate the rules by reference. This will undoubtedly involve pressure on the court's limited resources.

9.37 The fourth, and I hope compensatory, principle in terms of resources is that the court should, on its own initiative, apply increased robustness in identifying and dismissing, as early as possible, hopeless cases (including defences) applications and appeals by litigants in persons bereft of sensible advice, or (but rarely) bereft of basic common sense. Too much time is at present spent upon letting down litigants in person with hopeless cases gently and slowly, at unnecessary cost and delay to their opponents. The resources saved by a more robust approach would be better deployed in the bespoke early case management to which I have just referred.

9.38 Fifthly, judges should be encouraged and trained to adopt a more investigative approach than hitherto in hearings involving litigants in person even when the other parties are professionally represented, and a more flexible approach than previously to permitting others to speak on their behalf.

9.39 Finally, it should be treated as a principle that all further Chancery drafting of standard forms, directions or orders of types which may involve litigants in person be subjected to professional review and assistance by qualified pro bono and similar agencies so as to ensure in advance, as far as possible, that litigants in person are able to use and understand them. The same principles should be uniformly applied to all types of public guidance designed to assist litigants in person.

Free or affordable advice

9.40 It is easy to state as a principle that litigants in person should be assisted at the earliest possible stage in obtaining free or affordable legal advice, ideally before they first attend court or commence, or defend, proceedings. But there are, at present, formidable difficulties in gearing up the judges and court staff of the Chancery Division to provide useful guidance as to where that advice may best be obtained, not least because of the generally specialist nature of the Division's work.

9.41 The characteristic experience of the Chancery judiciary when faced with a litigant in person in obvious and desperate need of advice might go as follows:

- This person desperately needs advice.
- I have some general knowledge of the main advice agencies (CAB, Bar Pro Bono, LawWorks), but no idea of their contact details.

- I know there is a National Pro Bono Centre in Chancery Lane.

- I have no idea which agencies can provide the specialist advice needed in connection with this case, or how quickly, or what their priorities or time-lines are in terms of deserving customers.

- Anyway it is now probably too late, because I cannot fairly visit on the professionally represented parties the cost and delay of an adjournment.

9.42 To some extent, the early notification to computer literate litigants in person of available sources of free or affordable advice has recently started to become available. The Bar Council has just published its "Guide to Representing Yourself in Court", which is available online. It begins with a chapter on finding free or affordable help. Other online information about the obtaining of advice for litigants in person is springing up all the time. Nonetheless, little if any of it is focussed upon the chancery litigant in person, and until very recently the current version of the chancery section of the Ministry of Justice website provided no help at all for litigants in person.

9.43 Discussions are shortly to start between the MOJ and HMCTS about the compilation of information about nationally available sources of advice and assistance for litigants in person with a view to developing a central online resource to which judges and others can easily refer. But again there is no reason to expect that this will be focussed on chancery litigation.

9.44 There are two sides to the making available of useful up to date information about sources of advice for chancery litigants in person. The first is collation; and the second is dissemination. Taking collation first, this requires at the outset, the creation of a database on which the currently available advice resources are set out. Since worthwhile advice is likely to have to be delivered to a significant extent face to face, it seems to me inevitable that this information will have to be compiled on a regional basis, dealing separately with at least London, Birmingham, Manchester and Leeds, and probably also with Bristol, Cardiff, Liverpool and Newcastle, so as to cover all the regional centres for the trial of High Court chancery cases.

9.45 Once collated, it will be necessary for this material to be periodically reviewed and updated. For both purposes (that is initial collation and subsequent review) I consider that co-operation between each court centre and the local providers of free and affordable advice will be better than leaving the task solely to the court centres. For that purpose I consider that small local working groups need to be formed so as to act as the focus for that co-operation. The nucleus for doing so is already coming into existence regionally, in the sense that there is now a representative for litigants in person on all the Northern and North Eastern Chancery Court User Committees and the Liverpool Civil and Family Court Centre has appointed a liaison judge for co-ordination of the work there of the local Personal Support Unit. Steps are in hand for the extension of the local liaison judge concept to all the main regional trial centres.

9.46 I therefore recommend that local working groups in each of the Rolls Building and chancery High Court regional trial centres be formed or (where already in existence) consolidated for the purpose of taking forward this work of collation of information about available chancery free and affordable advice, and thereafter for keeping it under regular review. The Hickinbottom report recommends that general responsibility for this should lie with DCJs. I am not convinced that this would be ideal in the chancery High Court context, but it may work well in some of the regional trial centres. As will appear, I have in mind that these working groups or committees should be judicially led, and that they should be given responsibility for the implementation and on-going maintenance of a number of the recommendations which follow in this chapter.

9.47 It may be that, in particular court centres, the volume of chancery work is insufficient to justify the formation of a chancery working group, rather than a group or committee devoted to the collation of this information across a wider range of litigation disciplines. Consideration should be given to the inclusion of the other specialist civil jurisdictions. The Mercantile and TC Courts in the regions would be an obvious example. By contrast, the work of the Chancery Division in London is clearly large enough to warrant a chancery focused working group for that purpose.

9.48 Turning to dissemination, for the reasons already given it will usually be too late for information of this kind to be disseminated to litigants in person by judges. In many cases the best time for the obtaining of advice will have passed before a litigant in person first comes into contact with a judge of any seniority. Even by the time of a CMC, opportunities for avoiding litigation altogether by early alternative dispute resolution will have passed. Nonetheless, the judges will of course need to be provided with the relevant information and training as to its best use, both because earlier opportunities for the taking of advice may have been missed, and because both at CMCs and the hearing of interim applications, there will at least be time to maximise the prospects of litigants in person obtaining relevant and affordable advice before trial.

9.49 Nonetheless the focus for this purpose needs to be on maximising the earliest possible opportunities to inform litigants in person of available free or affordable advice. To a rapidly increasing extent, those opportunities are now being taken by the agencies concerned, but there is still much that the courts can do to assist.

9.50 I consider that the earliest practicable form of court based assistance lies in the chancery section of the Ministry of Justice website, into which an appropriately worded publication of the relevant information can be inserted, and kept up to date. The chancery section already contains both a London and Regional section, although the regional section thus far has little in it by way of detail. Nonetheless, there seems no reason in principle why this website cannot be used for the communication of the essential information to anyone with sufficient computer skills to gain access to the chancery section of the MOJ website via the internet.

9.51 As with all forms of dissemination there is a vital stage between collation and distribution, consisting of drafting in a manner most accessible to litigants in person using that medium of communication. Consistent with the sixth of my general principles, I

recommend that this drafting be entrusted to (or at the very least monitored by) a suitably qualified advice agency such as, (but not limited to) Advice Now, which has provided invaluable help in preparation of both Queens Bench and Chancery Guides to the Interim Applications Courts. The new chancery guide is copied at Annex 4.

9.52 As with any web-based information source, a careful and imaginative balance will need to be struck between the brevity necessary to attract and hold attention, and the detail required for accurate and useful guidance. This will require close co-operation between those with the litigant in person facing skills needed to impart the information to readers, and those with the knowledge of chancery work necessary to identify the best sources of largely specialist advice. At present, the judiciary, court staff and court service lack either of those areas of expertise, and are unlikely to acquire them without the co-operation and informal partnership which I consider should inspire and underpin all my recommendations in this chapter.

9.53 The next logical stage at which information about available advice can be communicated to litigants in person is when they first arrive at the relevant chancery court centre or (but only if defendants or respondents) when served with originating process. Taking the latter first, I consider that consideration should be given to including as a standard part of response packs at least the details of the government operated websites at which this information may be found. I recommend also that consideration be given to the design of a special form of response pack designed for use (both by the court and professionally represented parties where effecting service themselves) where it is anticipated that the party being served will or may be or become a litigant in person. Response packs of that kind could usefully contain substantially more than the bare minimum reference to an appropriate government website to which I have just referred.

9.54 Returning to arrival at court, there are substantial opportunities, currently not being fully exploited, to assist litigants in person with guidance about available free or affordable advice. The first ports of call are likely to be the relevant High Court counters and, in London and an increasing number of regional chancery trial centres, the PSU or the CAB. The maximisation of the opportunities to source relevant advice in the regional trial centres is a matter which I recommend leaving to the working groups to which I have referred. In the Rolls Building I recommend that consideration be given to allocating one of the public service counters on the ground floor specifically to litigants in person. The counter should be staffed on a rota basis by court staff specifically trained in the provision of this (and other) information to litigants in person, and copies of all relevant material kept there for distribution.

9.55 The allocation of a designated service counter for litigants in person would serve two valuable purposes. First, it would concentrate the provision of the requisite assistance and the information (both orally and in writing) at a particular point in the building, under the control of staff trained for the purpose. Secondly, it would divert litigants in person, and their sometimes time-consuming requirements, from other service counters, so as to make more efficient the services provided there to professional litigators. Overall, the outcome should be self-resourcing, for that reason. I do not by this proposal mean that litigants in person should be barred from the other counters, or that a version of the

service provided at every other counter should be available also at the counter dedicated for them. The dedicated counter should be their first port of call. Where they cannot obtain all they need there, they may well have to visit another counter but, by then, they should have become focussed upon what it is that they need from it.

9.56 I have considered whether I should recommend that encouragement be given to the advice and support agencies (the PSU and CAB) to set up permanent facilities in the Rolls Building, not least because the perception which they have reported to me is that a higher proportion of litigants in person are using the Rolls Building than had originally been anticipated, when decisions not to establish a full-time presence there were made.

9.57 On balance, I am not minded to make that recommendation, at least at this stage. The factors which have led me to that conclusion are as follows. First, there are real constraints in relation to available space. Secondly, there are understandable issues of resourcing affecting the agencies concerned. Thirdly those agencies are well represented by permanent presence at the RCJ, which is only a few minutes walk away from the Rolls Building, and would be readily contactable from a dedicated litigants in person counter there. Finally, those agencies are already committed to providing (and do provide) assistance to litigants in person using the Rolls Building when asked to do so. The real present difficulty is their invisibility to an uninformed litigant in person arriving for the first time at the Rolls Building, rather than the inevitable but relatively short delay which would be occasioned by the need to contact them by telephone from a designated litigant in person counter. In my view the problem of invisibility can be cured by the appropriate training of counter staff and, if necessary, the deployment of appropriately conspicuous notices about the services which the advice and support agencies can provide. It will be apparent that my conclusion that I should not encourage them in the short term to establish permanent presence in the Rolls Building is heavily based upon an assumption that my recommendation about a dedicated service counter for litigants in person is adopted.

9.58 It was suggested to me that a possible disadvantage of a dedicated counter was that it would discourage proper training of all court staff in dealing with litigants in person, in favour of training only the few placed on (or volunteering for) the rota. While I understand the concern, I have not been persuaded by it. In my view the training of court staff for dealing optimally with litigants in person is unlikely best to be achieved on a one size fits all staff basis. I shall have more to say about staff training later in this chapter but, in summary, it seems to me that different levels of training will be appropriate, for example, for ushers, counter staff, pure back office staff (without public facing duties) and, of course, judiciary. It is in my view impracticable at least in the short to medium term to expect all court staff to be trained in the whole of the requirements for dealing optimally with litigants in person. A significant degree of specialisation is both necessary and desirable, even if a basic level of training is needed for all staff.

9.59 Information about the availability of suitable free or affordable advice is a case in point. The effective communication of that information, whether orally or by the provision of written information, may require quite detailed training, even though it will not of course extend to the provision of legal advice itself. By contrast, every member of

the court staff who might come face to face with a litigant in person will need to know where in the relevant building that detailed guidance can be obtained. As will appear, this is only one aspect of the guidance which the courts will need to be able to make available to litigants in person, so that specialisation will be in my view inevitable.

9.60 Finally, and to ensure that no opportunity is lost, the chancery judiciary will themselves need to be provided with, and trained and encouraged to communicate, information about available free and affordable advice to litigants in person. For as long as the active use of a computer in court is not the stock in trade of every member of the chancery judiciary, that information will need to be available not only on line, but in hard copy form, and kept for use in every chancery court or hearing room. It will not in my view be sufficiently available when needed if it is merely added to a judge's Bench Book.

9.61 If a body of up to date and appropriately drafted information is available regionally for the guidance of litigants in person about obtaining free and affordable advice, then I see no reason why it should not in addition be made available to the local chancery practitioners, both solicitors and counsel, for disseminating to litigants in person against whom they are opposed. Generally speaking, I consider that it is almost invariably to the advantage of a professionally represented party that a litigant in person opponent obtains sensible and practical legal advice, so it follows that practitioners need envisage no conflict between interest and duty in equipping themselves to provide that information to litigants in person with whom they come into contact.

Free or affordable representation

9.62 Both the Bar and solicitor advocates (with the requisite rights of audience) provide free representation to litigants in person, including in chancery cases. Similarly, the Bar's Direct Access Scheme may make representation affordable to many for whom the use of a full litigation team, or representation throughout the case, would be impossible or disproportionate. It may be that, increasingly, solicitors will do the same, for example where a solicitor advocate is able and willing to provide a one person service, rather than the full resources of the firm, or a firm is able to provide a service for specific aspects of a case, rather than its conduct from start to finish. This is a matter currently being specifically considered by the Law Society.

9.63 So far as concerns the provision of information and guidance to litigants in person about the availability of such services, I need do little more than repeat the recommendations which I have made concerning information and guidance about the availability of legal advice. By that I do not mean to erode the important distinction between advice and representation, still less the need for advice earlier, in most cases, than representation. But the means of collation and dissemination of information and guidance about representation need not differ substantially from that which I have already recommended in relation to advice. Furthermore, there will be few cases in which

representation is not accompanied by at least some form of advice, even if it comes too late to enable litigation to be avoided altogether.

9.64 A critical feature of the requisite collation of information (in particular about representation, but also about advice) is the making available to court staff and judges of a sufficient understanding of the priority given by pro-bono agencies to particular types of litigant, and the typical time-line between introduction and the provision of a service. Bearing in mind that it is inevitable that the available resources for free representation and advice will always (and probably increasingly after April 2013) be far outstripped by the demand for them, a proper understanding of those priorities in its allocation is critical. There is, for example, no point at all in a judge adjourning a case for 14 days with encouragement to the litigant in person to go to a particular agency and seek free representation or advice, if that litigant will not enjoy sufficient priority to obtain it in time, or at all, from that agency. All that will have happened is that the case is adjourned with attendant expense and delay, before the litigant in person reappears empty-handed for a hearing which could (have the judge appreciated the lack of priority) have been dealt with first time round. Alternatively, an adjournment may turn out to have been too short, with consequential waste of resources by the represented party and by the court.

9.65 I appreciate that there are likely to be sensitivities and uncertainties in the provision of useful information of this kind by the representation and advice agencies concerned. Prioritisation may frequently be a matter of executive discretion rather than written rules, and it may frequently be difficult to place a particular litigant in person with any confidence in a particular place within an available pecking order. Nonetheless, and having myself encountered difficulties of this kind on repeated occasions, I am firmly convinced that information of this kind is an essential tool, at least for the provision of guidance to litigants in person by judges (as opposed to court staff).

9.66 In that context, it is not to be forgotten that, even after April 2013, there are still some areas of chancery business in which, pursuant to Article 6, Legal Aid may exceptionally be available. Again, provision of information and training to judges about those areas, and information about solicitors prepared to accept work of that kind, will on occasion prove to be invaluable. This is in particular true in relation to litigants in person who are respondents to committal applications where, notwithstanding procedures for the obtaining of Legal Aid, their search for solicitors prepared to accept a retainer for that purpose often proves fruitless, without informed and up to date guidance.

9.67 The obtaining of free or even affordable representation inevitably takes time, and under present arrangements will often be impractical for the purpose of responding to an interim application. To that end, I recommended in my provisional report that a duty advocate scheme for the Chancery Interim Applications Court be considered for the purpose of providing immediate representation to litigant in person respondents to interim applications. A pilot scheme had recently been launched to provide barrister and solicitor advocates in the Queens Bench Applications Court, and I could see no reason why it should not be replicated in Chancery. It is a feature of junior practice at the chancery

bar that insufficient opportunities for High Court advocacy arise in the first few years. Opportunity to provide pro bono advocacy, and even direct access at affordable cost to persons who would otherwise be unrepresented, could well be a win-win scenario for advocates and court users. At my invitation, the Chancery Bar Association has indeed undertaken to spearhead the setting up of such a scheme. It is being piloted as this report is published, and is planned to be fully up and running at the beginning of 2014 . This is a very welcome development.

Bespoke Early Case Management

9.68 I consider that cases involving one or more litigants in person need to be regarded as priority targets for bespoke, early, hands-on, face to face, case management. Subject only to the increased burden which this is likely to place on the court's resources, this principle was almost unanimously supported among the contributors to the Review. The reasons for it are not difficult to identify, but nonetheless worth setting out.

9.69 First, the understandable lack of focus and legal analysis of almost all litigants in person, and the frequently experienced shortcomings in their ability to express themselves clearly and concisely, mean that cases involving litigants in person are more likely than most to suffer from failure or delay in identifying the issues (if any) which need to be tried. Much time and expense is apparently wasted both by litigants in person and by their opponents due to a failure to arrive at an early and precise identification of the triable issues.

9.70 Secondly, litigants in person have a general lack of familiarity with, or ability to understand, the rules and practice directions, which means that they need to be given, in the clearest and the most simplest terms, directions as to their preparation of their case which they can reasonably be expected to follow. Only then they can fairly be sanctioned for non-compliance with them.

9.71 Thirdly, a substantial proportion of cases involving litigants in person turn out not to disclose any triable issues, and are suitable for summary disposal. Again, the earlier this is identified and dealt with, the better, because of the substantial savings in the effort and resources of both of the court and of the parties which will thereby be achieved.

9.72 Fourthly, procedures for the giving of directions either in writing (by email or post) or at telephone hearings are generally regarded as unsatisfactory for litigants in person. They are unsatisfactory for the court because it is thereby disabled from forming its own view as to the ability of the relevant litigant in person to understand and comply with directions. I am advised that telephone hearings are widely regarded by litigants in person (whether objectively justified or not) as unfair and unjust to them, because of a perception that the process lends itself to a preference by the court for the proposals of the professionally represented parties, without their views being given a proper hearing.

9.73 Fifthly, experience in the Family Court, where the recent cuts in Legal Aid have just led to a large increase in the numbers of litigants in person, but a large fall-off in

the use of ADR, suggests that litigants in person stand in particular need of assistance from the court in understanding the value of ADR, and how best to make use of it. This is something which represented parties routinely receive from their lawyers, but where litigants in person suffer from the combined disadvantages of ignorance and suspicion. It is easy to forget that while litigants in person may respect the independence of the judiciary as much as do represented parties, they may have no similar reason to respect the independence or impartiality of private mediators or evaluators, or the fairness of structured ADR processes. Without their own lawyers to explain this, they are likely to be critically dependant upon case management judges for explanation of, and encouragement to use, ADR.

9.74 There is much to be said for the full docketing, i.e. from start to finish, of cases involving litigants in person. That process will, better than any other, enable the trial judge to obtain, if necessary over time, a better understanding of the strength and weakness of the litigant's case by the appropriate use of investigatory techniques than is often likely to be derived simply by reading the litigant's attempt at statements of case, witness statements or skeleton arguments, and asking questions at trial. The trial judge will also obtain, in sufficient time to plan the course of the trial, a better understanding of the forensic abilities and disabilities of the relevant litigant in person, than would be possible if a face to face encounter with the litigant occurs for the first time only at the beginning of the trial. Conversely, the litigants in person themselves will be better able to prepare to present their case at trial if they had a previous encounter in court with the trial judge, than if they meet him or her for the first time when the trial starts.

9.75 To treat cases involving litigants in person as having priority for full docketing will of course give rise to major resource and flexibility implications within a system in which, at least for the medium term, full docketing is likely to remain the exception rather than the rule. For example, the current statistics show that 35.5% of bankruptcy hearings before the Registrars in the Rolls Building involve litigants in person. Furthermore, the higher than usual proportion of cases suitable for summary determination represented by those involving litigants in person mean that there will be a smaller proportion of those receiving initial case management that proceed all the way to a trial. This means that resources expended in more hands-on case management of these cases will be harder to recoup by consequentially shorter trials.

9.76 Constraints on resources mean that I would not therefore recommend any overriding prioritisation for cases involving litigants in person for full docketing. Nonetheless, the obvious advantages of that way of dealing with such cases are a significant factor supportive of a long term objective to make full docketing the rule rather than the exception in the Chancery Division, and those advantages may be a pointer towards achieving that result in types of cases where there is a high proportion of litigants in person, and in particular cases where the question whether or not to docket involves a balance of competing considerations.

9.77 Identifying the issues at the early management hearing of cases involving litigants in person will require special techniques. I recommend that the following be considered for early adoption. First, any represented parties should be required to submit a List of

Issues on a strictly neutral basis (i.e. by performance of their representatives' duty to the court) in much the same way that a party seeking relief on a without notice application has a duty of full and frank disclosure. Represented parties will be likely to have had relevant dealings with the litigant in person before the bringing of proceedings, in which the litigant's grievance will have been aired, even if not in terms designed to identify a cause of action or defence. Feedback has suggested that for the court to entrust this to the represented party may be misread by the litigant in person as partiality by the judge. While I recognise that there may be cases where it would both look and actually be better for the judge to undertake this task, in advance of a case management hearing, I consider that the implications in terms of judicial resources are (at least at the moment) too large for this course to be practicable as a general rule.

9.78 Secondly, the court should apply investigative techniques at the first case management hearing designed to identify the triable issues. This is likely to require even handed questioning by the court both of the litigant in person and the represented party. One of the recommendations of the Hickinbottom report is that Judges are trained for and deploy these investigative techniques in cases involving one or more litigants in person.

9.79 In my view it is no longer satisfactory to leave the process of identifying whether there are any triable issues in cases involving litigants in person to the represented party, in the sense that the triable issues are all those which survive a strike out or summary judgment application. The court should in my view regard the identification of triable issues (if any) as an ordinary part of early case management. While it may in appropriate cases best be achieved by the full panoply of a strike out or summary judgment application, it may in many routine cases be achieved more quickly, economically and less confrontationally by a process of judge-led investigative case management.

9.80 Once the triable issues have been ascertained, the presence in a case involving one or more litigants in person calls in my view for a fundamental change of culture and practice in the giving of case management directions. Currently, directions are given frequently on paper and, whether on paper or orally, in accordance with well recognised standard forms which, however much they use plain English, assume a knowledge and understanding of the rules and practice directions. The enforced compliance with orders (including orders with directions), rules and practice directions is now part of the Overriding Objective: see CPR 1.1(2)(f). There is no exemption or modification of this requirement for litigants in person.

9.81 I consider it to be fundamentally unjust (and therefore in conflict with another part of the Overriding Objective) to subject litigants in person with a case or defence that discloses triable issues to a regime for the preparation of their cases with which they are expected strictly to comply, when relevant parts of that regime are either inaccessible or unintelligible to them.

9.82 This serious difficulty cannot be resolved, as it has tended to be in the past, by imposing an unintelligible regime on litigants in person, and then largely excusing them when, inevitably, they fail to comply with it. Nor can it be solved by oral explanations given by judges to litigants in person about the meaning of a standard form directions

order issued to both parties (where the other party is professionally represented). The litigant in person needs, and is entitled to be given by the Court, a set of simple and comprehensible instructions for their preparation of the case, which may well need to be in different style of language than the directions order given to the opposing represented party.

9.83 The directions given to the litigant in person need to be, as far as possible, self-contained, so that the litigant in person can comply with them without the need to consult rules or practice directions at all. Depending upon the abilities and experience of the particular litigant in person before the court, the directions may need to condescend to detail in relation to the requirements of disclosure, the preparation of witness statements and skeleton arguments (or their equivalent) and the rules for filing and serving documents.

9.84 Furthermore, the directions to litigants in person are likely to have to be couched in user-friendly language which may be beyond the current skills of many case management judges. For this purpose it is likely to be necessary to provide training and to devise a portfolio of standard or common forms of directions for litigants in person, in both cases with the assistance of pro bono and other agencies, whose advice to this review has been that, however hard lawyers and judges try to use everyday language, they still sound like lawyers and judges to lay people.

9.85 Concern has been expressed by some consultees that the provision of bespoke directions to a litigant in person may expose the represented party to the jeopardy of having to comply with a double set of rules. I consider that this concern can be managed. In many cases the directions given to the represented party can be in the usual form, so that each side is required to comply with a complementary but not identical set of directions. In other cases it may be fairer to give both sides the same bespoke directions. If they are comprehensible to the litigant in person, then the represented party should have no difficulty understanding them. This is not to usurp the function of the CPR. The current Rules are amply flexible enough to accommodate bespoke directions in appropriate cases.

9.86 I do not underestimate the size, novelty and difficulty of this task. In an ideal world, the form and content of bespoke case management directions would be framed differently, having regard to the wide differences in literacy and management skills of the range of litigants in person likely to be before the court. But this would place burdens upon the time of case management judges beyond what can realistically be expected under present constraints on resources, so that some degree of standardisation will both be necessary and probably desirable in any event.

9.87 Whereas I have recommended that committee work on communication to litigants in person about the availability of advice and representation be best done regionally, by separate working groups, I consider that work on drafting forms of case management directions for use with litigants in person is best done by a single national working group.

9.88 I note that the Hickinbottom Report recommends consideration of proposals for a dedicated rule and practice direction in relation to litigants in person. While it may be that the formulation of suitable directions for litigants in person could form part of that process, the particular requirements of chancery practice and procedure are in my view sufficient to justify this work being carried out from a specifically chancery perspective, in the same way as the work that led to the inclusion of a standard form of case management directions (with options) in Appendix 3 to the 2013 Chancery Guide.

Guidance to, and Communication with, Litigants in Person

9.89 I have already made recommendations about the court's involvement in the provision of guidance to litigants in person about the obtaining of free or affordable advice and representation. It is inevitable that, however successful this guidance, and however fast the provision of free and affordable advice and representation expands, there will still be many, probably a majority of, litigants in person who remain wholly unrepresented and without professional assistance, during the preparation of their case and at trial.

9.90 There is already a rapidly increasing body of published general guidance material for assisting litigants in person in the preparation and conduct of civil cases in Court. These are summarised in Annex 3. It has the particular merit, taken as a whole, of including materials of different levels of detail and sophistication, likely to be more helpful to the broad spectrum of litigants in person than a single publication. Nonetheless, apart from the new chancery Guide to the Interim Applications Court, none of the publicly available material of which I am aware is specifically focused on chancery business. There is, in short, no overall Chancery Guide for litigants in person. It is therefore for consideration whether the Court Service should fill that gap, or whether a chancery orientated association (such as the Chancery Bar Association) should be encouraged to do so, with appropriate help from the pro bono agencies.

9.91 If my recommendation that bespoke case management directions are developed for and provided to litigants in person in chancery cases is implemented, then it may well be that there is no need for any comprehensive guidance about chancery practice and procedure for litigants in person, separate from the general guidance already becoming available about how to prepare and conduct civil cases in court. This has indeed been the view of most consultees who have addressed this question. But I would suggest the following exceptions.

9.92 First, and bearing in mind that the Rolls Building is separate from, and much less well known to the public than, the Royal Courts of Justice, and because there are no facilities for the assistance of litigants in person located there, there is good reason to prepare and make publicly available both on the internet and elsewhere a simple location map for the Rolls Building, together with basic guidance as to the location within the building of the main chancery functions. This could sensibly be linked to the chancery part of the HMCTS website.

9.93 Secondly, it is important to provide guidance to litigants in person about the workings, practice and procedure of the Chancery Interim Applications Court, since litigants in person may find themselves applying there, or responding to applications there, before any case management directions are given to them in the underlying proceedings. Asplin J and I have already prepared, with the invaluable assistance of Advice Now and the PSU, a Litigants in Person Guide to the Chancery Applications Court: see Annex 4. The procedures and practices of the Chancery Interim Applications Court are sufficiently different from those of its Queens Bench counterpart for the continued existence of two separate guides to be easily justified.

9.94 I sought guidance in the provisional report as to whether there are further aspects of chancery practice and procedure which need to be contained in a litigants in person guide. The response was in the negative, on the basis that it would be better to concentrate on the development of general civil litigation guides, than upon a version focussed upon the Chancery Division. I do not disagree.

9.95 There are all sorts of relatively standard forms of correspondence used by chancery court staff when communicating with litigants, most of which are likely to be used in cases involving litigants in person from time to time, and some of it very frequently. An example of a type frequently used is the standard form of communication in response to requests for permission to appeal to a chancery Judge, in relation to bankruptcy orders made both by the Registrars and in county courts with bankruptcy jurisdiction. It has been suggested to me, and I agree, that all standard forms of communication likely to be used in relation to litigants in person should be subjected to professional review, for the purpose of ensuring that they are as intelligible as possible to the uninitiated. The same has been suggested of court forms generally, whether or not specific to chancery business.

9.96 I agree with these suggestions but, again, recognise the enormity of the task proposed. It is, like the preparation of standard form case management directions for litigants in person, probably best performed at a national level, and on a rolling basis in which those types of communication and court forms most commonly used in connection with litigants in person are prioritised for review. All new forms ought in my view to be professionally reviewed from the perspective of litigants in person as a matter of course, unless it is wholly unlikely that they would be used in that connection.

Training

9.97 There is at present no formal training resource for chancery judges directed at enabling them to make the chancery courts more accessible to litigants in person. There is no module for that purpose in the civil training prospectus issued by the Judicial College. Chapter 4 of the Hickinbottom Report recommends that, as a matter of urgency, the Judicial College develop specific training courses for this purpose, and certain forms of draft guidance for the judiciary are set out in its appendices.

9.98 Occasionally, specific after court seminars are laid on in the RCJ, including a recent and helpful session on litigants in person in the Interim Applications Court. Although the Hickinbottom Report acknowledges the need for training about litigants in person to be specific to different types of litigation, there is nothing at all provided specifically for the chancery judiciary, either in London or in the main regional trial centres.

9.99 The position in relation to training of court staff is not significantly different. The court staff in the Rolls Building are provided with short presentations, usually on a semi-annual basis, by representatives from the CAB and the PSU. Those (like ushers) who are likely to have substantial contact with litigants in person obtain initial experience by shadowing existing members of staff, and the development of the requisite skills is thereafter monitored by management.

9.100 I have mentioned on several earlier occasions in this chapter how the successful implementation of my recommendations will require specific judicial and staff training. As for judicial training, I agree with the view expressed in the Hickinbottom Report that this should, if the resources are available, be led by the Judicial College. This is consistent with the views of most consultees. Nonetheless the much greater impact of the recent Legal Aid changes on other areas of the courts than the Chancery Division may well mean that specifically chancery designed training will not be given a high priority in the competition for limited resources.

9.101 Furthermore, while there are some aspects of training for the better provision of justice to litigants in person that will be common to the civil judiciary (and even the civil and the family judiciary) generally, regional differences in the availability of free and affordable legal advice and representation will mean that some aspects of the necessary training will not in practice be able to be rolled out even on a chancery-wide basis nationally.

9.102 I have referred to the need for the setting up of working groups both on a national and regional basis, charged with specific aspects of the provision of better access to chancery justice for litigants in person. It may be that these groups would be best able to take forward the training aspect of the recommendations made earlier in this chapter, to the extent that the provision of training by Judicial College falls short of what is required.

9.103 As for the training of court staff, this will have to be a management matter for HMCTS. If my recommendation of a dedicated counter for litigants in person for the Rolls Building is accepted, then it would follow that there would need to be different levels of training for different types of court staff. Ushers, Associates and those manning the litigant in person counter will need the most detailed training, with others perhaps continuing to receive, in broad terms, the level of intermittent training already made available. The acquisition and development of skill and experience in dealing with litigants in person should be a regular aspect of staff appraisal.

9.104 Appendix 3 to the Civil Justice Council Report sets out draft guidance to litigants in person as to what help they may reasonably expect to receive from court staff.

Consideration should be given to that draft, and to its development as the basis of what might usefully be published on the chancery part of the MOJ website, as the basis of what the staff in the Rolls Building and in the regional trial centres are trained to provide.

Miscellaneous

9.105 It remains for me to mention certain suggestions made during consultation, which I have not incorporated under the various headings in this chapter. I mention them in no particular order.

9.106 The first is that it has been suggested that the current chancery practice of listing trials to start on a floating date within a window is particularly inconvenient for litigants in person. This is because, without the skills and resources of a firm of solicitors, the challenges presented by marshalling witnesses in accordance with a trial timetable beginning on a uncertain date are more than usually daunting, quite apart from the challenges represented by preparing some form of cross examination of their opponent's witnesses in good time.

9.107 I agree with this suggestion. In cases where case management has shown that a litigant in person wishes to call a significant number of witnesses, or needs to be prepared to cross examine a number of opposing witnesses, then I consider that priority should be given for a fixed date rather than floating date trial even if my earlier recommendations favouring a general move towards fixed dates are either impossible to implement, or can only be introduced over an extended period of time.

9.108 Secondly, it has been suggested that chancery judges should adopt an altogether more flexible and permissive approach to allowing McKenzie Friends to speak for litigants in person than is reflected in current guidance, in particular in cases where English is not the litigant in person's main language or where they suffer from other forms of communication difficulties. Again, I agree with this suggestion, and chapter 6 of the Hickinbottom Report contains recommendations which may if implemented lead to the same outcome. In my view the current guidance about McKenzie Friends (see [2010] 1 WLR 1881) is inevitably but unfortunately inhibited by a notion that these persons are, by being allowed to speak, being granted some form of 'right of audience' of their own. This derives from the current statutory gateway which enables the court to permit someone to act as an advocate for a litigant in person in court, in the Legal Services Act 2007. No such restriction affects the practice in the tribunal system: see chapter 6 of the Hickinbottom Report.

9.109 In my view, putting on side the current statutory constraint, all that is happening when a judge permits a McKenzie Friend to speak for a litigant in person is that a revocable permission is given to the litigant to have someone to speak on his or her behalf, but only for as long as it continues to appear to the judge that this method of trial (or hearing) management better serves the attainment of justice that requiring the litigant in person to speak for him or herself. The question how far in particular circumstances

to permit McKenzie Friends to speak for litigants in person is, again, one likely to be best addressed by good training, rather than merely by the issue of practice statements. I would also recommend the general use in chancery courts of the McKenzie Friend form now in use in the CJC in Manchester, by which the judge is appraised of the essential details about the Mckenzie Friend in advance of any decision about who should speak.

9.110 Finally, the suggestion has been made that, in cases where there is a litigant in person on one side, and a professionally represented party on the other, the court should develop procedures which require the professionally represented party to take responsibility for the preparation of bundles and minutes of order even where (eg. because the litigant in person is the claimant or applicant) the responsibility would ordinarily lie the other way. It is suggested that some form of special provision as to the costs thereby incurred should be developed so that the represented party is not placed at an unfair disadvantage. Again, I agree with these suggestions. I should say that publication of this recommendation in the provisional report led to some feedback which doubted whether any such fair system could be devised. More generally, there are guidelines in paras 119 – 124 of the Civil Justice Council Report, and in its Appendices 2 and 3, which provide valuable insights into best practice for lawyers when dealing with litigants in person on the other side of cases, which deserve better dissemination within the chancery community than they currently enjoy.

Chapter 10: Regional Trial Centres

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10.1 Readers of the whole of this report will find numerous references both by way of description and recommendation to the regional trial centres. Generally, I have tried to accommodate them in each of the specific chapters of this report dealing with all the stages of chancery practice and procedure, treating them, as I consider that they should be, as integral parts of the Chancery Division.

10.2 Nonetheless, there are numerous respects in which recommendations primarily aimed at changing practice and procedure in London are either inapplicable or require substantial modification when applied to the regional trial centres. This is partly because many of the culture changes and specific changes in practice which I recommend have already taken place in all or most of them. In other respects they operate on such a smaller scale, and with such limited resources, that it is in practice impossible and undesirable to replicate there all the practices which apply, or which I think should apply, in London.

10.3 It is additionally inappropriate to treat the regional trial centres as a uniform block since, although there are a number of features of their practice which are common to all or most of them, each centre has developed its own way of doing things, its own relationships with the other two specialist civil jurisdictions (Mercantile Courts and TCC), its own back-office arrangements and its own waiting times.

10.4 I must also acknowledge that, despite very useful visits to Birmingham and Bristol, my knowledge of the practices there, and even more so in Cardiff, is much less detailed than the knowledge which I gained about the practices in Liverpool, Manchester, Leeds and Newcastle during my times there as Vice Chancellor. I have nonetheless had the advantage of very helpful written and oral explanations in relation to the centres with which I am less familiar, at all stages during this Review.

10.5 I do not see it as part of my task in this Review to address in detail, still less to attempt to micro-manage, the differences of practice which occur as between the various regional trial centres, still less to suggest that there should be imposed any rigid or unnecessary level of uniformity governing all of them. They are all of different sizes. Their catchment areas are widely different and there are good reasons for many of the differences in their listing practices, and in the management of their relationships with the parallel specialist civil jurisdictions.

10.6 The purposes of this chapter are first to describe the regional trial centres in a little more detail than in Chapter 1, secondly to point out the main differences in workload and practice between them taken as a whole, and London, thirdly to set out principles by which the allocation of chancery business to them should be governed and finally to draw together the threads of those of the recommendations made earlier in this report which are applicable to the regional trial centres, with necessary variations.

Description

10.7 There are seven regional trial centres. In order of size (i.e. judicial resources and workload) they are Birmingham, Manchester, Leeds, Bristol, Cardiff, Newcastle and Liverpool. There are also High Court district registries at Preston and Chester, but they are not trial centres, and each has only a single chancery qualified District Judge. At present, the s.9 Judicial resources in each trial centre are as follows: Birmingham three, Manchester two and a half, Leeds two, Bristol and Cardiff one each, and Newcastle and Liverpool none. In practice, Newcastle shares the s.9 Judicial resource at Leeds, and Liverpool shares that available at Manchester. Newcastle listing is dealt with separately from (but in collaboration with) Leeds, but Judges' listing in Liverpool is run from Manchester.

10.8 Each regional trial centre has its own team of specialist chancery District Judges, ticketed as such in Birmingham, Manchester, Leeds, Newcastle and Liverpool, but not in Bristol or Cardiff. In practice, the presence or absence of a system of formal ticketing seems to make little difference to the amount of time spent by District Judges on chancery work which, taking the regional trial centres as a whole, varies between 25% and about 50%, with occasional exceptions due to special circumstances such as part-time working.

10.9 In each regional trial centre there is both a High Court chancery district registry and an adjacent county court, under the same roof and served by substantially the same judicial and back-office staff, although jurisdictional constraints mean that civil Recorders are available for county court but not High Court cases (unless they have a s.9 chancery ticket, which few of them do). In practice, the large majority of the time of the s.9 Circuit Judges resident in each regional trial centre is spent doing High Court work, and this is part of their job description. In some, but not all, of the centres the District Judges do a substantial part of the trial work in the county court. Like the Masters they case manage the bulk of the cases in both courts.

10.10 It is fair to say that the High Court / county court distinction in the regional trial centres resembles a highly permeable membrane. It is frequently a matter of indifference to the parties whether their case is listed in the High Court or the county court. Sometimes cases are transferred between those courts so as to make available a judge without High Court trial jurisdiction. Sometimes cases are transferred to the High Court at a late stage before trial, (or occasionally even at trial) in recognition of their importance, complexity or value. None of this makes any significant difference to the place of trial, the identity of the staff handling the case or, in many cases, the identity of the trial judge. It can have a significant effect on appeal routes.

10.11 There is a similarly permeable membrane (albeit of varying degrees of permeability in different centres) between the Chancery Division and the local Mercantile Court and TCC, with a high degree of mutual assistance and cooperation, and full cross-ticketing of the available s.9 Judges in most of the centres. This flexibility extends also to the chancery supervising Judge who, at least in the North and North-East, commonly hears mercantile and county court cases as well as chancery cases, where to do so would assist in the

timely discharge of business. It is also common for interim applications in all the relevant jurisdictions to be heard together on Fridays or other application days.

10.12 The result of these arrangements, necessitated or at least promoted by the generally small scale of the different jurisdictions, viewed separately, is that there is in many of the regional trial centres something approaching a unified civil court, and a nearly merged specialist civil jurisdiction. This is perhaps best exemplified by the system of common listing for chancery, mercantile and TCC cases in Leeds, and by the recent appointment of Judge Bird as a 50/50 chancery and mercantile Judge in Manchester.

10.13 I have included at Annex 2 the most recent available statistics descriptive of the volume of the chancery workload in each of those trial centres. In most of them the chancery workload is substantially greater than the mercantile or TCC workload, as indeed it is in the Rolls Building, as between the Chancery Division, the Commercial Court and the TCC.

10.14 The average value at risk in chancery cases in the regional trial centres is undoubtedly much lower than in London. This is not because there is any rule or practice that larger cases should be heard in London regardless of the geographical location of the parties or their solicitors. Rather it is because of an undoubted tendency among court users to choose London as the venue for the largest cases.

Differences between London and the regional trial centres

10.15 Many of the obvious differences will be apparent from the foregoing description. Nonetheless, the following are worthy of special mention in the context of the recommendations made in this report. The first is that all the regional trial centres list fixed-ended trials starting on fixed dates, and most have done so for many years. They all use individual judges' diaries and the parties are, in general, aware of the likely identity of their trial judge very much earlier than in London. Thus, a major aspect of the culture changes which I recommend for London has already occurred in the regions. Furthermore, at least some of the regional trial centres operate four day trial weeks, freeing up their Judges to hear applications on Fridays.

10.16 Although this is by no means universal, there is already a much greater degree of case management for dispute resolution in the regional trial centres than in London. This is exemplified by the use of FDR, the occasional use of judicial ENE, and a generally high degree of 'hands-on' case management. Thus another of the culture changes which I propose for London has already at least started in the regions, although it is by no means complete.

10.17 Waiting times are, in all the regional trial centres, very much shorter than in London. In practice, parties can obtain both the hearing of an application and a trial by the end of the time they need to conduct the necessary preparations. The result of this is that there is at least some capacity for relieving the pressure on London waiting times by the transfer of appropriate cases to the regions, even though it is already customary

for the chancery s.9 Judges in each regional trial centre to spend time hearing trials and applications in the London lists as deputies.

10.18 There is no equivalent in the regions to the team of chancery Associates responsible for the drawing and sealing of orders in London. Each region has its own arrangements, but the allocation of responsibility for the drawing of orders to the parties' lawyers is better established there than in London, and the consultation process revealed no dissatisfaction with the time taken in the drawing and sealing of orders in the regional trial centres, of the type which I have sought to address in relation to London in Chapter 8 above.

10.19 There is already in place in Manchester and Leeds a system for the appointment on a rota basis of a local chancery s.9 Judge responsible for the supervision of listing. In the centres where there is only one resident chancery Judge, that is automatic.

Recommendations

Maximising Use

10.20 I am in no doubt that the maximum use should be made of all the regional trial centres, and that none of them should be closed. They all perform a valuable function in providing specialist chancery case management and trials for cases where the parties or their lawyers are based in the relevant region. Most of them have some capacity for further work, as reflected by their generally very short waiting times. They also perform a valuable function in underpinning the maintenance and growth of legal and litigation services and (in relation to insolvency work) accountancy services in the cities in which they are located.

10.21 In my view maximisation of the use of the regional trial centres should be achieved by the application of the following principles. First, it should be a firm principle that no chancery case is too big to managed and tried in a regional trial centre. Cases which call for trial by a full time High Court Judge (as opposed to a s.9 Circuit Judge) can be dealt with either by the chancery supervising Judge or, if too long, by sending a serving or retired chancery Judge from London to the relevant centre to conduct the trial. This already occurs in Manchester, and there is no reason why it should not be replicated elsewhere, subject only to the availability of the necessary court facilities, which should be prioritised for such cases for the reasons given above. The sending out of a High Court judge for the longer heavy trial involves no large resources problem for London because, if it is not done, then the case would have to be tried in London anyway.

10.22 Secondly, care should be taken to ensure that, on a continuing basis, there are not allowed to develop incentives to regionally based parties to bring their cases in London rather than in their relevant regional trial centre. Such incentives may arise, for example, from the habitual use of a judge of less seniority, specialisation or experience for comparable cases outside as opposed to in London, or from differences in the application of costs budgeting as between London and the regions. Another example may be the

ability of large law firms with offices in London and the relevant region to obtain higher charging rates by issuing in London, and better recovery of costs if successful. Chancery court user committees should be consulted on a regular basis about the emergence of any such factors from time to time, and steps taken promptly to deal with them.

10.23 Thirdly, cases issued in London should, at the earliest (triage) stage be scrutinised for suitability for transfer to a regional trial centre. Such suitability may emerge from the geographical location of the parties or, quite separately, from the fact that the parties' solicitors may all have offices (including litigation departments) in a particular region. I am advised that, whereas the Masters are currently assiduous in sending to the Central London County Court cases which may more appropriately be tried by the chancery Judges there, there is not such a well-established practice of scrutinising and sending cases to the regional trial centres.

10.24 There will of course be resource implications arising from the institution of such a practice on a regular basis, since the sending out to a particular regional trial centre of even a small number of middle-sized or large cases may risk overwhelming the resources of a one or two Judge court. This is a matter about which there will need to be a properly managed regular exchange of information. In my view the appropriate focus for that process will be the resident chancery s.9 Judge in each region who has responsibility for the supervision of the chancery lists at that centre. The information about scope for further work in the regions will need to be made available to the Masters and Registrars in London, and updated on a regular basis. Again, modern IT would make this much easier than it is at present.

Allocation (triage)

10.25 I see no good reason why the process of triage of incoming cases for allocation to an appropriate management track should not be adopted in the regions, broadly as I propose that it should be in London, albeit with the necessary modifications arising out of the very different size and constitution of judicial resources in each of them. In my view, each region should be allowed to develop its own guidelines, applied by the District Judges or Judges hearing applications, under the leadership of the local s.9 Judge in charge of supervising chancery listing. In some regional centres the S.9 Judge with chancery listing responsibility already exercises close supervision of allocation and case management. Nothing in this report is intended to disturb that, where it is already working satisfactorily. It should be the responsibility of the High Court supervising judge from London to co-ordinate the development of those guidelines in the regions under his or her supervision, and also to liaise for that purpose with the sub-divisional supervising Judges in London so that the regional guidelines have an appropriate (but not slavish) correspondence with those being developed in the Rolls Building.

10.26 It may be that the less severe pressure on regional judicial resources will enable a more rapid move toward case management by Judges in the regions than I envisage as possible in London under present constraints. If so, then the regional trial centres will, again, find themselves in the foreground of a desirable development, and valuable lessons may be learned from their experience, provided that sufficient trouble is taken in the establishment of lines of communication.

10.27 By contrast it is unlikely to be appropriate in the regional trial centres to make full use of the imminent increase in county court jurisdiction as a means of relieving pressure on the Chancery Division by requiring all cases within that jurisdiction to be issued or transferred there. There are a number of reasons for this. First, cases within the new county court limit form a large part of the staple diet of the Chancery (High Court) district registries in many of the regional centres, such that to send them all to the county court would risk depriving the High Court centre of an unnecessarily large part of its work.

10.28 Secondly, there is not the pressure on the High Court's resources in the regions that there is in London, as illustrated by their much shorter waiting times, and the generally lower level of value at risk in their cases.

10.29 Thirdly, the transfer of work to the adjacent county court would achieve little of value. The same buildings, staff and (for the most part) judges provide the service for both courts. To the extent that transfers to the county court enables trials to be heard by District Judges, (a valuable device at present), this can equally be achieved by a relaxation on their jurisdictional constraints, as I recommend for Masters in London.

10.30 Fourthly, if the effect of large scale transfer of work to the county court was to mean that the s.9 senior Circuit Judges spent most of their time trying cases in the county court, this could easily be perceived as something of a de-motivating downgrade for them, and a departure from the basis on which they were appointed. Apart from those Judges and the District Judges, there is in any event a real scarcity of the requisite judicial skill and experience for trying chancery cases in the county courts outside London, the Central London County Court being a well-regarded exception.

10.31 All this may of course change if my recommendations under the heading 'Maximising Use' lead to a substantial increase in larger chancery cases being managed and tried in the regional centres. If that occurs, a greater degree of transfer of the smaller or simpler cases to the adjacent county court may well become necessary, if the requisite judicial resources are available.

Listing

10.32 In many respects listing arrangements in most of the regional trial centres are already more modern than those in London, and incorporate many of the features which I recommend for London. There have however been some specific suggestions for improvement with which I agree. The first is that there is not in every trial centre any list or mechanism for getting urgent matters heard by District Judges, or at least a mechanism

sufficiently well advertised to, and therefore known by, court users. It strikes me as an obviously sensible suggestion that there should be.

10.33 Secondly, there has from time to time in certain centres developed a lack of skill and experience in chancery listing. This has arisen in part from an excessively rapid turnover of the relevant staff, in one case involving a change of listing officer every two weeks, on a rota basis. It has also been caused by attempts to treat chancery as just one aspect of a wider listing responsibility, without recognition of the fact that the extraordinary diversity of the chancery workload makes chancery listing something of an art, requiring continuity and specialist experience.

10.34 This is not a subject about which there can be hard and fast rules. In some centres there simply is not enough chancery business to warrant a special chancery listing section. In others the practice of a shared specialist civil list, covering chancery, mercantile and TCC, has proved to be positively beneficial. All that I need to say is that listing of any kind is best conducted by persons who have real continuity in the job, and that chancery listing is 'special' enough to warrant a separate section (or at least recognition as a distinct skill) in all the centres where the amount of business is sufficient to warrant it.

Specialisation

10.35 There have been suggestions that, by comparison with the Masters and Registrars in London, many of the District Judges who perform the same functions in the regional centres compare unfavourably in terms of specialist chancery skill and experience. This is in one sense the inevitable consequence of the fact that hardly any of them do chancery work (still less company and insolvency work) full-time, as all their Rolls Building colleagues do. It is in no sense a matter for personal criticism. Furthermore they bring to their work valuable experience and skill from other areas, as is exemplified by their development of Financial Dispute Resolution from experience gained in the Family Court. Most of them value the diversity of skills which their various areas of work require, and do not wish to become full-time chancery specialists.

10.36 But that is no reason for simply accepting the relative lack of chancery skill and experience as a given, if anything can be done to improve it. I think that two methods are worthy of serious consideration. The first is, in appropriate places, to consider slightly reducing the number of chancery ticketed District Judges (or of those who do chancery work without formal tickets) so as to increase the chancery proportion of the workload of those who continue to do so. This was recently done in Liverpool on the retirement of a senior chancery District Judge there. There are some other regional centres where the numbers would still be sufficient to provide the necessary continuous service, even after such a process of concentration. This is of course not something about which I can be prescriptive, and I am certainly not suggesting that District judges who have chancery tickets (or chancery lists where ticketing is not used) should have them taken away if they wish to continue with them. Each centre must find its own way to striking the best balance between flexibility, concentration of experience and, importantly, job satisfaction.

10.37 The second is training. It may be that the skills and experience of the full time Masters and Registrars could be harnessed by a programme of regional training or seminars. It might also be provided as part of an annual chancery judicial conference. I am advised that the annual District Judges Chancery Meeting (which precedes the District Judges National Annual Seminar) is much valued as an example of a unique and excellent training opportunity, as is the practice in some regional trial centres of arranging for new chancery District Judges to spend time sitting with Registrars and Masters before undertaking their work. Both those opportunities strike me as valuable models for the future.

10.38 Finally, I have already mentioned the need, in the regions just as much as in London, for chancery and in particular insolvency work to be regarded as a distinct area of specialisation at the District Judge level, so that the past practice of giving that work to anyone prepared to volunteer, regardless of experience, does not continue or re-appear.

Case management

10.39 Again, I see no reason why my recommendations about case management for dispute resolution, and an issue-based approach to case management for trial, should not be as fully applicable in the regional trial centres as in London. As I have said, there are several respects in which the regional trial centres are already ahead of London in this respect.

10.40 This is another area in which better communication between the central and regional parts of the Chancery Division is in my view highly desirable. It should not have necessitated a review of this kind for the Chancery Division in London to become aware of the important respects in which (with the advantages of smaller size and greater flexibility) the regional trial centres have led the way in aspects of modernisation. The recent chancery judges' national conference at the Rolls Building went some considerable way along that route, even in the course of a single day.

Trial

10.41 To the extent that the recommendations which I make about a culture change, and changes in practice in the conduct of trials, have not already been adopted in the regional trial centres, I can see no good reason why, subject to one exception, they should not be now.

10.42 The exception relates to the use of a four day trial week. This should not in my view be a mandatory requirement in every regional trial centre, even though it may be of real value in some, where for example interim applications are regularly heard on Fridays, as in Manchester and Leeds. In centres (such as Birmingham) where five day trial weeks are the norm, I would be content to leave it for further discussion, and indeed local decision, whether a change to a four day trial week would significantly assist in the increase of the

number of cases which are managed by Judges rather than District Judges. It may be that their listing diaries are sufficiently flexible to accommodate that change by other means than leaving Fridays free of trials.

Litigants in Person

10.43 I need add little here to the detailed treatment of this question in Chapter 9. Where necessary, I have already dealt with the regional trial centres in that chapter.

10.44 Nonetheless, the point which needs particular emphasis is, in my view, the need to treat the assembly and monitoring of information about available free and affordable advice and representation for LIPs as a regional (i.e. local) rather than merely national matter, so that each trial centre has available to its judges, court staff and habitual professional court users up-to-date information about the local availability of such assistance for persons who would otherwise be LIPs, with the requisite skill and experience for advising and appearing in chancery cases.

10.45 By the same token, the provision of on-site pro bono assistance in the relevant court centres is quintessentially a local rather than national matter, even if national agencies are the main providers of those services in each centre.

10.46 Finally, whereas I have recommended that the making more accessible of chancery justice to LIPs in London should be looked at as a chancery rather than merely civil litigation matter, the very much smaller size of some of the chancery operations in the regional trial centres may make this locally impracticable. In those places, it is possible that a better solution will consist of amassing information about assistance for LIPs in connection with specialist civil litigation, or civil litigation generally.

Chapter 11: Company And Insolvency Work

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The present position

11.1 Company and insolvency matters represent one of the main components of the Chancery Division's work, both in London and in the regions. While cases in this category do not always have a statutory basis, very many do. The relevant legislation includes the Insolvency Act 1986, the Company Directors Disqualification Act 1986, the EC Regulation on Insolvency Proceedings 2000, the Limited Liability Partnerships Act 2000, the Financial Services and Markets Act 2000, the Companies Act 2006, the Cross-Border Insolvency Regulations 2006 and the Companies (Cross-Border Mergers) Regulations 2007.

11.2 In London, company and insolvency work is currently undertaken by Judges, Registrars and by certain District Judges of the Central London County Court. In the regional trial centres it is undertaken by s.9 Circuit Judges, District Judges and by the chancery supervising Judges, when on circuit.

11.3 In London the District Judges deal with many of the bankruptcy petitions presented in the London insolvency district. A creditor's petition based on a debt of less than £50,000 must be presented in the Central London County Court rather than the High Court, as must a debtor's petition if the total indebtedness is less than £100,000. The numbers of creditors' petitions presented in the London insolvency district are boosted by the fact that HM Revenue and Customs (and other Government departments) are entitled to present petitions there regardless of where the debtors live or carry on business. Once, however, a bankruptcy order has been made, the matter is transferred to a county court closer to the debtor's home if he or she does not live in London. This limits the extent to which District Judges of the Central London County Court handle cases after making bankruptcy orders.

11.4 The distribution of insolvency business as between Registrars and Judges is governed by the Practice Direction – Insolvency Proceedings which came into force on 23 February 2012. This provides for applications for committal for contempt, for administration orders and for injunctions always to be listed before Judges. Applications for the appointment of provisional liquidators are also heard by Judges. Most other petitions and applications are listed before Registrars in the first instance. Very often, a matter will be dealt with by a Registrar throughout. The Practice Direction stipulates that, when deciding whether to hear proceedings or to refer or adjourn them to a Judge, a Registrar is to have regard to the following factors:

(a) the complexity of the proceedings;

(b) whether the proceedings raise new or controversial points of law;

(c) the likely date and length of the hearing;

(d) public interest in the proceedings.

In practice, only a small minority of cases are referred to Judges. Registrars regularly hear and determine contested matters, including matters raising substantial issues of both fact and law.

11.5 Non-insolvency company work is also shared between Registrars and Judges. In some instances, the Registrars will again deal with matters from start to finish. That is generally true, for example, of applications to confirm reductions of capital. With some other types of case, the Registrars will handle some or all of the case management, but any trial will be before a Judge. It would, for example, be most unusual for a Registrar to try an unfair prejudice petition presented pursuant to section 994 of the Companies Act 2006. With applications to sanction schemes of arrangement and business transfers, the final hearing will also be before a Judge, but the Registrars handle earlier stages in the applications. In the case, say, of an application to sanction a scheme of arrangement, a Registrar will normally give directions as to meetings of members/creditors and the like.

11.6 A Courts and Tribunals Service website refers to Registrars as "procedural judges". This reflects a misconception. While Registrars do give directions in relation to matters that will be tried by Judges, they deal with many other matters in their entirety. They are trial judges as well as procedural judges.

11.7 The Registrars operate five lists: bankruptcy, companies, general and two trial lists. Taking these in turn:

11.7.1 The bankruptcy list is largely concerned with bankruptcy petitions, but it also includes applications relating to proposals for individual voluntary arrangements. Matters lasting up to half a day can be accommodated in this list. A trial expected to take longer than this will be allocated to one of the trial lists;

11.7.2 A variety of company-related matters are dealt with in the companies list. Prominent among them are applications in relation to reductions of capital, schemes of arrangement and business transfers; petitions to wind up companies in the public interest; applications to restore companies to the register; and applications to rectify the register of charges;

11.7.3 The general list includes both company and bankruptcy cases. Among other things, the Registrar responsible for this list will hear winding-up petitions, give directions in relation to applications under the Company Directors Disqualification Act 1986, and deal with bankruptcy petitions presented by debtors and with public examinations. The relevant Registrar will also be the Duty Registrar and have particular responsibility for urgent matters (which are generally listed for Tuesday and Friday mornings);

11.7.4 With regard to the trial lists, a trial will normally last between one and ten days, but most lie at the shorter end of this spectrum. Cases regularly involve the following:

- Allegations of breach of duty by company directors
- Disputes as to the ownership of company shares
- Misfeasance claims
- Allegations of misappropriation of assets, transactions at an undervalue and preferences
- Applications for the sale of matrimonial homes and issues as to their beneficial ownership
- Applications for disqualification and bankruptcy restriction orders.

11.8 The Registrars are considering the creation of a third trial list. Two Registrars would cover three trial lists between them. This arrangement has been the subject of a pilot since June of this year, and I understand that it appears to be working satisfactorily.

11.9 Although most cases handled by the Registrars have been issued in London, cases are not infrequently transferred to London from elsewhere in the country. This is attributable at least in part to the high level of specialist expertise that is rightly seen to exist in London. In particular, the Registrars can offer a greater depth of experience in insolvency matters than is available in all or most courts outside London. It is only the Registrars who do this work full time, even in London.

11.10 At present, there are five Registrars, who are supplemented by Deputy Registrars with specialist knowledge of insolvency law. Three District Judges of the Central London County Court are available and qualified to deal with bankruptcy work in that Court.

11.11 The Central London County Court acquired its present bankruptcy role in 2011. It was said to be impossible or difficult to accommodate within the Rolls Building (to which the Chancery Division moved in the autumn of 2011) the resources required to carry out the full range of insolvency and company work that had hitherto been undertaken in the High Court. Some bankruptcy work was therefore allocated to the Central London County Court, sitting in the Thomas More Building within the Royal Courts of Justice site. It was anticipated that, under the new arrangements, 80% or more of bankruptcy petitions would be presented in the Central London County Court, and the work was expected to occupy two District Judges on a two thirds basis and a third for half his or her time. The number of the Registrars was reduced from six to five.

11.12 In the event, fewer bankruptcy petitions have been presented in the Central London County Court than had been envisaged. In 2012-2013, for example, about 39%

of petitions were presented in the High Court. In particular, only about 56% of creditors' petitions were presented in the Central London County Court. As a result, the District Judges have not had as much bankruptcy work as they would have liked. The bankruptcy work has not been enough to occupy even two District Judges on a two thirds basis. The problem has been alleviated by the District Judges taking on small claims work for the Patents County Court, and additional general work at Park Crescent. These District Judges therefore have considerable spare capacity for the bankruptcy work for which they were recruited, although this may in part be due to the time that elapses between a bankruptcy order and subsequent applications by the trustee in bankruptcy. Central London County Court is for the most part dealing with bankruptcies resulting from petitions presented since it assumed this jurisdiction, and bankruptcy work can be very long-tailed.

11.13 The Registrars, in contrast, are quite hard-pressed. In consequence, the waiting times for some sorts of hearing before the Registrars are unacceptably long. Dissatisfaction on this account was expressed in a number of the responses to consultation, and it is a major objective of the proposals in this chapter to put this right. In other respects, however, the Registrars and their work are clearly held in very high regard.

11.14 Outside London, personal bankruptcy is spread among those county courts having an insolvency jurisdiction, while the great majority of company insolvency work is handled by the Chancery District Registries of the High Court in the main regional trial centres. In those centres, the same Circuit Judges and District Judges handle both types of work.

The roles of the Registrars and District Judges

11.15 As already mentioned, the District Judges of the Central London County Court currently have too little insolvency work while the Registrars have excessively long waiting times. A key question is how this imbalance should be addressed.

11.16 One solution would be to restore the number of Registrars to six and reduce correspondingly the number of District Judges allocated to insolvency work. This, it is said, should have no cost implications since Registrars and District Judges are remunerated on the same basis. It is also argued that a larger Registrars' court would afford much-needed flexibility.

11.17 There is much to be said for this view, but I fear that it is unrealistic in the current financial circumstances. Apart from anything else, it might prove to have resource implications. Unless the new Registrar was one of the present District Judges, the proposal could result in an overall increase in the head count, at least in the short term. However, there is a very strong case for the appointment of a sixth Registrar in the longer term, when financial resources permit.

11.18 At the other end of the spectrum, I have considered whether the solution could be to transfer the Registrars and their work into the Central London County Court lock, stock and barrel. An obvious problem with any such approach is that some or all of the Registrars could be expected to object to their transfer, as they did when it was proposed

that they should remain there at the time of the move to the Rolls Building. Even supposing, however, that the Registrars could be persuaded to accept such a scheme, it seems to me that it would have little to commend it.

11.19 In the first place, the Registrars currently provide a national centre of excellence. They are the only judges in the country who work full time in insolvency and company matters. They are recognised as experts, and cases are transferred to the High Court with that in mind. Their judgments are regularly reported in specialist series of insolvency reports. Their work on major company reconstructions and schemes has both national and international importance, and involves assets worth enormous sums. The Central London County Court, however knowledgeable its District Judges, would simply not be seen in the same way or provide an equivalent service.

11.20 Secondly, absorption of the Registrars into the Central London County Court would be likely to be an obstacle to recruitment. Although Registrars are paid the same as District Judges, practitioners with insolvency expertise may well find appointment as a Registrar more attractive than appointment as a District Judge. Were that to mean that those sitting in the Central London County Court were less well-qualified than the current Registrars are, Judges might need to deal with more of the work than they currently do, and the quality of the service provided would be bound to fall.

11.21 That leads to a third point. The chancery Circuit Judges at the Central London County Court are highly regarded for their work, but that has tended to be mainly property work. They have not hitherto had so much experience of insolvency work. This might suggest that, where it was not appropriate for a District Judge to deal with something, it would be better dealt with by a Judge of the Chancery Division. That is readily possible under the current system, with Registrars and Judges all operating in the same building and the same Court. It would be less straightforward with District Judges based in a different court and a different building.

11.22 A fourth point is that, as things stand, the court undertaking corporate insolvency work needs to have a judge (and not merely a Registrar or District Judge) with relevant experience available every day to hear emergency applications (notably, for injunctions to restrain the presentation or advertisement of winding-up petitions). It is not clear how that could be arranged within the Central London County Court.

11.23 A fifth point relates to geography. To leave the Registrars (or their District Judge replacements) and the associated staff and files in the Rolls Building while the remainder of the Central London County Court was in the Thomas More Building would be a recipe for confusion akin to that which the Central London County Court has previously experienced when based on two sites. Conversely to move the Registrars and their associated staff and files to the Thomas More Building would create the same disruptive geographical relationship between them and the chancery Judges in the Rolls Building.

11.24 Sixthly, there is no cost advantage to using District Judges rather than Registrars: they are paid the same.

11.25 Seventhly, there is simply no demand for the Registrars and their work to be moved wholesale to the Central London County Court. The responses to the consultation indicate that, waiting times apart, users think that the current system works well.

11.26 Another possible way forward would be to allocate all personal insolvency work to the Central London County Court, leaving the Registrars to handle only corporate matters. Again, there seem to me to be compelling objections to such a course.

11.27 In the first place, the resulting divorce of personal and corporate insolvency strikes me and others as very undesirable. While there are certainly points of difference between the two regimes, they have a great deal in common, in terms of both the legislation and the principles underlying it. There is much to be said for those making decisions on corporate matters being familiar with equivalent issues in the context of personal insolvency. The Cork Report on insolvency law recognised this. The report included this:

> *"It is ... desirable to concentrate insolvency court business, so far as practicable, for hearing before the minimum number of judicial officers consistent with its effective and expeditious discharge...*
>
> *"The harmonisation of corporate and personal insolvency will, we are convinced, be more effective if the same judicial officer deals with both types of administration. We therefore recommend that whoever is appointed to hear insolvency matters should deal with all types of insolvency."*

11.28 A second point is that, while the approach under consideration would threaten the Registrars' role as a national centre of excellence less than transferring all insolvency work to the Central London County Court, it would still be bound to do so to some extent. The Registrars could hardly be seen as retaining exceptional expertise as regards personal insolvency. There is a risk that their reputation in relation to corporate insolvency would also be diminished.

11.29 A third point is that bankruptcies sometimes involve very large sums of money and/or considerable legal complexity. At least some such cases should surely be in the High Court. It could not, however, be satisfactory for those to be the only bankruptcy cases handled by Registrars. If they are to have the appropriate expertise, they need to have regular exposure to bankruptcy cases, at all stages in their development.

11.30 The best way forward, in my view, is (a) to identify further types of case or hearing that could appropriately be handled by the Central London County Court and (b) (perhaps) to identify matters that could be dealt with administratively, without involving any court.

11.31 With regard to (a) (additional work for the Central London County Court), the pressure on the Registrars could be relieved to an extent by, for example, it becoming the practice for Registrars to order public examinations to be conducted before District Judges of the Central London County Court and to transfer other more routine applications (including applications relating to corporate insolvency) to those District Judges. These might include the hearing of oral examinations under s.236 of the Insolvency Act

and some less contentious or difficult applications about preferences. I agree with the suggestion made by some consultees that formal guidelines for transfers should be developed. The levels of debt below which bankruptcy petitions must be presented in the Central London County Court should also, as it seems to me, be substantially raised. As already mentioned, it was envisaged that the present levels would mean that 80% or more of bankruptcy petitions would be presented in the Central London County Court. The levels of debt should be raised to whatever extent is necessary to achieve and then maintain that objective. I would suggest that, in the first instance, the level below which a creditor's petition must be presented in the Central London County Court should be increased to £100,000. I can also see considerable merit in the proposal made by some consultees that there should be a band of shared jurisdiction (say, in respect of debts between £100,000 and £150,000) within which a petitioner could choose between the High Court and the Central London County Court.

11.32 As for (b) (matters that could be dealt with administratively), candidates for transfer out of the courts altogether include the restoration of companies to the register, the extension of administrations and applications relating to the distribution of the "prescribed part" (as to which, see section 176A of the Insolvency Act 1986), and the registration of company charges out of time. At least some such matters did not seem to me to call for judicial input, and I suggested in my provisional report that some or all of them would be better dealt with administratively by, say, Companies House. However, various consultees thought it important that the Courts should continue to be involved in the extension of administrations, and concern was also voiced at the prospect of other applications (in particular, those for restoration to the register and for the registration of charges out of time) being disposed of administratively. The view was expressed, too, that Companies House would not be willing to take on additional work unless given more resources. On balance, I still think that applications relating to the distribution of the "prescribed part" could be transferred out of the court system, and I remain to be persuaded that the court really needs to maintain control on the progress of all administrations, not least because a distributing administration has now become a preferred alternative to a liquidation in many (if not most) cases. Were such an approach to be adopted, it would doubtless make sense for there to be provision for any case throwing up a significant issue to be referred to the court.

11.33 In my provisional report, I also proposed that one or more of the District Judges of the Central London County Court should be appointed as Deputy Registrars. That suggestion received no real support from any consultee. The District Judges themselves doubted both its desirability and its practicality.

The roles of Registrars and Judges

11.34 As matters stand, the Registrars are precluded from making administration orders or granting injunctions to restrain the presentation or advertisement of winding-up petitions. In my view, these constraints should be relaxed. In the first place, it seems to me that the

Registrars, with their acknowledged expertise in insolvency matters, should be permitted to deal with an application for an administration order unless there are particular circumstances making it appropriate for a Judge to hear the matter. Secondly, it would, I think, be desirable for the Registrars to be empowered to grant injunctions restraining the presentation or advertisement of winding-up petitions. Registrars already deal with similar issues when deciding whether statutory demands served under section 268 of the Insolvency Act 1986 should be set aside, and when winding up petitions are defended on the basis that the debt is contested. I appreciate that injunctions are traditionally granted only by Judges, but I consider that the power to grant injunctions of the kinds I have mentioned could safely be entrusted to the Registrars.

11.35 I also consider that the Registrars could play a larger role in relation to unfair prejudice petitions presented pursuant to section 994 of the Companies Act 2006. As mentioned above, all such petitions are at present tried by Judges. I cannot see, however, why every such petition should necessarily call for trial by a Judge. Unfair prejudice petitions need be no more demanding than other matters which are regularly determined by the Registrars (e.g. directors' disqualification proceedings). In my view, the question whether an unfair prejudice petition should be tried by a Registrar or by a Judge should be determined on the basis of the principles applied when determining whether insolvency proceedings should be heard by a Judge.

11.36 The involvement of Judges with applications under the Companies (Cross-Border Mergers) Regulations 2007 should be reduced as well. At the moment, such applications come before Judges for final approval, earlier stages having been handled by the Registrars. To my mind, there is no need for most of these applications to be heard by Judges at all. They are very often straightforward and could perfectly well be dealt with by the Registrars. There would need, however, to be a mechanism for referring appropriate cases to Judges. One option would be for the Registrar to consider at the pre-merger certificate hearing whether the matter merited consideration by a Judge.

11.37 These suggestions for the transfer of work from Judges to Registrars should, however, be implemented only if there was a more than corresponding reduction in other areas of the Registrars' work. The first priority must be to reduce the waiting times for Registrars' hearings to an acceptable level, and to maintain them at that level thereafter.

11.38 In contrast, I think that certain especially difficult schemes of arrangement should be dealt by a particular Judge throughout. Such an approach would (a) facilitate good case management, (b) help to ensure that the schemes in question were subject to adequate scrutiny and (c) remove the need for more than one decision-maker to master the materials.

The procedure for Unfair Prejudice Petitions

11.39 A specific issue arises in relation to the procedure adopted for unfair prejudice petitions. At present, such a petition is allocated a first hearing date when issued, usually several weeks ahead. At that hearing, which will be short, a Registrar will typically give

directions for the matter to proceed with statements of case. Nothing much may have been achieved in the (potentially quite lengthy) interval between the petition's issue and its first hearing. The position can be contrasted with a Part 7 claim in respect of which the CPR impose an automatic timetable for statements of case. In that context, particulars of claim must generally be served no later than 14 days after service of the claim form and a defence should ordinarily follow within 28 days after that.

11.40 It seems to me that the procedure for unfair prejudice petitions should be aligned more closely with that for Part 7 claims. I find it hard to imagine an unfair prejudice case in which statements of case would not be appropriate. On the contrary, they are likely to bring a welcome discipline and structure to cases which can all too easily become ill-focused. That being so, it makes sense that there should be a framework for statements of case from the outset and that the first hearing should be timetabled to follow rather than precede their preparation. Such an approach would mean both that the time between issue and first hearing was not wasted and that the first hearing could be expected to be more useful (since the issues between the parties should have been clarified by the process).

Special administration regimes

11.41 There has been a tendency in recent years to introduce administration regimes tailored to particular types of company, where they provide a service to the community rather than merely profit to their shareholders. Thus, separate sets of rules now exist as regards, for example, gas and electricity supply companies (the Energy Administration Rules 2005), the water industry (the Water Industry (Special Administration) Rules 2009), building societies (the Building Society Special Administration (England and Wales) Rules 2010), investment banks (the Investment Bank Special Administration (England and Wales) Rules 2011) and energy supply companies (the Energy Supply Company Administration Rules 2013), while the Postal Services Act 2011 makes provision for "postal administration orders". I appreciate the special importance of the sectors for which such regimes have been introduced, and the need to make special provision as to matters such as the persons who may apply for an administration order and who may be heard on an application, the purposes of an administration and the powers of the administrator, tailored in each case to the sector concerned. However, I do not consider that the proliferation of entirely separate regimes and procedure rules is desirable. A multiplicity of regimes and rules is liable to give rise to confusion. So far as possible, the same regime and procedure rules should apply to all 'special' administrations, with bespoke provisions limited to those matters which require it, in relation to particular types of company.

Registrars' Listing Arrangements

11.42 The Registrars run their own lists, without a separate listing officer. Proposals have been made that they should be brought under the listing supervision of the chancery Listing Officer. I do not favour this, for the following reasons. First, I am advised that the

chancery Listing Office already handles as much business as an office of that type can be expected to handle efficiently.

11.43 Secondly, the chancery Listing Office handles distinctly different business from that handled by the Registrars, both in terms of the types of work and the judiciary involved. There would in short be no obvious synergy in managing the two together, beyond that already achieved by that Office handling the small number of company and insolvency cases transferred to Judges.

11.44 It was proposed in the Norris Report that a working group should be set up to review the registrars' listing arrangements. It does not appear to have happened, but I have seen correspondence in which his recommendations were later discussed. The outcome appears not to have led to any change from the arrangements about which Norris J felt some concern.

11.45 Like Norris J, I have yet to be fully persuaded that the Registrars' lists are handled as effectively as they might be for the purpose of keeping waiting times as short as possible. Many similar lists in other courts are run in ways that minimise the loss of useful judicial time caused by cases settling late, or at the court door, for example by double (or even treble) listing. I am advised that gaps in the lists caused by late settlement of cases before the Registrars are not as great as elsewhere, and that the judicial time released is well used by helping out with other lists, doing box-work or judgment writing. It may nonetheless be helpful to entrust a particular member of staff with overall responsibility for the Registrars' lists with a view to ensuring that the available judicial resources are used as efficiently as possible.

The District Judges of the Central London County Court

11.46 As already mentioned, three of Central London County Court's District Judges currently deal with insolvency matters. The Court has two other chancery District Judges. If the workload justifies it, I suggest that one of these should also be asked to take on some insolvency work. The District Judge in question would need to hear insolvency cases on a regular basis and devote at least 30% of his or her sitting time to such work. Further, a District Judge without existing insolvency expertise would of course need to be given appropriate training.

11.47 The Registrars are permitted to allocate transfers out, first time extensions and slip rule amendments to their Court Manager. The bankruptcy District Judges of the Central London County Court have no similar ability at present. It is desirable, as it seems to me, that they should be authorised to delegate similar matters to a suitably trained member of staff.

Insolvency and Company Work outside London

11.48 There has been a practice in the past to treat this work in some of the regional trial centres as not even deserving classification as chancery specialist work. The result has been that any District Judges prepared to do the work, regardless of prior experience, have had it allocated to them. Recent attempts in the Northern and North Eastern Circuits to have all this work treated as reserved to the specialist chancery District Judges should in my view be continued and extended to any other regions where its specialist nature is not fully recognised

11.49 It is nonetheless unrealistic in any of the regional trial centres to expect of chancery District Judges the degree of insolvency and company experience and expertise displayed by the Registrars in London, although there are a few distinguished exceptions. This is because none of them even do chancery work full time, and because none are recruited exclusively for their insolvency and company expertise, as are all the Registrars and their deputies. It may be unrealistic in the much smaller-scale environment of the regional trial centres to expect otherwise.

11.50 This has the following consequences. First, the proposals for re-allocation of work between Registrars and Judges which I suggest for London will be of little direct application in the regional trial centres, where the allocation of work will have to reflect (as it already does) the different mix of experience and skills, as between District Judges and s.9 Judges in each centre.

11.51 Secondly, there is not outside London the same excessive waiting time for hearings before District Judges as there is before the Registrars, the alleviation of which underlies many of my recommendations in relation to London. In practice the same District Judges deal with insolvency work in the High Court and the adjacent County Court in each trial centre, usually under the same roof, without the difficulties in relation to split sites which will still affect London after the move of the Central London County Court to the Thomas More Building.

11.52 Thirdly, there is in my view a persuasive case (as some commentators have suggested) for seeking to increase the available reserve of insolvency experienced judges in the regional trial centres. This might be achieved both by making insolvency a valued skill in competitions for appointment as District Judges and by seeking to recruit specialist insolvency practitioners as deputies. The availability (and current use) of the power to transfer cases to the Registrars in London should continue, but there will be cases where the location of the parties will militate in favour of keeping the case in the regional centre, quite apart from the pressure on the Registrars' lists.

Chapter 12: General Business And Commercial Cases

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12.1 Perhaps the best illustration of the way in which the work of the Chancery Division has changed in the last thirty years is that Lord Oliver was able in his 1981 Report to describe the Division as concerned with property, whereas business and commercial rather than property cases now comprise by far the largest individual part of its workload, albeit still less than 50% of the whole. It is a tribute to the effectiveness of his proposals for modernisation that the Division has evolved into much the largest forum (by volume of caseload) for the resolution of business and commercial disputes in the country, so that it can and should truly be described as a business and property court.

12.2 I have for statistical purposes included under this general heading the following specific types of work, in no particular order:

- Contract disputes
- Commercial property
- Restrictive covenants
- Business fraud
- Competition
- Banking and financial services
- Professional negligence
- Breach of fiduciary duty
- Pension schemes.

All company work, much insolvency work and all intellectual property work can also properly be described as business and commercial, but those areas have been treated separately for statistical purposes, and are dealt with in separate chapters.

12.3 Cases under this heading range from modest size (in practice above about £300,000 in London) up to the very largest size. In the larger cases in particular, the

presence of one or more overseas parties is commonplace, as are cases in which a UK incorporated party is wholly owned by an overseas parent which is in substance the person principally interested in, and in control of, the litigation.

12.4 The scale and international element in this part of the chancery workload makes it, like the intellectual property workload, a major contributor to UK plc, both in terms of the underpinning which it provides to investment in and the conduct of business in the UK, and in its contribution toward foreign earnings from the provision of legal services.

12.5 It is of course in this field that the work of the Chancery Division overlaps most completely with that of the Commercial Court and, but to a less extent, the TCC. Only a very small part of this section of the workload is specifically assigned to the Chancery Division and, because the Division's history did not lie in business and commercial work, little of it is conducted in the Division for merely historical or traditional reasons. It is therefore a forum of choice, rather than of necessity, for this kind of work.

12.6 London waiting times for trial of this part of the workload are broadly comparable with those in the Commercial Court, although at present slightly longer, by about two months. In the regional trial centres waiting times are broadly comparable with those in the local Mercantile Courts, but universally much shorter than in London.

12.7 The enormous growth in this part of the Division's workload, coupled with the fact that litigants appear to be prepared to wait at least as long, if not longer, for trial in the Chancery Division than in the available alternative courts is, in my view beyond argument, ample demonstration of the quality and attractiveness of the service provided. It is characterised by efficiency, flexibility and the application within complex disputes of an appropriate combination of legal skill and business common sense.

12.8 Efficiency is perhaps best demonstrated by the fact that the vast bulk of case management is carried out by the Masters on paper, without the need for hearings, with minimal appeals, and in accordance with relatively standardised directions well known, understood and appreciated by the legal profession. Its flexibility is most clearly demonstrated by the practices of the Listing Office which I have described in detail in earlier chapters. They both contribute to keeping waiting times within bounds and afford substantial opportunities, where needed, for expedited trials, for a small number of fixed dates and for some full docketing of case management by the trial Judge. The application of legal skill and business common sense is derived from the recruitment of its full time and deputy judges from a wide range of different legal, business and commercial backgrounds, among whom the Listing Officer can to some extent choose for the allocation of the best qualified judge to each case. Finally, the chancery full-time Judges are able to devote the whole of their time to chancery work, without diversion into the Crown Court, the Court of Appeal Criminal Division or, with very limited exceptions, into the Administrative Court or on circuit. Their appellate and tribunal work is almost entirely chancery related, and complements their work in the Division.

12.9 This generally attractive picture should not however be allowed to disguise the fact that, in this field of work in particular, respondents to consultation displayed the clearest

preference for many of the practices and procedures of the Commercial Court over those of the Chancery Division. This is not in my view because the Division deals with business and commercial work in a less satisfactory way than with the other parts of its workload, but because court users who use it for business and commercial work above £2 million in value have a choice to go to the Commercial Court, and frequently use both, whether out of choice or because, as defendants, they are drawn there by a choice made by their opponents.

12.10 I have already set out in Chapter 2 (under the heading Case Management by Judges) how a clear majority of users of both the Chancery Division and the Commercial Court preferred the latter's uniform use of Judges (rather than Masters) for case management. A similar majority also favoured fixed date rather than floating date trials and, in larger cases, the generally tougher approach to case management, including summary judgment, applied by the commercial Judges by comparison with the chancery Masters.

Recommendations

Convergence

12.11 Many of the proposals in the earlier part of this report are designed to address the perceived shortcomings in chancery practice, as compared to Commercial Court practice, in relation to cases of a similar type. It is unnecessary to repeat them in this chapter. More generally, it is in the business and commercial part of the chancery workload that the greatest opportunities for achieving a real convergence in practice and procedure between the Chancery Division and the Commercial Court must lie. The same is true as between the Chancery Division and the Mercantile Courts in the regional trial centres, but much more convergence has already occurred there than it has in London.

12.12 I have already set out in Chapter 2, under the heading Convergence, why in my view it is in any event a desirable goal in relation to workload of the type which can be dealt with in any of those courts. It is, on the face of it, anomalous and less than ideal for similar work to be subjected to different procedures and practices in two courts located (both in London and in the regions) in the same building. Convergence is, therefore, an end in itself, subject always to factors genuinely calling for different practices, whether due to the different sizes of the two units, the aspects of their workload which are genuinely different, and the general desirability of not seeking to fix that which 'ain't broke'.

12.13 The areas where I consider convergence in practice and procedure to be most worth pursuing in relation to business and commercial work are as follows:

- The application of the guidance in the Aikens Long Trials Report, and the experience gained in the Commercial Court from its implementation.

- Four day trial weeks.
- A move towards fixed trial starting dates, with built-in time for pre-reading and judgment writing.
- Limiting the length of cross examination.
- A more rigorous weeding out of cases more appropriately managed and tried in other courts.
- A greater emphasis on considering ADR as a normal part of case management.
- The taking by the parties of full responsibility for the drawing of orders.

12.14 By contrast I would not favour a general prioritisation of chancery business and commercial cases for case management by Judges (other than the trial Judge). In my view the greater advantages of full docketing are a more suitable target for the allocation of limited resources than merely case management by Judges, for the reasons set out in detail in Chapter 2. The Chancery Division ought to be better resourced than the Commercial Court to provide full docketing of appropriate cases to single Judges (or to trial Judge / Master partnerships), because of the larger number of available Judges and because only two of them spend time away from London on circuit.

12.15 I am advised that the Commercial Court does not at present extend full docketing to a larger proportion of its caseload than does the Chancery Division. Even when it does, there is normally assigned a team of two Judges, precisely to deal with the much greater incidence of judicial absences on circuit. I see no reason why the Chancery Division should follow this course merely out of a desire for convergence, where it does not share the difficulty which has led to its adoption.

12.16 There is much greater force in the application of convergence to the way in which cases of the same type are actually managed and tried, than in the practices for the allocation of judges to that task. This is the area where it could properly be said that differences need to be justified, if they are to survive under the roof of a single business and property trial centre. It is likely to apply with particular force to costs budgeting, if the CPRC sees fit to remove the temporary level of convergence achieved earlier this year by the institution of the £2 million ceiling for the mandatory preparation of costs budgets by solicitors in chancery cases.

12.17 It should not in my view be assumed that convergence in this area will necessarily be achieved by the application of the same ceiling (or other criterion for automatic costs budgeting) in both the Chancery Division and the Commercial Court. This is because each group of judges may apply very different considerations to the exercise of discretion, whether to dispense with costs budgeting below the ceiling, or to apply costs budgeting

above it. They may also apply a different level of rigour to the process when even it is used. If forum shopping is to be avoided, differences in discretionary practice between the two courts, and between London and the regional trial centres, will need to be carefully monitored.

12.18 I make it clear that the achievement of greater convergence in the business and commercial sector of the chancery workload with the Commercial and Mercantile Courts is unlikely to go so far as to render separate practice guides unnecessary, even if convergence may reduce their size. There is so much difference between these courts in their workloads, their sizes, in the arrangements for judicial allocation to case management and trial and in the differing calls upon the time of their Judges that, at least for the medium term, I envisage that different procedures and practices will continue to make such guides helpful, if not essential.

12.19 My expression of these views about convergence in the provisional report has been followed by almost universally supportive feedback form court users. Some have regretted that I have not gone further, for example by a complete exclusion of Masters from case management of international commercial cases when brought in the Chancery Division, in favour of case management by Judges. I have sought to explain why I have gone as far but no further than I have, and I have not been persuaded by the advocates of more radical convergence. Generally I have recommended convergence where, in common with most consultees, I have been persuaded that the Chancery Division has something worthwhile to learn from other courts undertaking the same work. It is of course a matter for those courts whether to follow (or converge with) practices and procedures developed in the Chancery Division, whether by adopting recommendations in this report or otherwise.

Mutual Assistance

12.20 I have already noted how, in discharging the business and commercial workload in the regional trial centres, the judges and court staff have proceeded much further in terms of mutual assistance, and even list sharing, than has occurred in London. Although this is no doubt partly the result of the much smaller size of the separate units (Chancery, Mercantile and TCC) in each regional trial centre, by comparison with London, the main reason for the absence of any significant mutual assistance in London is probably the historical divisional structure, coupled with the very different demands upon the working time of Queen's Bench Judges, by comparison with their Chancery Division colleagues.

12.21 Nonetheless, it seems to me that there is no logical or good reason why, in London, chancery, commercial and TCC Judges should not, during periods allocated to them for civil (rather than criminal or administrative) work, provide mutual assistance for the purpose of dealing with occasional peaks and troughs in their respective workloads. On the very rare occasions when it has occurred, anecdotal evidence suggests that it has worked perfectly well. The obstacles to its greater use appear to derive from a combination of the following elements:

- The absence of any unified management structure below the level of the Lord Chief Justice (who has many more pressing matters to deal with);

- The lack of any agreed or understood guidelines as to how such mutual assistance should work;

- The operation of separate listing offices with no common management.

- Historical inertia, derived from a period when, in sharp contrast with the working arrangements in the Rolls Building, the three groups of judges worked in different parts of, and in different courts within, the sprawling Royal Courts of Justice, with widely separated listing offices.

12.22 The experience of working in close proximity, under the same roof in the modern court buildings in many of the regional trial centres, has undeniably been the main facilitator of mutual assistance of this kind. The environment in the Rolls Building, in which the chancery, commercial and TCC judges and their clerks are mingled on the fourth and fifth floors, rather than in separate groups, and in which the respective listing officers are in sight of each other in an open plan office, ought to be an ideal environment for the development of mutual assistance in London, along the lines that have emerged elsewhere, in particular in Leeds, Manchester and Birmingham.

12.23 Apart from the obvious advantages of the management of short term peaks and troughs in the three units' respective workloads, mutual assistance would also offer the advantage of ensuring that no large disparities in waiting times emerge as between each of them, and in particular as between the Chancery Division and the Commercial Court, in relation to common types of work. It is those disparities which, once perceived by the legal profession, can lead to forum shopping.

12.24 It is however not for me to do more than make this recommendation in outline, because of the limitations in my terms of reference. Nonetheless it seems to me that the combination of convergence in practice and procedure and mutual assistance in judicial allocation ought in combination to be powerful factors in converting the Rolls Building from the common home of three different civil courts into a single, internationally pre-eminent centre for the resolution of business and property disputes.

12.25 A form of forced (but not mutual) 'assistance' does exist in the current power of the Commercial Court and the TCC to transfer out of another court (including the Chancery Division) any case which it considers could better be dealt with in the transferee court. This usually arises where a defendant prefers the Commercial Court or the TCC to the court chosen by the claimant for the issue of the claim. The (admittedly only very occasional) exercise of this power causes real resentment both to chancery judges and to litigants whose choice of court is thereby undermined, because it involves no assessment by the court first seized of the question whether such a transfer is appropriate or necessary. It can, rightly or wrongly, be seen as cherry picking, or forum shopping. My understanding is that, in practice, transfers of this kind do not take place without at least

informal cross-divisional communication at a high level, although this may not always be understood by the parties concerned, or by their legal teams. The abrogation of this power is the subject of a recent letter by the chairman of the Chancery Bar Association to the CPRC, which has the support of the chancery Judges. It seems to me in principle better that the question whether there should be a transfer should initially be addressed by the court first seized, although of course no transfer should be made without the consent of the receiving court. If my recommendations in chapter 4 about triage are implemented, the question whether a case has appropriately been issued in the Chancery Division should in every case routinely be considered as part of that process.

IT

12.26 Better use needs to be made of existing infrastructure for paperless trials in the Rolls Building, and the provision of proper connectivity for wi-fi and mobile phone users in the Rolls Building should be treated as an urgent priority. It is in the area of business and commercial litigation that these shortcomings are most destructive of the quality of the offering presented by the Rolls Building. I cannot over-emphasise how urgent it is that these matters be remedied, so that the Rolls Building may provide to business and commercial litigators the thoroughly modern and user-friendly service which it was designed to offer, and for which such a large financial investment has already been made. It is some comfort to know that the importance of these matters has now been accepted by HMCTS, and some funding made available for the purpose.

Chapter 13: Intellectual Property

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13.1 Intellectual Property is one of the two clearly distinct parts of the chancery workload, the other being Company and Insolvency. Although claims and issues about intellectual property may arise in other types of case, the work typically manifests itself as specific litigation about intellectual property and nothing else. Its main sub-categories are:

- Patents and registered designs
- Copyright and design right
- Trade marks and passing off

For statistical purposes, I have also included within Intellectual Property the litigation about confidential information and privacy, although this is by no means litigated exclusively in the Chancery Division.

13.2 A fuller description of the types of claim treated as part of the intellectual property workload may be found in CPR 63.1(1) and 63PD paragraph 16.1.

13.3 Patent and registered design cases (for brevity I shall refer to them in this chapter as patent cases) are assigned to a separate court within the Chancery Division, namely the Patents Court. All trials and case management are dealt with by the Judge in charge of the Patents Court together with seven other ticketed Judges, but not generally on a docketed basis. None of them sits exclusively to hear patent cases or even intellectual property cases. Rather, they all share in the general work of the Chancery Division.

13.4 By contrast, all other intellectual property work is treated as part of the general workload of the Chancery Division, for the trial of which all the full time and deputy judges of the Division are treated as available. Case management of trade mark cases is currently assigned to a single specialist Master, when available.

13.5 A less costly and less complex alternative to the Chancery Division for intellectual property cases exists in the form of what used to be called the Patents County Court. It was originally set up in 1990 as an alternative to the Patents Court, and its jurisdiction limited to patents and registered designs. This was expanded in 2005, after an initiative from the Intellectual Property Court Users' Committee, to include all intellectual property work. After short periods in a succession of temporary homes, it moved to the Rolls Building in 2011.

13.6 From October this year, the Patents County Court has been renamed the

Intellectual Property Enterprise Court ("IPEC") and has become part of the Chancery Division of the High Court, but without any significant change to its already modern and highly regarded practices and procedures. There is also a small claims track within the IPEC. This is, and will continue to be, administered at the Thomas More Building, although it will technically form part of the High Court, and indeed the only part of it specifically designated for the hearing of small claims. The IPEC has its own Guide (see Volume 2 of the 2013 White Book at Section 2F-149). It has (although there has recently been a vacancy) a single full time Circuit Judge in charge, assisted by such other judges as may be nominated from time to time by the Chancellor.

13.7 Intellectual property work is transacted for court users by relatively tightly knit communities of barristers and solicitors, each with their own specialist association, to which I have been much indebted for their active and helpful response to consultation. There is, in addition, an active and very effective Intellectual Property Court Users' Committee.

13.8 Intellectual property work now within the purview of the Chancery Division therefore ranges from the very largest to the very smallest cases, with a high proportion of international work. The intellectual property workload is therefore a major part of the underpinning which the Chancery Division provides to UK plc, both in supporting businesses established here, and in generating foreign earnings.

Practices and Procedures

13.9 I have already described the practices and procedures of the IPEC as thoroughly modern and well regarded. The same is true for the rules and practice directions of the Patents Court and of the Chancery Division generally in relation to intellectual property work. Although the framework is provided by the general provisions of the CPR, Part 63 and its associated Practice Direction make comprehensive provision for intellectual property cases. It was completely revised and updated in 2009, and amended to accommodate small claims in 2012. Nothing in the responses to consultation suggests that any further significant revision of Part 63 and its Practice Direction is needed at present.

Strengths and Weaknesses

13.10 A European Patent granted pursuant to the European Patent Convention is a bundle of national patents. This gives claimants a broad international choice of forum, but means that the Patents Court now faces competition from a number of European courts. The responses to consultation suggest that the Patents Court is, comparatively, very highly regarded for the quality of its decision-making, and is indeed the forum of choice for those with large scale disputes meriting substantial trials within the EU, and from further afield.

13.11 There is nonetheless real concern that, because patent cases are listed for trial alongside the generality of chancery cases, with no built-in priority, the current waiting

time of about fourteen months from setting down compares unfavourably with the time which the German patent court takes to reach a decision on infringement. The apprehended result is that the patent litigation industry in the UK faces stiff competition where the parties' commercial priority is for a speedy outcome rather than perfect justice (as it often is). There is also concern that, even if preferential waiting times were afforded to patent cases for the purpose of meeting international competition, the current allocation of only two chancery Judges with the requisite scientific background and experience for highly technical patent cases may cause trial log-jams which no amount of preferential list management could cure.

13.12 A separate weakness in the Patents Court's international competitiveness, again arising from current listing practice, is that, uniquely within Europe, trials in the Patents Court are usually listed with floating, rather than fixed, dates. It is because of the high incidence of international participation in patent cases (in terms of parties, witnesses and experts) that the uncertainties in trial timetabling attributable to the absence of a fixed starting date are regarded as a distinct competitive disadvantage, albeit mainly in the smaller to middle sized cases rather than the largest cases, where an uncertainty of two or three days in commencement may pale into relative insignificance in the context of the trial as a whole.

13.13 I have already noted in Chapter 2 that there was a significant measure of concern at the lack of specialist treatment of non-patent intellectual property work of a heavy or middle-sized weight, which some commentators portrayed as a poor sister by comparison with patent cases, and with all types of small intellectual property cases, each of which have their own specialist court. The suggested solution was to widen the jurisdiction of the Patents Court to include all intellectual property work so that it would be dealt with only by ticketed Judges, and case managed either by those Judges or by specialist ticketed Masters.

13.14 I have in Chapter 2 set out the pros and cons of this proposal in some detail, together with my conclusion that it should not be adopted, largely because of the adverse implications for the Chancery Division as a whole. I shall not in this chapter repeat my analysis of the pros and cons, or the reasons for my conclusion, but any readers whose particular interests lead them to study this chapter in isolation will need at this point to refer in detail to the Specialisation section of Chapter 2.

13.15 In the context of my conclusion that it would not be right to include the whole of the intellectual property workload within a specialist ticketed court it is important nonetheless to look more closely at the particular disadvantages which are regarded by some commentators as flowing from the treatment of non-patent intellectual property cases as part of the general chancery workload. As I have already noted in Chapter 2, these concerns do not relate to the quality of the decisions eventually made at trial, at least by full time chancery Judges and by deputies who specialise in that type of work.

13.16 There is however a concern at the quality of the decision making in intellectual property cases where a non-specialist deputy, without previous experience of the relevant law, is allocated for trial. I have acknowledged the force of this criticism, subject to the

need to introduce some deputies to relatively simple intellectual property cases, as a means of widening the talent pool in the longer term.

13.17 Much more widespread were the concerns arising from the uncertainty facing the parties and their advisers during the whole of the preparation of an intellectual property case as to whether the eventually chosen trial Judge would have any experience of the relevant type of work. This uncertainty is said to undermine the ability of the parties' solicitors to predict the length of trial, the cost of preparation and therefore effective costs budgeting. The vivid example was given of the difficulties facing counsel in preparing a skeleton argument, not knowing the identity of the trial Judge, in a complex trade mark case. Would he need to educate the Judge in the skeleton argument about the now voluminous European jurisprudence, or would he, by setting it out in a lengthy written submission, merely be wasting his client's money?

Recommendations

A third technically experienced Patent Judge

13.18 I am persuaded that in future competitions for the appointment of chancery Judges, the Judicial Appointments Commission should be requested to prioritise the appointment of a third scientifically experienced specialist in patent cases, and that thereafter a level of three should be maintained if possible. Whether this will be attainable while newly appointed High Court Judges receive the remuneration (including pensions) currently provided remains to be seen, but I consider it to be a worthwhile objective. In that context it is to be borne in mind that the scientifically experienced recruits would continue as at present to be available for the generality of chancery work, even if their availability was prioritised for patent cases.

13.19 I can see no downside in this recommendation. Feedback from the patent court users in response to the provisional report was enthusiastically in favour and it was not suggested by anyone that this would create any significant risk of a shortfall in the requisite expertise elsewhere. Some considered that it would go a long way to resolving the disparity in waiting times between London and Germany.

Use of non-specialist deputies

13.20 As noted in Chapter 2, there is in my view a compelling case against the use of deputies without specialist skill or experience in intellectual property work for the trial of complex intellectual property cases, and even for those parts of their case management which give rise to real difficulty, such as the planning and conduct of surveys and the appointment of experts.

13.21 But this should be a flexible principle, rather than an outright ban. By no means

every intellectual property case requires specialist knowledge or experience, and there will continue to be many which can satisfactorily be tried by a non-specialist deputy. Furthermore, it will as I have said be valuable for deputies experienced in other fields to be exposed to some intellectual property litigation, both to widen the talent pool, and to maintain the essential flexibility required by the Listing Office in avoiding an extension of waiting times.

Listing priority for patent cases

13.22 I do not consider that I should recommend that patent cases be given an institutional listing priority, so as to maintain the competitiveness of the Patent Court in the European context. Feedback on this question when raised in the provisional report was mixed, even among Patents Court users.

13.23 There are persuasive arguments for and against institutional priority for patent cases. The argument in favour is that it would be unfortunate for the patent litigation industry in the UK if its current workload were to melt away, for example, to Germany due to its shorter waiting times, if that misfortune could be avoided by priority for listing on a 'no slower than Germany' basis. It may be that the proportion of trial days taken up with patent cases, by comparison with chancery trial days as a whole, is not so significant as would adversely affect waiting times for other chancery trials to any significant extent. That proportion is at present only slightly greater than 10%.

13.24 Against that, there is I think a real disadvantage in giving any particular type of chancery work an institutional listing preference. The current regime, in which all non-urgent trials take their place in the same queue, is designed to afford substantial flexibility to the Listing Office for providing earlier trial dates where there is a real reason for urgency on a case by case basis. In six years as a chancery Judge, I can recall no occasion upon which the Listing Officer turned down a request from me for an expedited trial date. The introduction of any form of institutional listing preference would, as I see it, give rise at least to a risk that this essential and valuable aspect of listing flexibility would be attenuated. Furthermore many patent cases are likely to be suitable for some degree of expedition on a non-institutional basis, where for example there is a continuing alleged wrong calling to be remedied.

13.25 Quite separately, there is the question whether the existence of competition between the Chancery Division and some other court, whether in or outside the UK, for a particular aspect of its work should lead to any special treatment of that part of the workload. This is a question which has arisen from time to time in the past when large differences in waiting times between, for example, the Chancery Division and the Commercial Court have led to forum shopping between those courts by parties seeking trial as early as possible. It may be that those with longer memories than mine will be able to recall how this unsatisfactory state of affairs was eventually resolved.

13.26 By contrast, there is I think a real case for recommending that intellectual property

cases be prioritised both for fixed rather than floating trial dates and for as early as possible an identification of the trial judge. Again, this need not be an inflexible rule, because there will be numerous intellectual property cases which would benefit from those steps no more than the general run of chancery cases. But in areas where the law is complex (such as trade marks) there seems to me to be good reason to assist the parties in their preparation by knowing at least whether or not they will have a trial judge with previous relevant experience, or expertise acquired from practice at the Bar.

13.27 Similarly, where the case involves the attendance of parties, witnesses or experts from abroad, and is of short to medium length, then there is likely to be a compelling reason for the grant of a fixed date.

Case Management

13.28 My general proposals for case management, and in particular the allocation of judges to case management, will I expect be of real value in addressing some of the concerns which have been expressed about the management of intellectual property cases. The use of full docketing in large and complex cases with detailed requirements for interim management (including surveys) should be particularly suitable for some higher value intellectual property disputes. It has been suggested, and I agree, that a move towards at least partial docketing of patent cases (that is management, but not necessarily trial, by the same Judge throughout) will be a valuable tool in the larger and more management-intensive disputes. Accordingly, I do not consider it necessary to make bespoke case management recommendations limited to intellectual property cases, save in one respect.

13.29 There is I think real force in the proposal that a second Master should be identified to assist as a ticketed case manager of non-patent intellectual property cases, including but not limited to trade marks. One unsatisfactory aspect of having all the case management of a class of work ticketed to a single judge is the difficulties caused by holidays, other periods of absence, or short term peaks in the case management workflow. Again, I can see no downside in this recommendation, because neither of those ticketed Masters would be confined exclusively to intellectual property cases. If the work was insufficient to occupy both of them (and it probably would be for much of the time) then each of them can assist in the general chancery Masters' workload, as occurs at present.

13.30 A concern has been expressed that the current format of chancery court files provides insufficient information to enable a succession of different judges adequately to case manage complex intellectual property cases. I agree, and this seems to me to be a criticism of general application to the content of chancery court files, as I have set out earlier. In particular, the files do not contain sufficient comment by earlier case management judges in legible form to enable successors to benefit from their predecessors' experience. Furthermore, all too frequently case management and other orders made by Judges do not find their way onto the court file. The result is that the court file is of no real use, either at the PTR or to the trial Judge. A way needs to be found

for more detailed case management notes to be included, but on a confidential basis such that they are available only to judges rather than upon public inspection. This will be difficult to achieve for as long as court files remain in physical form, but much easier once the necessary IT is provided to enable them to be kept electronically.

Chapter 14: Individual Property

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14.1 This section of the workload contains much of that which was characteristic of the Chancery Division (leaving aside company and insolvency work) before its large scale move into business and commercial work during the last thirty years. I have given it this title because its typical feature is that it mainly concerns issues about property of varying kinds between individuals rather than corporate bodies. It includes the following specific types of cases:

- Disputes about the ownership, occupation and mortgage of residential property
- Partnership disputes between individuals
- Contentious probate cases
- Disputes relating to trust property
- Guardianship of the estates of minors
- Inheritance Act claims
- Disputes about the rectification and interpretation of wills
- Proceedings for the removal or substitution of trustees and personal representatives
- Variation of trusts

14.2 Many of these cases concern disputes between members of the same family. Many of them are, by their nature, relatively modest in terms of the value at risk, but some concern the settled estates of the wealthiest families in the land. Many of them are brought under Part 8, and handled by the Masters from start to finish.

14.3 Characteristic of much of this work is that it involves the interpretation, development and application of the law relating to trusts and estates which has been the responsibility of the Chancery Division (and predecessor Court of Chancery) for centuries, and for which the chancery judges (including the Masters) are both a national and indeed international centre of excellence. There are numerous overseas jurisdictions in which vast amounts of assets are held on trusts which are governed either by English law or by closely

related systems of law which, whether or not linked by continuing Privy Council appeals, continue to take the principles developed in the Chancery Division as their guide.

14.4 It is a feature of this aspect of the Chancery Division's international leadership that it underpins a London-based international trust litigation industry which derives substantial foreign earnings from the conduct of major high profile trust disputes in those overseas jurisdictions, usually resorted to by settlors for their favourable tax regimes. In certain respects the international jurisdiction of the English courts has lagged behind this development, and welcome steps are being considered to extend it. This is outwith my terms of reference, save only in the sense that, if implemented, these proposals may increase the volume and international content of this part of the chancery workload.

14.5 It was suggested during consultation that the trusts work of the Chancery Division should be hived off into a specialist trusts tribunal. This did not find general favour, and I do not recommend it. It would be a type of balkanisation likely to lead to the dismemberment of the Division, with no clear advantages. Trusts work lies close to the heart of the Division's field of expertise, and its international leadership of the legal development of the subject would be downgraded by the transfer of its trusts jurisdiction to a domestic tribunal.

14.6 Even within England and Wales, a significant part of the Chancery Division's work on individual property cases is tax driven, in the sense that the administration of estates and trusts, and the grant of relief under the Inheritance Act, needs to have attendant tax implications constantly in mind. In this respect the chancery Judges are well placed to apply the requisite expertise, in part because they continue to handle most of the tax appeals in the Upper Tribunal, sometimes sitting on their own and now more frequently sitting with other tax specialist tribunal judges.

14.7 Another feature of the law which has to be applied to these cases is that it is generally relatively complex, and that its proper application depends upon a deep understanding of the fundamental principles involved, usually gained over a lifetime of chancery practice. It is, quintessentially, chancery work calling for chancery judges, rather than general practitioners. Much of it is, at the High Court level, specifically assigned to the Chancery Division, although there are notable exceptions where the work is shared with one or more other Divisions, such as Inheritance Act cases, which may be pursued either in the Chancery Division or in the Family Court.

14.8 There have been suggestions, both before and during this Review, that because of its characteristically modest scale in terms of value at risk, much of this part of the Division's workload should be transferred out of the High Court, or at least out of the Rolls Building, so as to focus the continuing work of the Chancery Division in London upon the corporate, business, commercial and intellectual property work which many regard as characteristic of the offering of a modern international business court.

14.9 I have mentioned this proposal, and my reasons for rejecting it, in the section of chapter 2 headed Priorities. It is unnecessary to repeat it here, but readers concentrating only on this part of my report should study those paragraphs at this point in the analysis,

if they have not already done so. In summary, the proposal would involve the destruction of a national and international centre of excellence for the development and application of the law relating to trusts, inheritance and individual property ownership. It would be to desert a substantial and longstanding section of chancery court users, and it would consign this modest scale but nonetheless frequently complex and difficult work to courts which, on the available evidence, are neither currently funded nor proposed to be funded so as to have the specialist resources to undertake it.

14.10 It is also a part of the Division's workload which the responses to consultation unanimously suggest attracts a high level of court user satisfaction. It is in relation to individual property work that the highest level of approval of case management by Masters has been displayed by consultees, coupled with a positive disinclination to think that a large increase in the management of these cases by Judges would be of any significant advantage.

14.11 I cannot pretend that my expression of these views in the provisional report has entirely silenced those consultees who would still prefer to confine the work of the Rolls Building to international business and commerce. But nothing said by way of feedback has caused me to change my mind on the point.

14.12 More generally, both in London and in the regional trial centres, the way in which this part of the workload is discharged is clearly fit for purpose. The quality of the service is much appreciated by the relevant court users, and there have been few proposals for substantial change.

14.13 Nonetheless, it does not follow from that generally high level of customer satisfaction that this part of the workload should be exempted from the changes in culture, practice and procedure which I recommend for the generality of the workload, and which are set out in detail in chapters 2 to 9 above. It may well be that the process of triage of incoming cases for appropriate management tracks will not lead to a substantial increase in management of these types of case by Judges, and the relatively modest sums at stake in much of this work may well mean that the economy and efficiency of the current mainly paper-based system of case management should continue to be applied, so as to avoid a disproportionate escalation of front-loaded costs. Nonetheless I set out below those parts of my more general recommendations which seem to me to be likely to be of particular relevance to individual property cases.

Recommendations

Pre-action protocols

14.14 The Association of Contentious Trust and Probate Specialists ('ACTAPS') has developed a pre-action protocol for contentious trust and probate litigation which, although never made mandatory by rule or practice direction, has become widely used by experienced practitioners, and to apparently good effect, on a purely voluntary basis.

One of its advantages is that it encourages the early provision and exchange of relevant information between parties to disputes about trusts and estates, and thereby facilitates early mediation, before the costs of what are frequently multi-party proceedings start to become disproportionate to the amounts at stake, as they very frequently do well before the trial.

14.15 The question arises whether this protocol should now be made mandatory. My view, which echoes that of the majority of those attending the ACTAPS meeting convened to discuss this Review, is that it should not. This is not because there have been cogent criticisms of its terms, although there have been some, but rather because its undoubted success appears to have been to a significant extent attributable to its essentially voluntary nature. As with all pre-action protocols, there are cases where it is of great value, and others where it risks becoming an expensive waste of time. For as long as it remains voluntary I consider it reasonable to think that it will continue to perform a valuable role where the (usually experienced) parties' representatives recognise the contribution which it can make to early resolution. Feedback since the provisional report has been generally to the same effect.

14.16 All that I can usefully do in this respect is to encourage among all practitioners instructed in contentious trust and probate proceedings (whether or not members of ACTAPS, or experienced in that field) to study and consider the use of that pre-action protocol, if they have not already done so.

Financial Dispute Resolution

14.17 I have in chapter 5 described how this valuable technique, derived from established practice in the Family Court, has for some time been applied to chancery work by District Judges in the regional trial centres, although not yet in London. In the same chapter I have made a firm recommendation that FDR should be continued in the regional trial centres, and formally introduced in London, in particular for individual property cases. I need not repeat the detail of that recommendation here. It has been enthusiastically supported by consultees.

14.18 One aspect of the FDR process, as applied to chancery work, seems to me worthy of special mention. In the Family Court the usual practice is for there to be a first appointment in money cases, at which directions for FDR are given, followed by a specific FDR hearing. It may be that this process of two successive hearings is efficient and cost effective in the Family Court, but I am concerned that the process as applied in the Chancery Division should as far as possible be concentrated into a single hearing, in particular in cases where modest amounts are at stake, and where the risk of disproportionate costs being incurred is therefore at its greatest.

14.19 I understand that, in the Family Court, where there are experienced practitioners on both sides, it is often agreed that the parties go straight to an FDR hearing, bypassing a first appointment or using it for that purpose. FDR is not at present a process with

which many chancery practitioners (even in the regions) can be expected to be familiar. I consider therefore that consideration should be given to the formulation of a voluntary protocol whereby parties wishing to do so can make the necessary preparations for an effective FDR, by following standard form directions for the exchange of information and the preparation of position statements of the type which, on a first appointment, would be made by the District Judge in a family case in any event.

14.20 I stress that this process should be voluntary, for two reasons. The first is that, as was pointed out at the ACTAPS meeting to which I have referred, not every individual property case will be suitable for FDR, and it should not be thrust upon parties whose experienced legal teams regard it, in particular cases, as unsuitable. Secondly, there will be cases where a first hearing in advance of FDR will be appropriate, proportionate and cost-effective. Where, for example, the parties have not followed any pre-action protocols for the purposes of exchanging relevant information, it may be necessary for the court to tailor specific directions designed to provide limited early disclosure, so as to maximise the prospect of settlement at the FDR stage.

14.21 It has been suggested that the introduction of FDR into chancery practice in London should be preceded by a pilot scheme. In my view this is unnecessary. The process has, albeit entirely informally, already been piloted in many of the regional trial centres with considerable success and general approbation. It will of course need to be preceded by the necessary training.

Trial by Masters

14.22 I have described in Chapter 4 above how the implementation of my general recommendations concerning judicial allocation will be facilitated by an increased trial role for Masters, and (in Chapter 3) by the removal of the current jurisdictional restraints on them trying Part 7 claims. Individual property cases seem to me to be prime (but not the only) candidates for such trials, in particular where there are modest sums at stake. The flexible process of triage which I have recommended in Chapter 4 should enable Masters and District Judges (with the assistance of the triage supervising Judges) to develop a feel for the cases best suited for this mode of trial. The choice will generally lie between the use of a full time Judge, a deputy Judge, transfer to a county court or from London to a regional trial centre, or trial in London by a Master.

14.23 All I need say at this stage is that there will be many cases in which the Masters' full time experience of the relevant type of litigation, and the relevant law, exceeds that of a deputy, a District Judge in a regional trial centre, or a county court generalist Circuit Judge, such that the Master would be the ideal person to conduct the trial. There will be other cases, for example in which the issues are purely factual, where a generalist Judge who hears evidence and cross-examination almost daily will be the most suitable tribunal. It is unnecessary for me to be prescriptive at this stage. Nonetheless I note that issues of the type which commonly arise in individual property cases are habitually tried by the Registrars, where they arise for example in bankruptcy applications, and by the

Masters under Part 8, although less frequently. A typical example concerns the ownership of matrimonial or other shared residential property. In London, those issues are almost universally tried by the Registrars, and sometimes by Masters, rather than by Judges.

14.24 A minority of consultees expressed a preference that Part 7 trials by Masters should still require party consent. I am not persuaded that this restriction should continue. It might nonetheless be prudent at the beginning of this extension of the Masters' role for a decision that a Master try a Part 7 case without party consent to be subject to review by a supervising Judge.

Transfers to county courts and regional trial centres

14.25 The force of the proposition that many individual property cases involve such modest value at risk as to make them questionably appropriate for trial in the Rolls Building is in my view best met by the vigorous application of the power to transfer such claims, where appropriate, both to county courts and to the regional trial centres. Precisely because they involve families, both as parties and witnesses, who may find a regional court more convenient than London, such transfers will frequently be proportionate and cost-effective on geographical grounds alone.

14.26 When considering a transfer of a case of this kind to a regional trial centre, it may safely be assumed that the requisite chancery expertise will be available both for the case management and trial of that dispute. The same cannot however be assumed of county courts generally, save for the Central London County Court, where there is undoubtedly the requisite experience and expertise, which is indeed already regularly used by transfer of appropriate work of this type from the Chancery Division.

14.27 In my view it is likely to be necessary before deciding to transfer a case of this kind to a county court other than the Central London and those which are based in the regional trial centres, to ascertain whether there exists in that court the requisite chancery expertise, both for case management and trial.

Chapter 15: Reporting And Feedback

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15.1 I have observed in various earlier parts of this report how, in my view, it is a weakness of the Chancery Division that it neither communicates internally to the extent that it should, nor makes the best use of opportunities to report to, and receive feedback from, its court users.

15.2 Taking internal communication first, there is a tendency in London for each part of the judicial team to plough its own furrow independently, with minimal communication with any other part. There is a lack of significant discussion of, or consistency about, methods and practices of case management. Although there are termly meetings between the full time Judges, and (separately) between the Chancellor and the Chief Master and Chief Registrar, there is little, or in my view at least insufficient, opportunity for the development of a common understanding about, and common approach to, the development of the work of the Division as a whole.

15.3 As between London and the regions, there is of course the structure of regional chancery supervising Judges, and the s.9 senior Circuit Judges (now at least) all spend time sitting in London. There is good internal communication within each regional trial centre, but not much between them, viewed separately. I understand that the Chancellor intends to make annual visits to the main chancery regional trial centres. That will be very welcome.

15.4 As for external communication with court users, there are well-established chancery, insolvency and intellectual property court user committees which are designed to enable the Division both to report to and receive feedback from its court users. Some are highly effective, others tend to be little more than purely formal.

15.5 The Chancery Guide is an undoubtedly helpful means of very occasional communication by the Division to its court users about practice and procedure, and well-regarded for its content, albeit that it is not designed as a particularly useful resource for litigants in person.

15.6 In sharp contrast, the chancery part of the HMCTS website is very little used (except perhaps by the Patents Court) and not particularly informative. Its non-use represents, in my view, a real missed opportunity. I have recently been advised that even those who try to use it tend to encounter unacceptable delays in getting material on to it. I have not had the time (or the skill) to investigate this complaint.

Recommendations

15.7 I have, elsewhere in this report, made a number of recommendations which are either designed, or which at least ought to have the consequence, of improving communication both internally and externally. The establishment of sub-divisional supervising Judges for the process of triage, set out in chapter 4, is a main example. So is the use of the chancery part of the HMCTS website as a means of providing better communication to litigants in person. I set out below some specific recommendations in this regard, not mentioned elsewhere in this report.

Annual Report

15.8 In my view it is now time for the Chancery Division to prepare and publish an Annual Report. Without wishing in any way to confine or constrain its contents, it ought to include statistical information about the level of the workload and waiting times, including any trends upward or downward. It should of course include appointments and retirements of judges, including deputies, both in London and regionally. It should focus on developments in practice or procedure with a particular chancery import, and there is in my view no reason why it should not contain a digest of some of the most notable chancery cases of the year.

15.9 I have no particular view whether an annual chancery report should be published separately from, or as part of, a report from the High Court, or even the Court Service. I am conscious that demands upon judges and staff mean that the minimum resource should be devoted to it, consistent with providing a basic amount of easily assembled information. What matters is that the Chancery Division should be, and be seen to be, concerned with setting itself goals for the delivery of the best service to its court users, and monitoring its performance against those goals.

Chancery Website

15.10 This is, as I have said, a large, currently missed, opportunity. I do not profess the skill or experience which would qualify me to advise on the improvement and management of a specific chancery website, although I acknowledge from experience in other fields that the quality of websites of this kind is critically dependent on responsibility being taken by a suitably qualified and enthusiastic person for its constant management, and upon resources in terms of time and money being provided for that purpose.

15.11 My views as to the appropriate subject matter for that website may be gathered from reading the other parts of this report. It should, at the least, contain up-to-date statistics about the chancery workload, a statement of current waiting times for different kinds of trial and application, a constantly updated telephone and email directory, up-to-date information about the availability of free and affordable advice and assistance for

litigants in person, and a location map of the Rolls Building and the main regional trial centres.

Chancery Conference

15.12 There has during the conduct of this review already been instituted a one-day chancery judicial conference held in October, attended by chancery judges from all over the country. All feedback about it, together with my own impression, was uniformly enthusiastic. This should in my view become an annual event. It would provide a valuable catalyst for what I regard as the necessary culture change in increasing internal communication among all chancery judges (including deputies), and a regular forum for sharing and learning about beneficial developments in practice or procedure in particular areas, many of which have tended to take place in undeserved obscurity until discovered in the course of this Review.

15.13 In the provisional report I raised for consideration whether, but not as frequently, it would be worth putting on a chancery conference designed for the attendance of court users and court staff, rather than just judges. It might be that a judicial conference could alternate with a wider public conference of this type. It would provide an on-going basis for the continual review and for the obtaining of feedback about chancery practice and procedure, in between major reviews of this type, which cannot be expected to be undertaken otherwise than very infrequently. Feedback on this proposal was less than enthusiastic. The main objection was that public attendance would be likely at least to dampen down the frank exchange of views. In fact, this year's conference was attended by a large number of fee-paid deputies, most of whom were, outside their sitting times, senior members of the court user fraternity. The result was that court users were in practice well represented at the conference, even though it was not held in public.

15.14 I have on this point been persuaded on balance by the doubters, and make no recommendation that there should be public conferences alternating with judicial conferences. By that I do not mean that there should never be a public chancery conference. There may come a time when such a conference would be useful.

Chancery Court Users Committees

15.15 I suggested in the provisional report that it would be worthwhile for there to be a separate mini-review of the constitution, practice and procedure of each chancery court users committee, both in London and in the regions. Some of them perform highly effectively, and need no improvement. Others have, as I have said, have become rather formal occasions. Among possible improvements for re-vitalising those, I tentatively suggested the following:

- A review of the process of appointment and retirement, designed to avoid membership becoming entrenched or too narrowly focused.

- Better publicity about the dates and agendas of forthcoming committee meetings, among court users in particular, so that input can be provided in time for inclusion on an agenda, and for discussion at meetings.

- Wider publicity to the transactions and minutes of meetings of user committees, perhaps on the chancery website.

- The holding of occasional public meetings of the committees, with a properly publicised open invitation to attend. This is, in particular, a feature of the practice of the Civil Procedure Rules Committee which is both valuable and well regarded.

- Pre-meetings between the judicial and court staff members of court user committees, designed to identify in advance matters calling for discussion and feedback, so that items on the agenda can be properly prepared for discussion.

15.16 Again, this proposal met with little enthusiasm. Those consultees with experience of active Court User Committees thought that a mini-review was unneccessary No-one was prepared to admit being a member of the more formal variety, but some court users told me that the very existence of such a committee in their area came as a surprise to them. I continue to think that there is, in some areas, room for improvement, and certainly room for better publicity. Implementation of the recommendations in this report (if adopted) is likely to be a lengthy, time consuming and in part experimental process, in which on-going feedback from Court User Committees is likely to be of the highest value. It would be a pity if an early opportunity to review and maximize their effectiveness were missed.

Chapter 16: Executive Summary

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Health Warning

16.1 This chapter contains a summary of the main conclusions and recommendations in this report. Those tempted to confine their reading of the report to this chapter should note that it does not seek to set out the reasoning for, or intra-relationship between, those conclusions and recommendations. In particular it does not explain the effect of the current constraints on the resources available to the Chancery Division, in terms of restricting the extent and in particular speed of implementation of some of the main recommendations.

16.2 Accordingly, those without the time to read this report in full are strongly recommended to read the overall analysis at the end of chapter 1 and the whole of chapter 2. This will a go a long (but not the whole) way to putting these conclusions and recommendations into context.

Key

Note: 'Judge" means High Court Judge, s.9 Circuit Judge or S.9 fee-paid deputy. 'judge' means all types of judge, including Master, Registrar and District Judge.

Where we are now: strengths, weaknesses, opportunities and threats

Where we are now

16.3 The Chancery Division is the largest single unit for civil litigation in the UK, typically sitting sixteen to eighteen Judges, six Masters and five Registrars every day in the Rolls Building. In addition the Division provides specialist Circuit Judges and specialist District Judges in seven regional trial centres, sitting between one and three Judges in five of them and up to three District Judges in each centre every day.

16.4 This compares with eight courts a day in the Commercial Court, three in the TCC in London, and one to two of each in four of the regional trial centres.

16.5 In sharp contrast with its mainly property-based work 30 years ago, the Chancery Division has evolved into a modern business and property court, handling the very largest and most complex business disputes, many with an international element, and with the value at risk typically running into many millions, and occasionally into billions, of pounds.

16.6 The workload of the chancery division comprises the whole range of business and property litigation, divided in this report into:

1. Business and commercial
2. Intellectual property
3. Company and insolvency
4. Individual property

16.7 The distinguishing features of the procedure and practice of the Chancery Division are:

- Case management mainly by Masters, Registrars and District Judges, rather than by Judges
- Absence of internal specialist ticketing, other than for patent cases
- Absence of special procedures for special work, save for Company and Insolvency
- Absence of up-to-date, effective Information Technology

Overall Analysis

16.8 The perceived strengths of the Chancery Division are:

- Generally a uniformly high level of appreciation for the quality of the judicial decision-making in the determination of disputes, at all levels of the judiciary.
- The achievement of a high level of consistency and economy in the largely paper-based conduct of case management by Masters, Registrars and District Judges. This perception pre-dates the introduction of the Jackson Reforms.
- The Division just manages to achieve acceptable waiting times in London both for applications and trials, subject to two exceptions.

- Waiting times are highly attractive in all the regional trial centres.

- The move of the Chancery Division in London to the Rolls Building enables it to take full advantage of modern court facilities, a high proportion of conference rooms, a single site for all back office support, and the wiring (but not the hardware) for the conduct of paper-less trials.

- Generally, the clear perception from consultees is that the Chancery Division provides a high quality, flexible and efficient service, and is not therefore in need of fundamental reform.

16.9 The main weaknesses of the Chancery Division at present are:

- Unsatisfactory waiting times for hearings before Registrars, and for the trial of patent cases.

- An almost complete lack of modern or effective IT.

- An inadequate amount of the workload subjected to case management by full docketing.

- Very late identification of trial Judges, after the PTR and even after the parties' deadline for preparation of skeleton arguments.

- The absence of pre-arranged times for pre-reading and judgment writing in judges' diaries.

- Limited scope for fixed dates for the start of trials, and large uncertainty as to when they will end.

- Occasional selection of deputies for complex specialist trials without specialist skill or experience in the relevant subject matter.

- Delays, inflexibility and poor communications in the drawing and sealing of orders.

- Lack of internal communication between different parts of the Chancery Division and, in particular, between different groups of its judges.

16.10 The opportunities for improving the service provided by the Chancery Division at present include the following:

- Full use of the advantages of the move to the Rolls Building. This opportunity has not yet been fully realised.

- The planned move of the Central London County Court to the Thomas More Building in the RCJ. This may facilitate greater co-operation and sharing of workloads between the two courts than exists at present.

- The opportunity for reform created by the institution of this Review.

16.11 The main threat facing the Chancery Division, mainly in London, is the risk that it will be unable to maintain, still less improve, current waiting times for hearings. This derives from the following factors:

- Downward pressure on resources, and in particular judicial resources, currently reflected in reduced budgets for deputies.

- Continuing increase in the amount of incoming work, in London and in several of the regional trial centres.

- Increases in judicial time necessary to implement the Jackson reforms, in particular but not limited to costs budgeting.

Objectives

Overriding Objective

16.12 The better serving of the Overriding Objective must be the primary purpose of the Review. In particular:

- The Division must serve its new elements of proportionality and adherence to rules.

- Above all the current waiting times, which in London are at the outer limits of what is acceptable for a business and property court, must at least be maintained and in certain respects improved.

Judicial Allocation

16.13 The objectives under this heading include:

- More cases managed by full docketing (that is by the trial judge from start to finish) whether by Judges, Masters or District Judges

- More cases managed by Judges, but on a fully docketed basis

- More trials by Masters and (where necessary) District Judges in some regional trial centres

- All of these changes to be managed gradually, subject to resources constraints and the maintenance or improvement of waiting times.

Specialisation

16.14 Broadly, the current areas of internal specialisation, namely bankruptcy, companies and patents, should be maintained, but not increased.

16.15 Specifically:

- There should be no ticketed intellectual property court (other than the new Intellectual Property Enterprise Court, replacing the Patents County Court).

- There should be no trust tribunal.

- There should be no more ticketing of judges within the chancery label than there is at present, save as set out below.

- Consideration should be given to reducing the number of chancery District Judges in some regional trial centres, so as to increase the chancery element in their respective workloads and improve their specialist skills.

- There should be no dilution of the specialist skill and expertise of the Bankruptcy and Companies courts in London.

- Difficult specialist cases should be tried (if not by full time Judges) by specialist deputies.

Convergence and Mutual Assistance

16.16 There is a clear case for convergence, and mutual assistance, between the Chancery Division, the Commercial and Mercantile Courts and the TCC. Specifically:

- Similar work should be dealt with in accordance with similar procedures and practices wherever possible.

- There should be more cross-ticketing and cross-working in the Rolls Building between the three specialist civil courts.

Information Technology

16.17 A major objective, but not within the terms of reference of this Review, is that modern IT should be provided to the Chancery Division both inside and outside London, to the specifications set out in the Jackson Report, including electronic judges' diaries, on-line issue, electronic filing and an electronic system for the drawing and sealing of orders. The provision of satisfactory mobile phone reception in the Rolls Building is very urgent.

Case Management

16.18 There should be a culture change by which case management is re-focused upon dispute resolution, rather than just on preparation for trial.

16.19 For that purpose there should be:

- Closer focus on ADR at case management conferences.
- The development of Financial Dispute Resolution ("FDR") for individual property cases in particular.
- The development of a judicial early neutral evaluation ("ENE") option.

16.20 The objectives of achieving economic case management and shorter trials should be achieved by an issue-based process of case management for trial from the outset.

Trial

16.21 The main objectives under this heading are:

- The earlier allocation of the trial judge
- Shorter trials
- Cheaper preparation
- Litigants-in-Person

16.22 The major objectives which are called for under this heading are:

- Better access for judges, court staff and court users to information about free and affordable advice and representation.

- Better information for litigants in person in the Rolls Building.
- Bespoke user-friendly directions orders for litigants in person.
- An investigatory approach by judges where litigants in person are involved.

Priorities

16.23 The severe constraints upon resources mean that it is essential to prioritise some of the above objectives over others. The three priorities which ought not to compromised in any way are:

- The maintenance of current waiting times in London, and their reduction where already unacceptable.
- The provision of better access to justice for litigants in person.
- The provision of modern IT.

16.24 More generally, priorities should be identified by treating as a main objective the preservation of a High Court level of service for the maximum number and type of the Chancery Division's existing court users, rather than confining it to some classes, and excluding the rest.

16.25 Subject to those priorities, the increase in the amount of the workload case-managed by full docketing and by Judges is a major priority identified by this Review.

Jurisdiction

16.26 Many of the current jurisdictional restraints on Masters, Registrars and District Judges are out of date, and a jurisdiction-based approach to identifying the work which they should not do is itself less satisfactory than a flexible, actively managed allocation of cases to judges.

16.27 The about-to-be increased jurisdiction of the County Court may be a real opportunity to transfer, or prevent the issue of, low-value chancery cases in the Chancery Division in London. No similar opportunity exists, or would yield advantages, in the regional trial centres.

Co-operation between courts

16.28 There is a sharp distinction between the high level of mutual co-operation and assistance between the Chancery Division, the Mercantile Court and the TCC in the regional trial centres, and its absence in the Rolls Building. In this respect, London should follow the example set by the regions.

16.29 Pressure of the workload upon the chancery judges in the Rolls Building may be relieved by a more rigorous transfer of appropriate cases to the Central London County Court and to the regional trial centres, both of which may have limited capacity to take extra chancery work.

16.30 The greater proximity of the Central London County Court after its move to the Thomas More Building may enable individual hearings and applications within cases otherwise in the High Court to be heard there, where cost effective to do so.

Judicial Allocation to Case Management

16.31 There should be a major culture change. Allocation should be by managed flexibility, rather than by the application of jurisdictional rules or hard value lines in rules or practice directions.

16.32 For this purpose, a system of triage of all incoming cases (on their first arrival) for management tracking should be instituted, conducted mainly by Masters and District Judges, led and supervised by sub-divisional triage Judges on a rota basis, with a power of review.

16.33 For that purpose the subdivisions in London should be:

- General business and commercial
- Insolvency and company
- Intellectual property
- Individual property

16.34 The regions are individually too small to admit such sub-division. There, a single s.9 Circuit Judge should be allocated (on a rota basis where there is more than one) for supervising and reviewing triage of incoming cases.

16.35 The considerations for the triage judge should be as follows:

- Should the case be moved to a different court or trial centre?

- If not, which of the following management tracks be most appropriate:

    1. Managed and tried by Master, District Judge, Registrar

    2. Managed by Master, tried by Judge

    3. Managed and tried by the same Judge (full docketing)

    4. Managed by a partnership of the trial Judge and one Master, Registrar or District Judge. This track should be the subject of a pilot scheme

- The choice of management track should be by reference to flexible guidelines published on the chancery website, against available resources. There should be a gradual move away from the currently standard track (2), as resources permit. But track 2 will remain the best management method for many cases, on grounds of economy, predictability and the best use of judicial resources.

- If the combined effect of the Jackson reforms and this Review produces fewer and shorter trials, then the resources of Judges thus released should be re-invested in a greater level of full docketing by Judges.

Case Management for Dispute Resolution

16.36 The main culture change to be implemented here is that case management should be seen to be directed toward dispute resolution, rather than merely preparation for a full trial which is unlikely to take place.

16.37 For that purpose, the parties should be required to address the timing, type of and impediments to ADR in an expanded questionnaire before the first CMC.

16.38 The court should at the first CMC give detailed consideration to assisting the parties in the choice and timing of ADR. The court should be prepared to offer or take the following steps:

- The provision of Financial Dispute Resolution, in particular for individual property cases, by District Judges and Masters, if possible without requiring a prior first appointment, if the parties agree.

- The provision at an appropriate time of Early Neutral Evaluation by a Judge.

- The greater use of preliminary issues to remove blocks on compromise.

- Provision of limited early disclosure to increase parties' awareness of relevant matters so as to remove blocks to ADR.

Case Management for Trial

16.39 Again, there should be a culture change: all case management for trial should be issue-based.

16.40 For that purpose, the parties should be required before the first CMC to prepare a rough and ready list of the main issues, based on the statements of case, to be used as a flexible management document thereafter throughout the case.

16.41 There should in general be a single CMC for the making of all necessary directions for trial, rather than a series of expensive successive management hearings, unless that would be clearly a better management route in particular cases.

16.42 Armed with, and by reference to, the List of Issues, the court should then strictly control:

- The extent of disclosure
- The subject matter, length and number of witness statements
- The subject matter of expert evidence, encouraging experts to meet before providing first reports, and then providing sequential reports

16.43 The CMC should where practicable set out the full timetable to trial, and at trial, with a built in period at the appropriate time for ADR, rather than a general stay. In larger cases a provisional timetable laid down at the CMC should be reviewed at the PTR, by the trial Judge.

Trial

16.44 There should be a major culture change: chancery trials and heavy applications should mainly be fixed-ended rather than open-ended. Overruns should be kept to a minimum. Trial time should, where necessary to achieve proportionality, be rationed by the court rather than chosen by the parties.

16.45 The adoption of fixed-ended trials should be preceded by a pilot scheme, while the IT necessary for full implementation is being designed and installed.

16.46 Full implementation of fixed-ended trials will, as a quid pro quo, enable the creation of individual judges' trial diaries, the early selection of the trial Judge, and a move toward fixed trial starting dates, in London.

16.47 Pre Trial Reviews should, as far as possible, be conducted by the trial Judge. There should be more PTRs than at present, and held earlier than is the current practice. There should also be a move towards the CMC being conducted by the trial judge (i.e. full docketing) in appropriate cases.

16.48 Trial timetables should have built in judicial pre-reading and judgment writing time, and, where appropriate, time for preparing written closing submissions.

16.49 A new convention should be considered for limiting the length of cross-examination.

16.50 The rationing of trials and heavy interim applications should be by detailed timetables (or if the parties prefer by a chess-clock system, under which each party is given an allocated time, to use at it wishes).

16.51 Use of IT at trials should be maximised, including electronic authorities, electronic bundles, skeletons and submissions.

16.52 There should be a four-day week for trials in London, to free Fridays for case management and post judgment hearings. In the regions, this should only be adopted where appropriate.

16.53 In difficult specialist cases, deputies should be selected for trial only if skilled or experienced in the relevant field.

16.54 Flexible seating patterns in court should be encouraged so as to facilitate communication between counsel, solicitors, experts and parties.

Orders

16.55 There should again be a culture change in London, under which primary responsibility for the drawing of orders is transferred from the Associates to the parties' lawyers, with more disciplined judicial supervision.

16.56 The sealing of orders should be carried out as far as possible by judges' clerks (including the clerking teams of Masters, District Judges and Registrars).

16.57 Experienced Associates should be retained for:

- The Interim Applications Court
- Cases involving litigants-in-person (where necessary)
- Some complex chancery orders

- Some orders made on paper applications, pending the implementation of modern IT enabling them to be drawn by the Masters.

16.58 There should be as fast as possible a move to the electronic sealing and delivering of orders.

16.59 All orders made by Judges should be placed on the Court File.

Litigants in person

16.60 A fundamental culture change is needed: persons cannot help being litigants in person in the absence of Legal Aid. They need fair, not just palliative, treatment.

16.61 This depends upon recognising and applying the following principles:

- Maximising free and affordable advice
- Maximising free and affordable representation
- Bespoke and early case management
- The robust identification and dismissal of hopeless cases
- An investigative approach by judges to cases involving litigants in person
- The amendment of current forms and drafting of all future forms (including standard correspondence and directions orders) in a litigants in person readable form, with the benefit of professional advice from pro bono agencies as to language and layout.

16.62 There should be developed regional up-to-date databases for the assistance of judges, court staff and professional legal advisers about the availability and whereabouts of free and affordable legal advice and representation, suitable for chancery cases. Regional working parties should be set up for that purpose.

16.63 There should be a designated service counter for litigants in person in the Rolls Building, staffed on a rota basis by specially trained court staff.

16.64 There should be developed a suite of litigant in person user-friendly full directions orders, not needing to be understood by reference to Rules, Practice Directions or standard Guides. Once litigants in person are directed in that way, non-compliance can fairly be sanctioned, in accordance with the Jackson reforms.

16.65 There should be a litigant in person variant of the standard response pack for use when the represented party thinks the other side is or may be unrepresented.

16.66 A fair costs regime should be developed to encourage represented parties to undertake trial preparation and bundling, even where not the claimant or applicant.

Regional Trial Centres

16.67 There should be established for application in all the chancery regional trial centres, and then implemented, the principle that no case is too big for the regions. For that purpose:

- Cases issued in London should be transferred to the regions where all parties or their lawyers are located.
- For the largest cases, full-time High Court Judges should be provided to sit occasionally in the regional trial centres, where hearings are too long for the chancery supervising Judge.

16.68 The following recommendations are made in relation to the District Judges:

- Encouraging them to do more trials, on the Manchester model, after removing outdated jurisdictional restrictions.
- Introducing urgent applications lists for District Judges.
- Providing training for District Judges in insolvency and bankruptcy matters to improve their specialist skills.
- Increasing the level of chancery skill and experience of District Judges by arranging (or ticketing) a smaller number to increase the chancery proportion of their individual workloads. (certain trial centres only).

16.69 Recommendations for regional trial centres include, where appropriate:

- Encouraging long service by specialist chancery listing officers and diary managers, and treating chancery listing as a specialisation in its own right.
- Increasing case management (including full docketing) by the s.9 Judges as resources permit.

Insolvency and Company

16.70 The Bankruptcy and Companies Courts in the Rolls Building are recognised and sought after as both a national and international centre of excellence. That status should be preserved and enhanced, as a guiding principle.

16.71 The current overload on the Registrars (and the consequentially excessive waiting times for hearings before them) should be addressed by the following:

- Raising the bankruptcy jurisdiction of the Central London County Court to achieve an 80%/20% apportionment to that court, and thereafter monitoring the issue of petitions so as to maintain that ratio.

- Sending routine time-consuming insolvency and bankruptcy hearings of matters retained at the High Court to be heard in the Central London County Court, e.g. s.236 examinations, public examinations and small-scale preference cases.

- Sending routine matters to Companies House (with referral of disputes to court): e.g. extension of administration and payment of the Prescribed Part.

- When resources permit, the appointment of a sixth Registrar.

16.72 To the extent that the Registrars' resources permit, they should, with the removal of outdated restrictions on their jurisdiction, be permitted to deal with restraint of presentation or advertisement of winding up petitions, with low value s.994 petitions and with most cross-border mergers.

16.73 Weight, complexity and the existence of new legal issues should be treated as criteria for referral of cases by Registrars to Judges. There should be full docketing by Judges of difficult company schemes, and of high value or high complexity insolvency applications.

16.74 As for rules:

- The proliferation of Special Administration procedure rules should be stopped and, if possible, reversed.

- The procedure for s.994 petitions should be changed so as to require statements of case without any special direction before the first appointment.

Intellectual Property

16.75 A sufficient case has not been made out for the creation of a ticketed intellectual property court, along the lines of the Patent County Court, but for higher value cases.

16.76 Nonetheless, to improve the case management and quality of trial of all intellectual property cases:

- The use of non-IP specialist deputies in all complex IP cases should be minimised.

- IP cases involving foreign parties or witnesses should be given fixed date trials wherever possible.

- IP cases with complicated case management issues, such as the commissioning and supervision of surveys, should be managed by full docketing to Judges.

- The identity of the trial Judge should be fixed and communicated to the parties as early as possible.

- A second IP specialist Master should be recruited.

16.77 To improve the quality of the service of the Patents Court:

- Recruitment to the chancery Bench should provide for three, rather than the present two, scientifically experienced judges.

- There should be a move to partial docketing by Judges (i.e. by the same Judge, although not necessarily by the trial Judge)

- There should be better capture of case management information on the Court File

Business and Commercial Cases

Convergence

16.78 A greater convergence of practice and procedure between the Chancery Division, the Commercial Court and the TCC in relation to business cases capable of being tried in each court should be treated as a worthwhile objective in its own right. In relation to larger cases, the recommendations in the Aikens Long Trials Report (for the Commercial Court) should be considered and adopted in chancery cases where appropriate.

16.79 Convergence will in practice be promoted by the adoption in the Chancery Division (recommended elsewhere in this report) of the following:

- Four-day trial weeks.

- A move to fixed trial starting and ending dates, with built-in time for pre-reading and judgment writing.

- Limiting the length of cross-examination.

- A more rigorous weeding out of cases more appropriately managed and tried in other courts.

- A greater emphasis on considering dispute resolution as a primary focus of case management.

- Transferring to the parties primary responsibility for drawing of orders.

16.80 The extent of convergence should be monitored to avoid forum shopping between, in particular, the Chancery Division and the Commercial Court (and the Mercantile Courts in the regions). This will require particularly close consideration in relation to the current debate about limits upon automatic costs budgeting.

Mutual Assistance

16.81 The Chancery Division, the Commercial Court and the TCC in London should be encouraged to take as their example the high level of mutual co-operation and assistance that exists between the Chancery Division, the Mercantile Courts and the TCC in the regional trial centres, to the extent that the larger scale of the London operations makes this possible. The shared facilities and collegiate environment of the Rolls Building should be ideal for that purpose. Mutual assistance should be of particular value in avoiding large disparities in waiting times between the Chancery Division and the Commercial Court.

Information Technology

16.82 The IT wiring infrastructure in the Rolls Building should be used by parties to larger cases for paperless trials wherever possible.

16.83 Urgent steps need to be taken to establish wi-fi and mobile phone connectivity in the Rolls Building.

Individual Property

16.84 The main recommendations for this aspect of the chancery workload are as follows:

- The encouragement of the voluntary use of the ACTAPS pre-action protocol in contested probate, family trust and Inheritance Act litigation.

- The development of procedures for, and training for the use of, Financial Dispute Resolution, without the need for a prior directions appointment if the parties agree.
- Greater use of Masters and District Judges for trials in appropriate cases.
- The transfer of smaller value cases to the county court, but only where there exists the necessary specialist expertise in the receiving court.
- Regional trials for regional families.

Reporting and Feedback

16.85 Communication in the Chancery Division, both internally and with its court users, should be addressed by the following measures:

- The publication of an Annual Chancery Report.
- The holding of an annual chancery judicial conference.
- Better use of the chancery part of the HMCTS website, including the publication of up-to-date waiting times.
- The revitalisation of some chancery Court User Committees.

Annex 1: The Court User Questionnaire

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1. There is copied below the standard questionnaire sent to chancery court users at the beginning of the review. It was sent to over 2,000 consultees, and elicited over 180 written responses.

2. The apparently modest number of responses conceals the fact that many of them came from groups of consultees, such as the litigation departments of major firms of solicitors, sets of barristers' chambers and relevant professional associations.

3. The questionnaires were sent under a standard covering letter that emphasised our wish that consultees should feel free to contribute in any way they liked and, in particular, should not feel confined to answering the questionnaire.

Questionnaire For Court User Consultees

1. What use do you make of the Chancery Division? Do you use it mainly in London, or in the District Registries and, if so, where?

2. For what type(s) of business do you use the Division? Please provide some outline of the subject matter, size (by time and value) and complexity of your cases.

3. Is your contact with the chancery judiciary mainly with High Court Judges, Deputy Judges, Masters, Registrars or District Judges?

4. Does your pattern of court use enable you to compare Chancery Division practice with that of other courts or tribunals, and if so, which?

5. Is your business with the courts such as enables you to choose between the Chancery Division and other courts or tribunals, including arbitration? If so, which do you usually choose, and why?

6. Do you regard any other courts or tribunals as offering better practice or procedure than the Chancery Division for comparable business? If so, why and in what respects?

7. If you bring business of a specialist nature to the Chancery Division, do you consider that the practice and procedure is sufficiently adapted to that type of business? If not, how could it be improved? Are the judges who hear your specialist business sufficiently specialized in their training and experience?

8. Do you consider the practice and procedure of the Chancery Division to be sufficiently flexible to accommodate your types of business, or the special requirements of particular cases with which you have been concerned? If not, please identify any relevant inflexibilities and explain how you would like to see them addressed.

9. Do you consider that judges of sufficient seniority have been allocated to your cases in the Chancery Division? Would you accept allocation of cases to more junior judges, if that would lead to shorter waiting times?

10. Are you content with the current allocation of most case management to Masters, Registrars and District Judges with trials allocated to High Court or Deputy Judges? Or would you prefer more docketing of cases to the likely trial judge? In either case, please give reasons.

11. If you would prefer more docketing, would you be content with a greater allocation of lower value trials to more junior judges, including Masters, Registrars, Recorders and District Judges (with transfer to county courts where necessary) in order to free up the senior judges for more case management?

12. Does your business with the Chancery Division give you a choice between using the Rolls Building in London or the main regional chancery trial centres? If so, how do you exercise that choice, and why?

13. Would you favour the replication of the concept of the Patents County Court to accommodate other specialist areas of chancery work and, if so, which?

14. What recommendations would you offer to make the Chancery Division more accessible to self represented litigants?

15. Do you think the current procedures of the Chancery Division are cost effective? If not, why not and how could they be improved?

16. What improvements to the practice and procedures of the Chancery Division not included above would you suggest and why?

Annex 2: Statistics (part 1) Five Year Headlines

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Introduction

1. This Annex is in two main parts. The first extracts headline statistics about chancery cases issued, heard and tried during the last five years, both in the Rolls Building and in the four main regional trial centres, namely Birmingham, Manchester, Leeds and Bristol. These figures are derived from statistical summaries routinely made available to HMCTS and to regional chancery court user committees. Their accuracy is not guaranteed, and they have not been re-checked against the raw data.

2. Unfortunately, each region prepares its statistics for its own particular purposes, using its own criteria and objectives. There is no consistency between them, or with those prepared in London. This means that, in certain respects, the elements summarised in the following tables are unavailable for certain regions, and that some of the figures represent extrapolations from information collated in a different way, and for a different purpose.

3. In my view the management of the Chancery Division as a whole would be better served by bringing about a common approach to the routine assembly of statistics nationwide. By that I do not mean that the regions lag behind London in this respect. On the contrary, those prepared in Manchester, Leeds and Bristol are more detailed and more informative. I would recommend Manchester as the best model, and include in this Annex the typical print-out supplied to its judges' meetings and user committees as an example to be followed and built upon. The Leeds model is almost as good, but the joint listing of all three specialist civil jurisdictions there means that chancery work, although much the largest segment of the whole, appears only as a sub-set.

Five Year Headlines

London

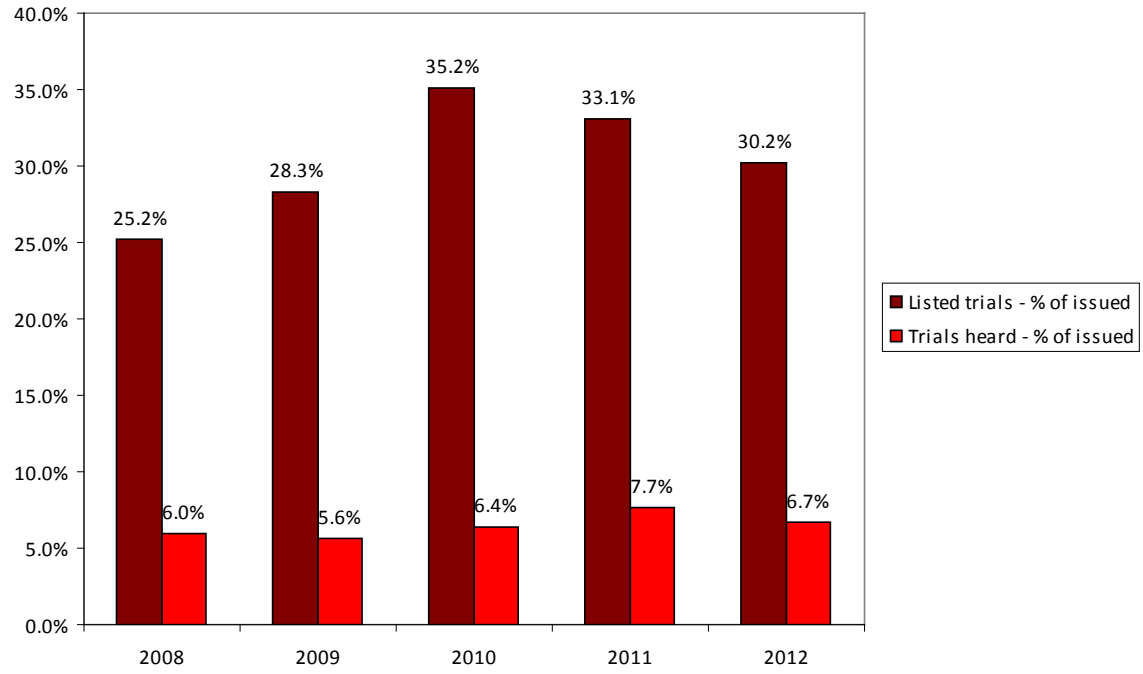
Chancery Division

	Claims issued	Listed for trials	Listed trials - % of issued	Trials heard	Trials heard - % of issued
2008	3779	953	25.2%	226	6.0%
2009	3567	1009	28.3%	201	5.6%
2010	3382	1189	35.2%	217	6.4%
2011	3381	1119	33.1%	260	7.7%
2012	3789	1146	30.2%	255	6.7%

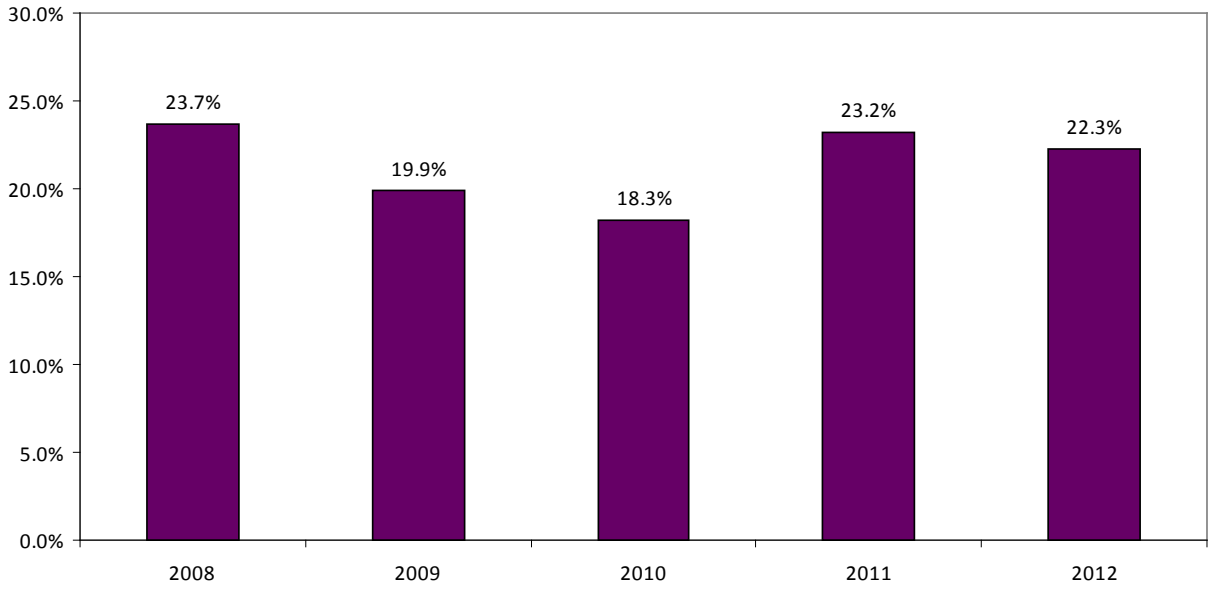
	Listed for trials	Trials heard	Heard trials - % of listed
2008	953	226	23.7%
2009	1009	201	19.9%
2010	1189	217	18.3%
2011	1119	260	23.2%
2012	1146	255	22.3%

	Waiting time (weeks)
2008	38.8
2009	39.8
2010	38.9
2011	40.9
2012	47.5

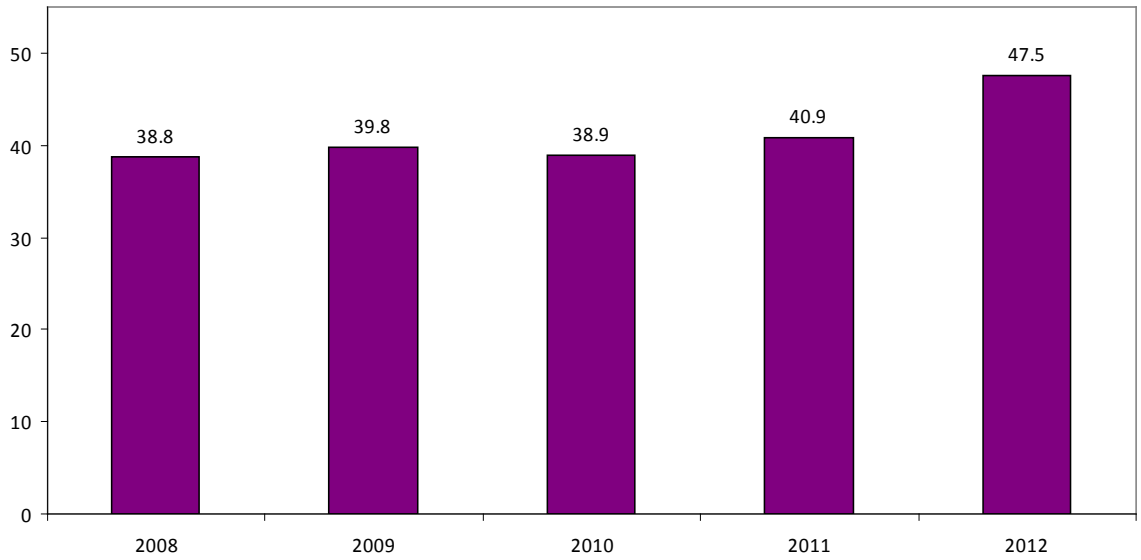
Proportion of cases issued which are listed for trial and tried



Heard trials - % of listed



Waiting time (weeks)



Notes

- The only consistent trends among these figures are the steady increases in waiting times in the last 3 years, and the substantial but irregular increases in trials listed and trials heard. Over the 5 years, they are 20.2% and 12.8% respectively. For every trial listed there will have been a case management stage, although many will have been conducted on paper, rather than at a hearing.

- The official chancery issue statistics in every year from 2009 onwards include a large number of 'claims' (2009: 1,320; 2012: 1,210) for payment of funds out of court. They are handled as claims administratively, and are dealt with entirely by the Masters. They are rarely adversarial and have no significant need for case management, or prospect of trial. They have therefore been excluded from these tables. They were inadvertently included in the tables annexed to the provisional report. All Part 8 claims issued have however been included.

- The chancery issue statistics do not include the Companies or Bankruptcy courts, or any appeals. The trials figures do include company and bankruptcy matters listed for trial by Judges, but not by Registrars. The number of trials of Part 7 claims by Masters is statistically insignificant.

- Trials do not include tribunal work or other appellate work.

Company and Insolvency

	Insolvency Issued	Company Issued
2008	12924	17163
2009	11444	19571
2010	9019	16155
2011	8847	16858
2012	6501	15412

	Insolvency Orders	Company Orders
2008	29522	30608
2009	30265	35090
2010	23805	30841
2011	22545	30049
2012	21888	27923

Notes:

- These tables include the large volume of bankruptcy and winding up cases still handled by the Registrars notwithstanding the transfer in 2011 of a substantial slice of the bankruptcy work to the Central London County Court.
- This is large volume business which, because of the short time spent on each case, is not fully captured by the 3 month statistics illustrated in part 2 below.
- Nor is it incorporated in the comparative tables for the Rolls Building in part 1 below.

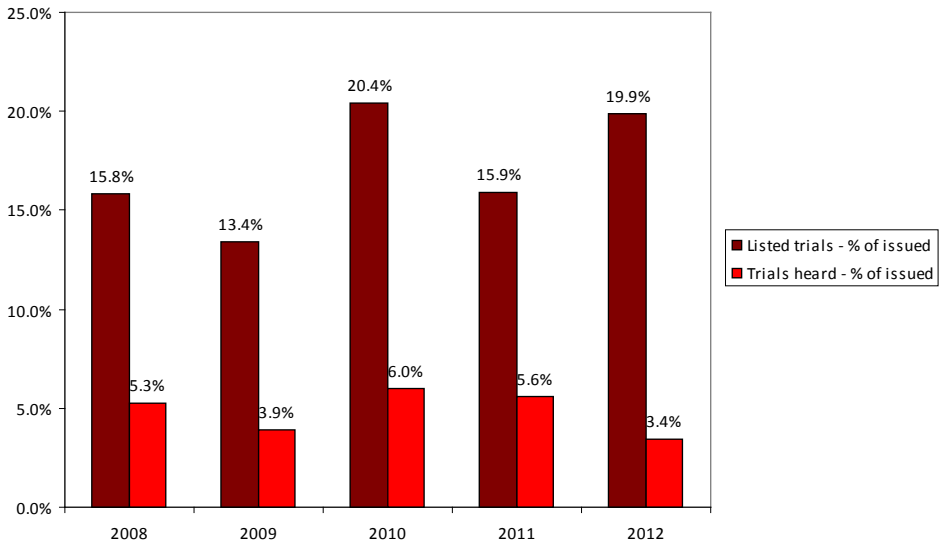
Other Rolls Building Courts

Commercial Court

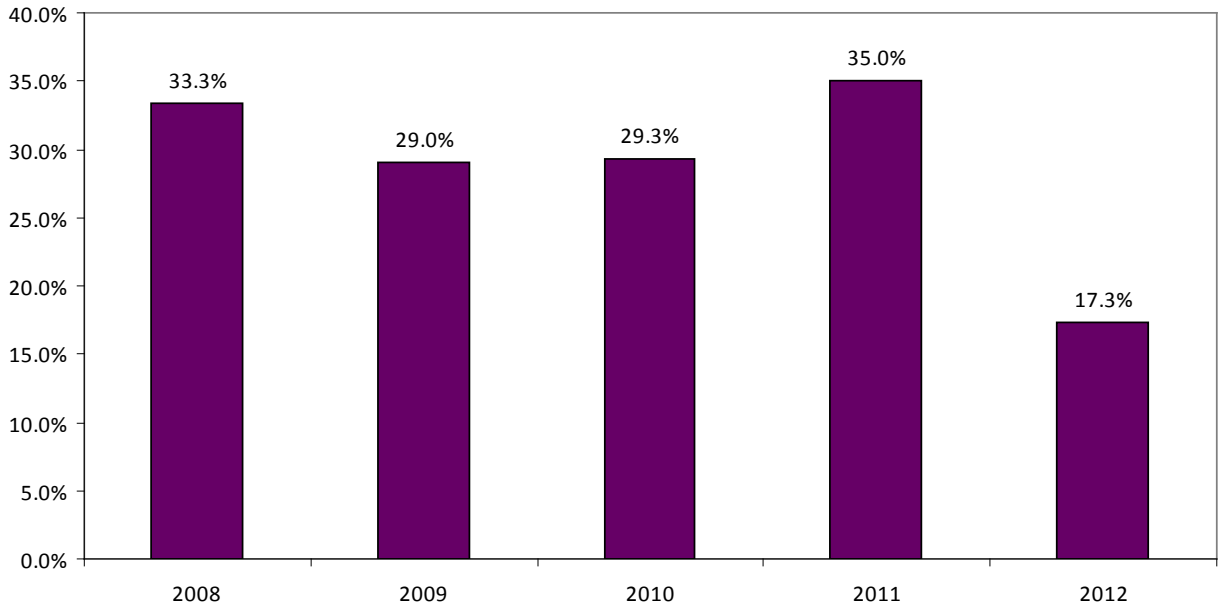
	Claims issued	Listed for trials	Listed trials - % of issued	Trials heard	Trials heard - % of issued
2008	1118	177	15.8%	59	5.3%
2009	1491	200	13.4%	58	3.9%
2010	1267	259	20.4%	76	6.0%
2011	1343	214	15.9%	75	5.6%
2012	1253	249	19.9%	43	3.4%

	Listed for trials	Trials heard	Heard trials - % of listed
2008	177	59	33.3%
2009	200	58	29.0%
2010	259	76	29.3%
2011	214	75	35.0%
2012	249	43	17.3%

Proportion of issued cases listed for trial and tried



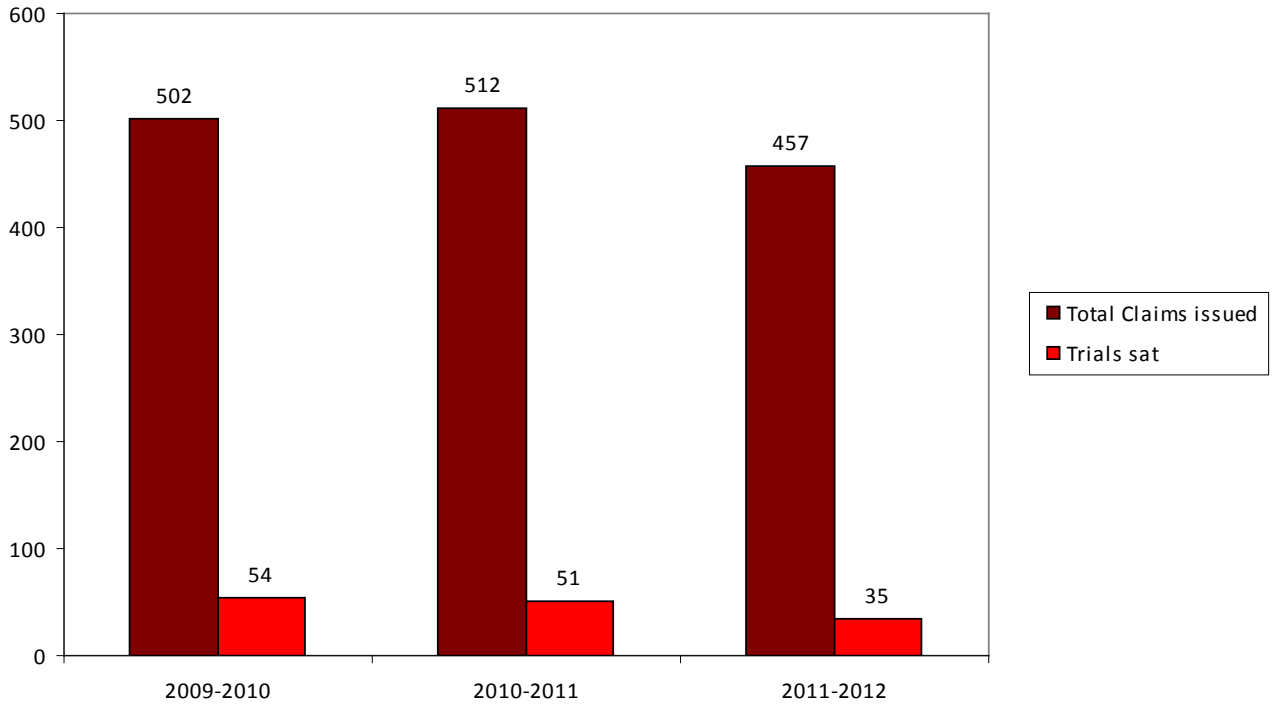
Heard trials - % of listed



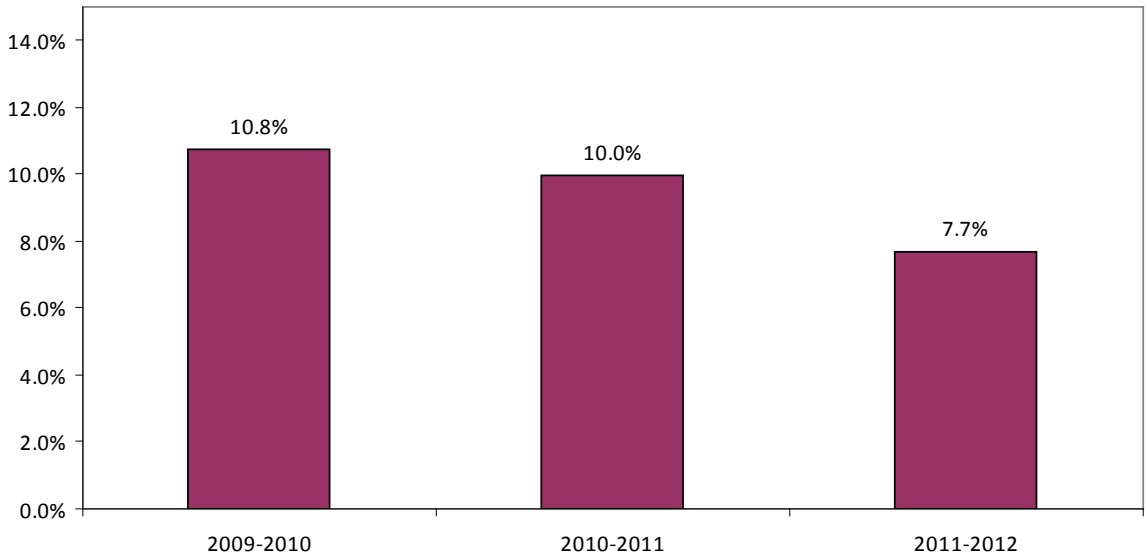
TCC

	Total Claims issued	Trials sat	Trials sat - % of claims issued
2009-2010	502	54	10.8%
2010-2011	512	51	10.0%
2011-2012	457	35	7.7%

Proportion of issued cases tried



Trials sat - % of claims issued



London Comparative

Claims issued

	Chancery	Comm	Mercantile	TCC*
2010	3382	1267	210	502
2011	3381	1343	207	512
2012	3789	1253	212	457

Trials listed

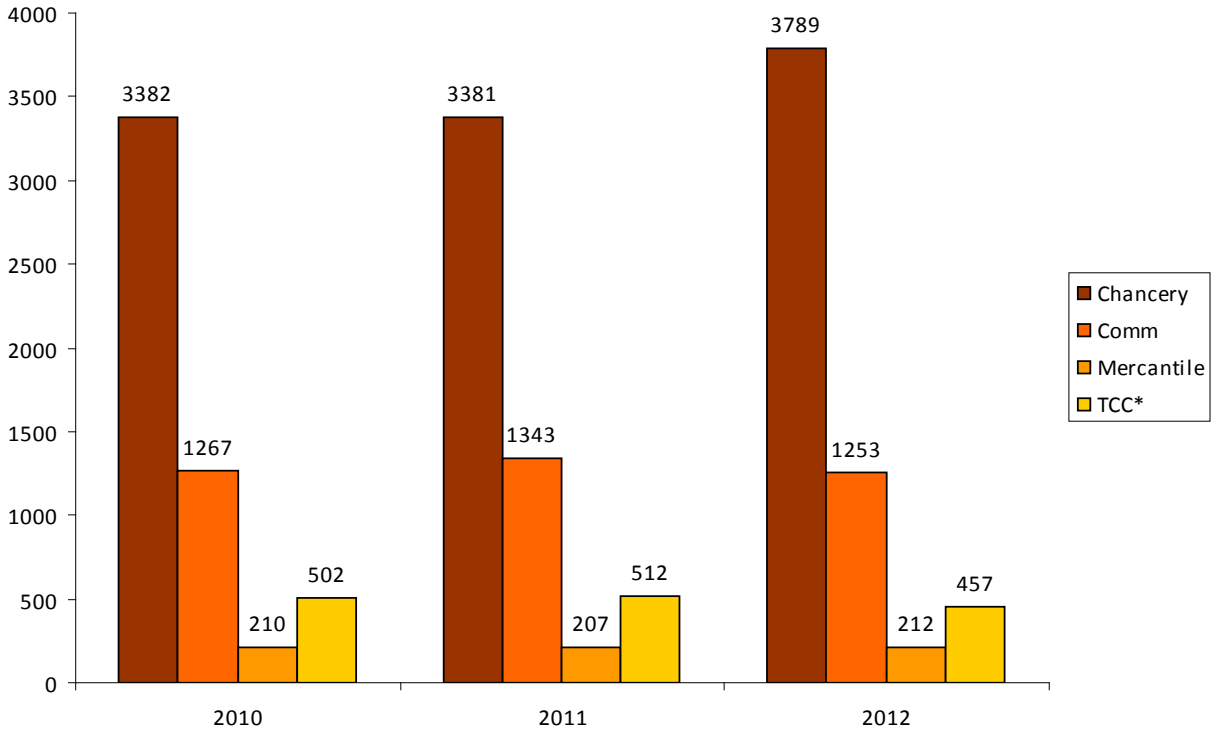
	Chancery	Comm	Mercantile
2010	1189	259	37
2011	1119	214	46
2012	1146	249	40

Trials heard

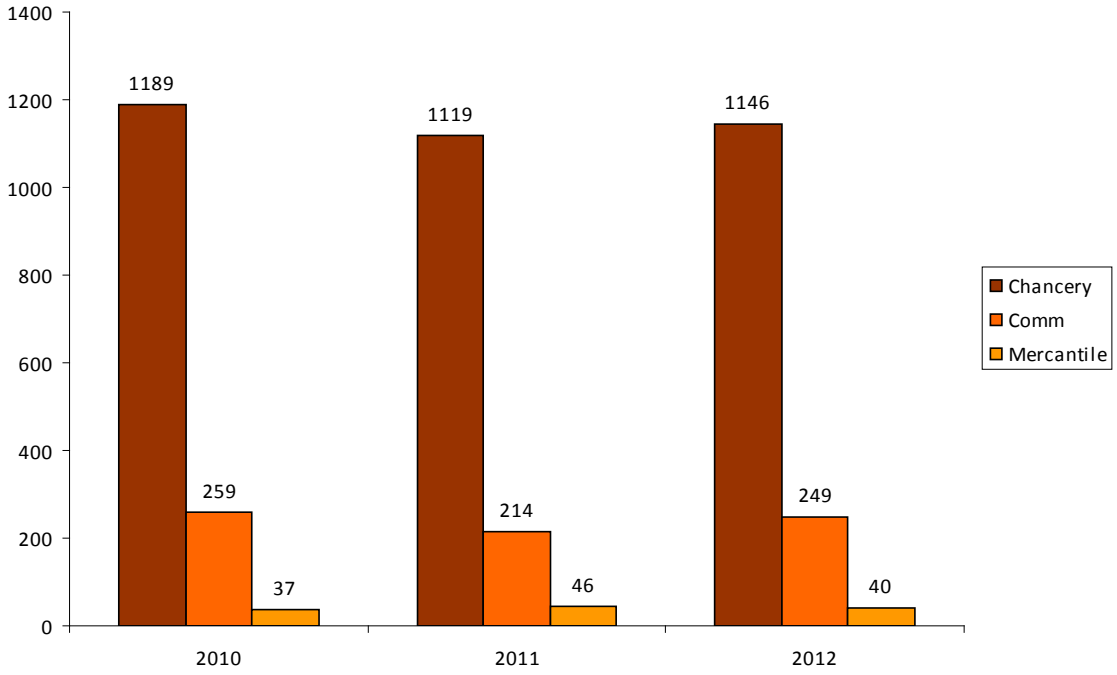
	Chancery	Comm	Mercantile	TCC*
2010	217	76	14	54
2011	260	75	10	51
2012	255	43	12	35

*** TCC data relates to twelve-month periods ending in the year in the first column (2009-2010, 2010-2011 and 2011-2012)**

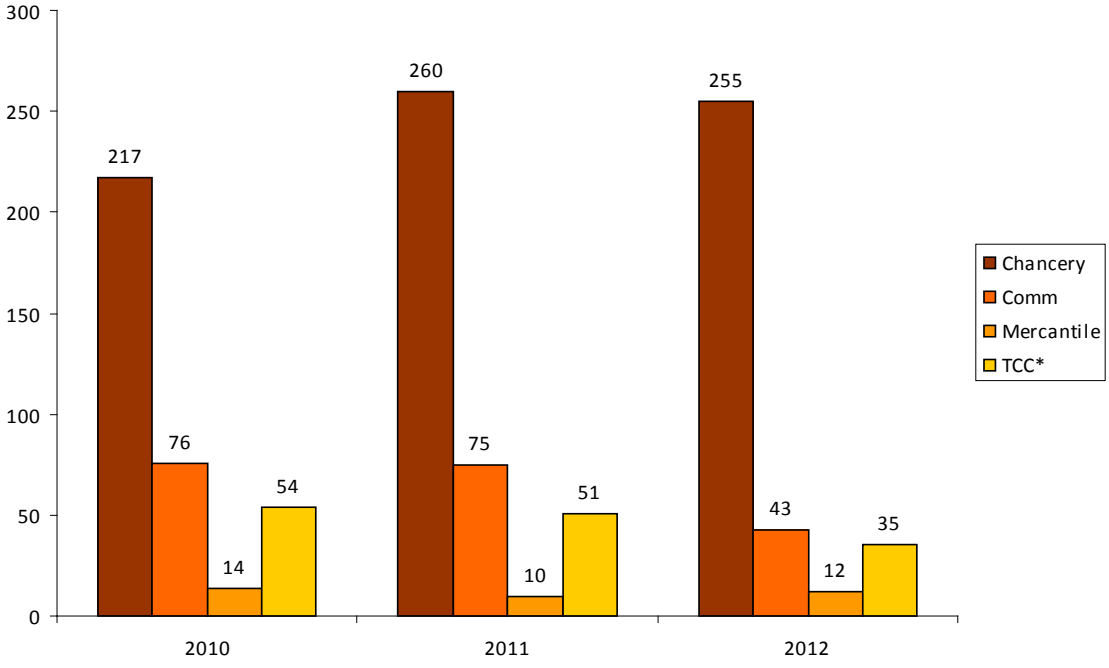
Claims issued



Claims listed



Trials heard



Notes:

- I am grateful to the Commercial Court Listing Officer and to Akenhead J for the Commercial and TCC figures. The main relevance of the Commercial Court and TCC statistics are the much lower level of issues, listings and trials in both courts, compared with the Chancery Division. Using 2012, the last complete year, Commercial Court issues, listings and trials were 33.1%, 21.7% and 16.9% of the chancery figures respectively. For the TCC, issues and trials were 12.1% and 13.7% of their chancery counterparts.

- These figures may understate the actual trial workload of the Commercial Court, because their average trial length, and the average value at risk, may be higher, although there are no available statistics. They certainly understate the burden of the workload on the commercial and TCC Judges, because they case manage everything, whereas the chancery Judges case manage relatively little.

- None of these figures say much, if anything, about judicial productivity. Although the Review has collected figures about the amount of appellate work done by the chancery Judges (not included in the above tables) their tribunal work, and the non-commercial or TCC work of their QB colleagues, is not modelled in the statistics available to the Review.

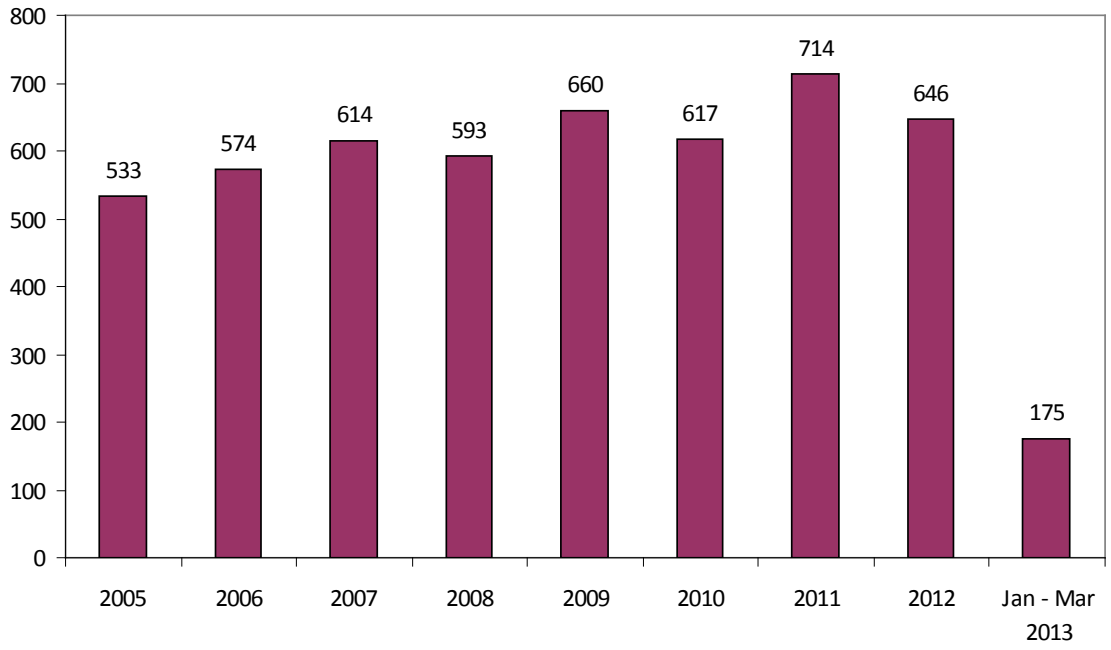
Regional Trial Centres

Birmingham

Chancery Division And County Court (Chancery)

	2005	2006	2007	2008	2009	2010	2011	2012	Jan - Mar 2013
Issued	533	574	614	593	660	617	714	646	175

Claims issued



Notes:

- Birmingham is the largest of the regional chancery trial centres, both by number of cases issued and number of available s.9 Judges.
- Unfortunately the only available statistics at the time of publication relate to issue.
- The issue figures show a sustained increase over 8 years, for which the centre has received a corresponding increase in its judicial resources.
- Unlike the other regional centres, High Court and County Court (chancery) issue figures are both incorporated in the same statistics. For this reason they have not been included in the comparative tables at the end of this part.

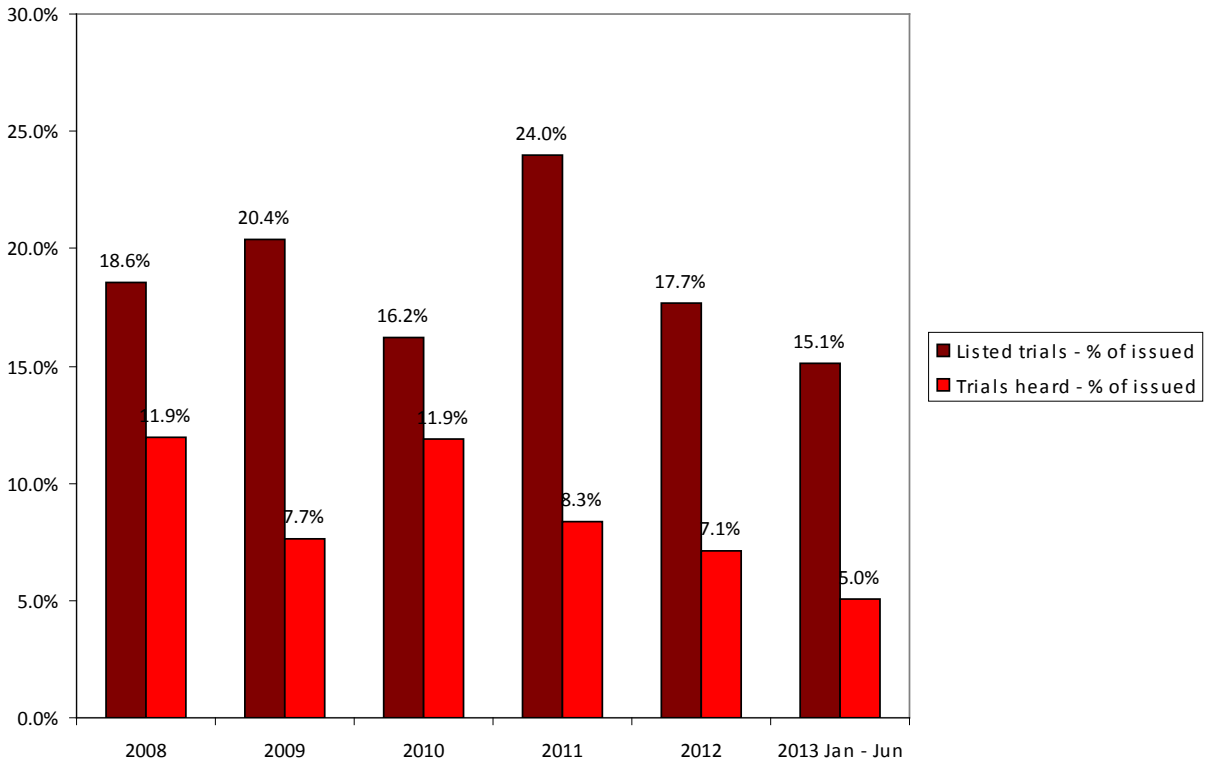
Bristol

Chancery Division

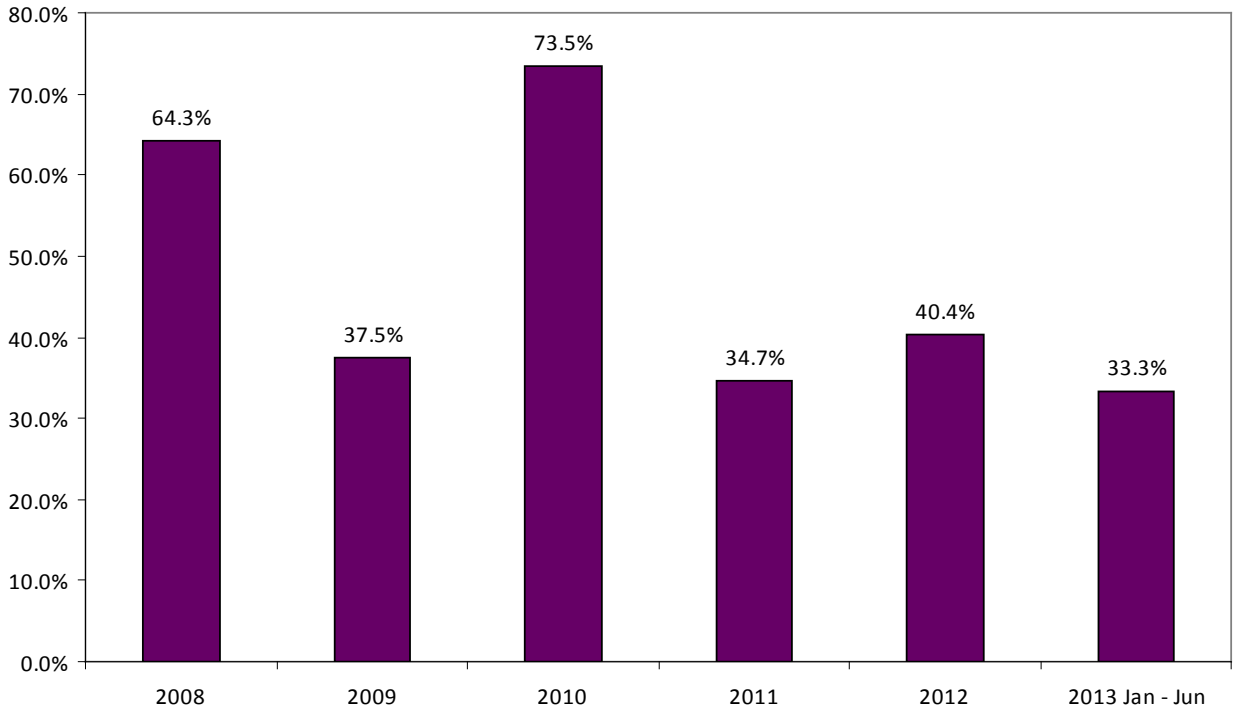
	Claims issued	Listed for trials	Listed trials - % of issued	Trials heard	Trials heard - % of issued
2008	226	42	18.6%	27	11.9%
2009	235	48	20.4%	18	7.7%
2010	210	34	16.2%	25	11.9%
2011	204	49	24.0%	17	8.3%
2012	266	47	17.7%	19	7.1%
2013 Jan - Jun	139	21	15.1%	7	5.0%

	Listed for trials	Trials heard	Heard trials - % of listed
2008	42	27	64.3%
2009	48	18	37.5%
2010	34	25	73.5%
2011	49	17	34.7%
2012	47	19	40.4%
2013 Jan - Jun	21	7	33.3%

Proportion of issued cases listed for trial and tried



Heard trials - % of listed



Notes:

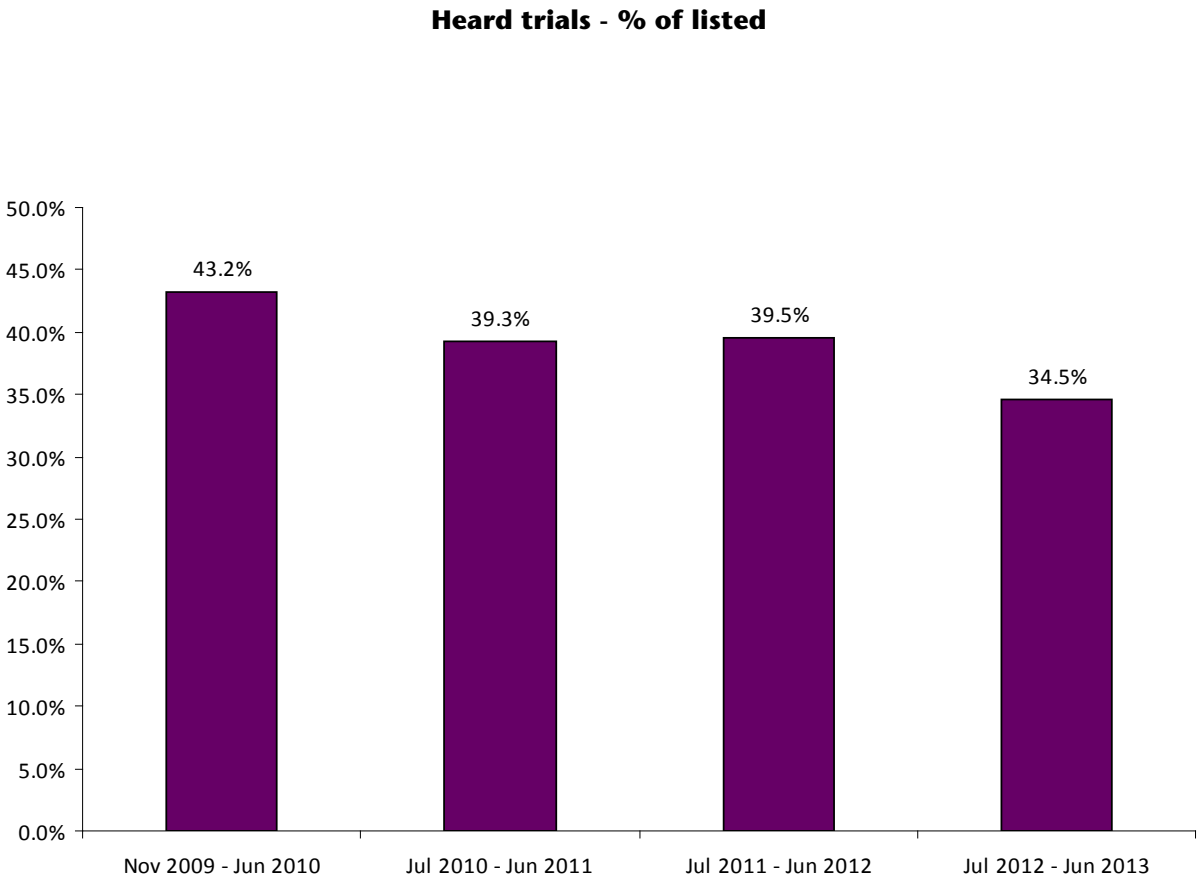
- The Bristol figures were given in magnificent detail, but did not focus on the issued, listed and tried indices used in this Annex. They were extrapolated for us by the resident chancery s.9 Judge.

- They show a significant recent increase in the incoming business after a slight tailing off between 2008 – 11. The small number of trials heard reflects the fact that Bristol is a single Judge chancery trial centre, although the supervising Judge also sits there three times a year.

Leeds

Chancery Division

	Listed for trials	Trials heard	Heard trials - % of listed
Nov 2009 - Jun 2010	132	57	43.2%
Jul 2010 - Jun 2011	191	75	39.3%
Jul 2011 - Jun 2012	157	62	39.5%
Jul 2012 - Jun 2013	165	57	34.5%



Notes:

- Leeds publishes statistics three times a year for its judges and chancery Court user Committee.
- The Leeds figures for cases issued did not distinguish between chancery and mercantile, and have not therefore been included.
- Cases listed do not show any marked consistent increase or decrease. Anecdotally, cases issued may recently have fallen a little, but this may be temporary.

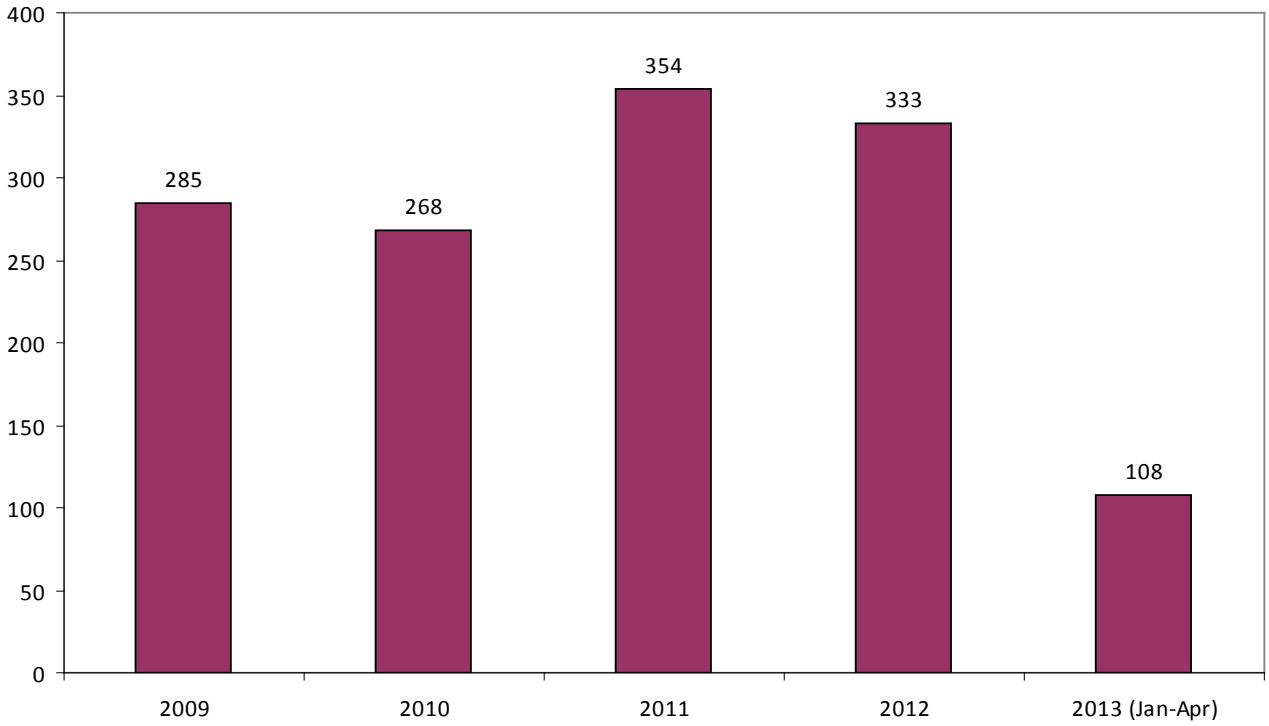
Manchester

Chancery Division

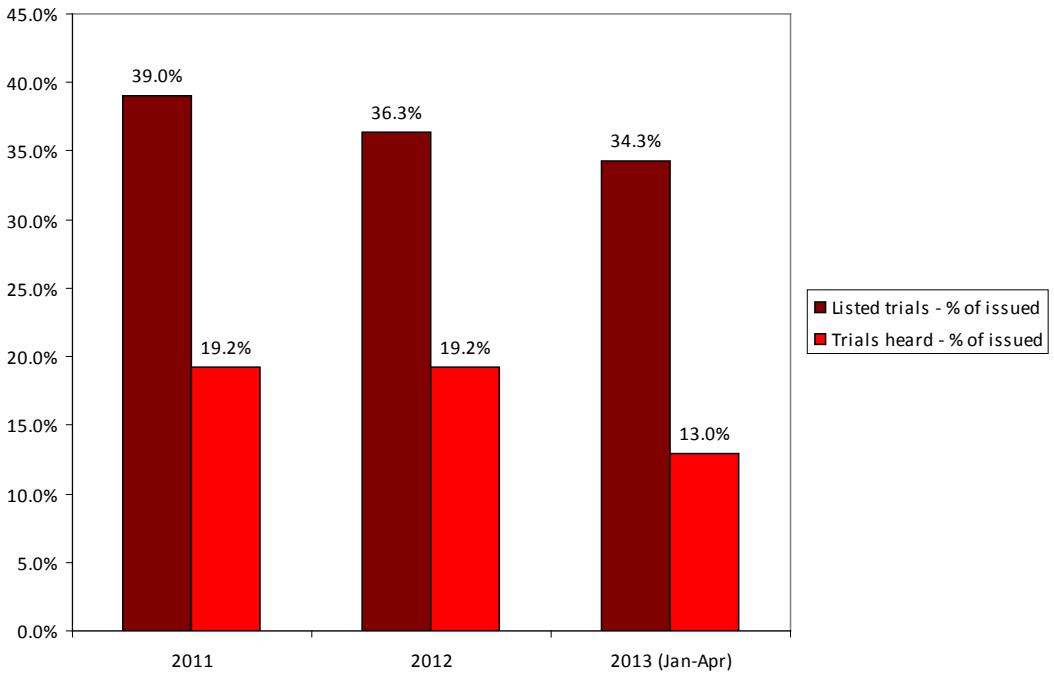
	Claims issued	Listed for trials	Listed trials - % of issued	Trials heard	Trials heard - % of issued
2009	285	No data	n/a	No data	n/a
2010	268	No data	n/a	No data	n/a
2011	354	138	39.0%	68	19.2%
2012	333	121	36.3%	64	19.2%
2013 (Jan-Apr)	108	37	34.3%	14	13.0%

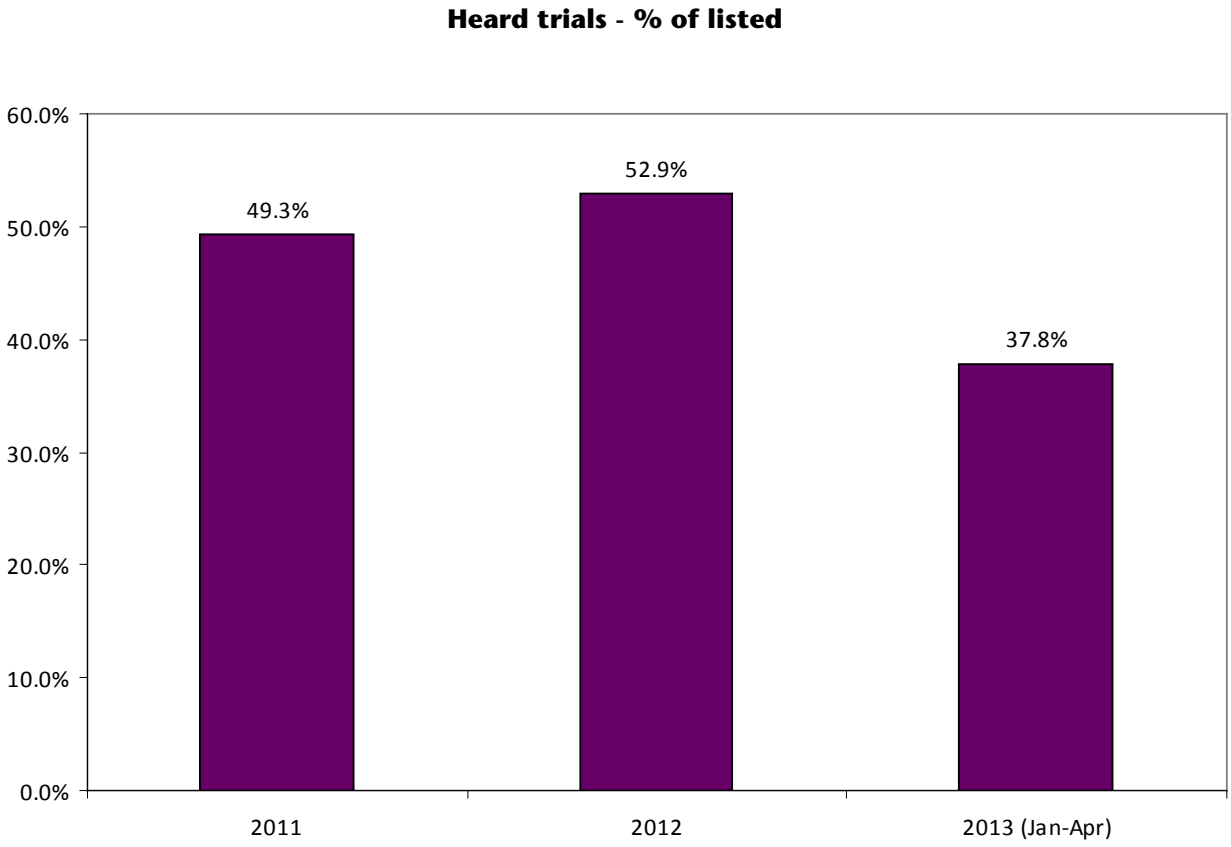
	Listed for trials	Trials heard	Heard trials - % of listed
2011	138	68	49.3%
2012	121	64	52.9%
2013 (Jan-Apr)	37	14	37.8%

Claims issued



Proportion of issued cases listed for trial and tried





Notes:

- Manchester publishes reliable statistics three times a year for its judges' and chancery Court user Committee meetings. The helpful form of the published figures is copied in part 3 below.

- 2011–12 shows a sizeable leap in the volume of cases issued, which looks likely to continue into 2013. It was partly for this reason that the retiring s.9 mercantile Judge was this year replaced by a Judge whose allocation will be broadly split equally between chancery and mercantile cases.

- Manchester shows the highest of all ratios between trials listed and heard, exceeding 50% in 2012. Anecdotal evidence suggests that this may be the result of a greater focus there at the first of (usually 2) CMCs upon case management for resolution, with a particular emphasis on early mediation, before listing for trial.

London And Regional Statistics Comparison

Claims Issued

	London	Bristol	Manchester
2008	3779	226	No data
2009	3567	235	285
2010	3382	210	268
2011	3381	204	354
2012	3789	266	333

Claims Listed

	London	Bristol	Manchester	Leeds*
2008	953	42	No data	No data
2009	1009	48	No data	No data
2010	1189	34	No data	191
2011	1119	49	138	157
2012	1146	47	121	165

*** Statistics are for the 12 months from July of that year**

Trials Heard

	London	Bristol	Manchester	Leeds**
2008	226	27	No data	No data
2009	201	18	No data	No data
2010	217	25	No data	75
2011	260	17	68	62
2012	255	19	64	57

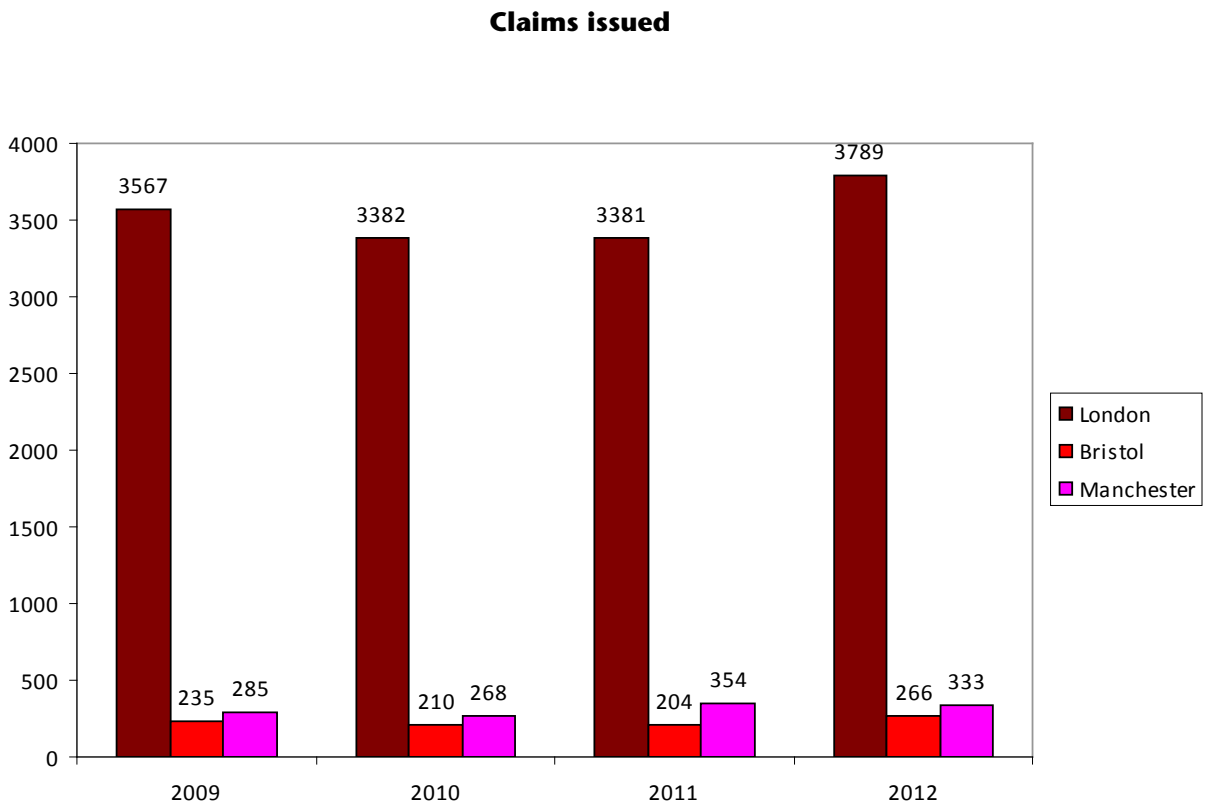
**** As above under '*'**

Trials listed - % of issued/Trials heard - % of issued (2012)

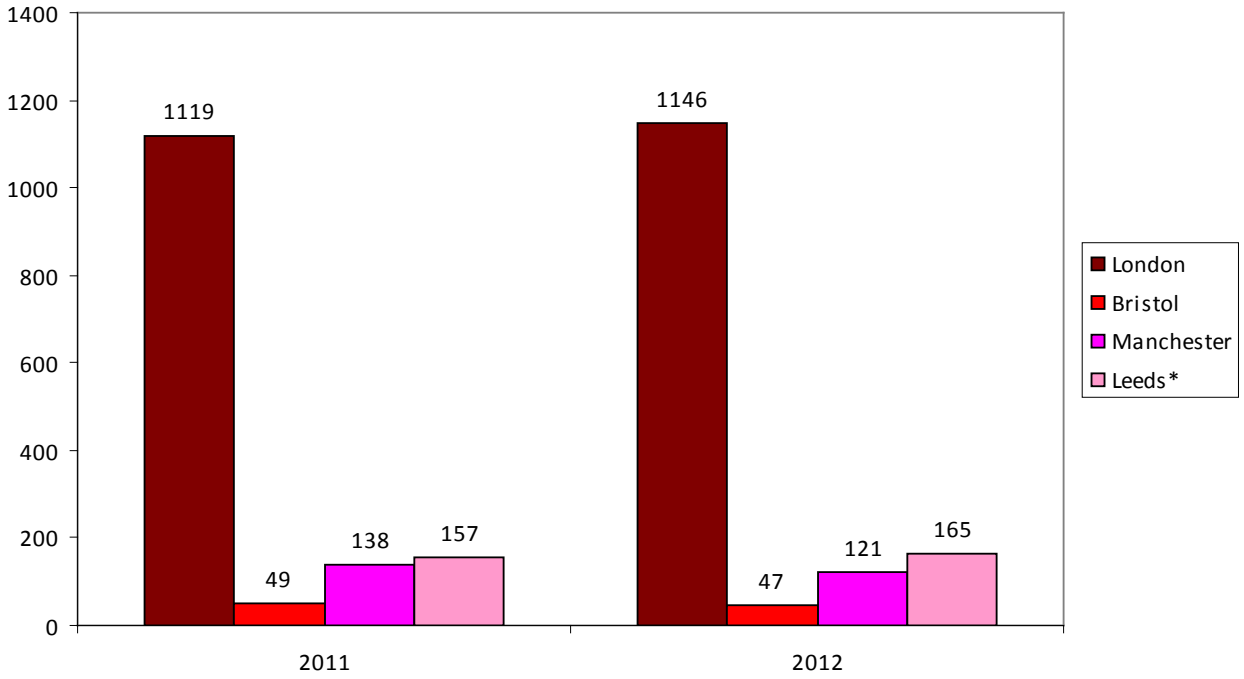
	London	Bristol	Manchester
Trials listed - % of issued	30.2%	17.7%	36.3%
Trials heard - % of issued	6.7%	7.1%	19.2%

Heard trials - % of listed

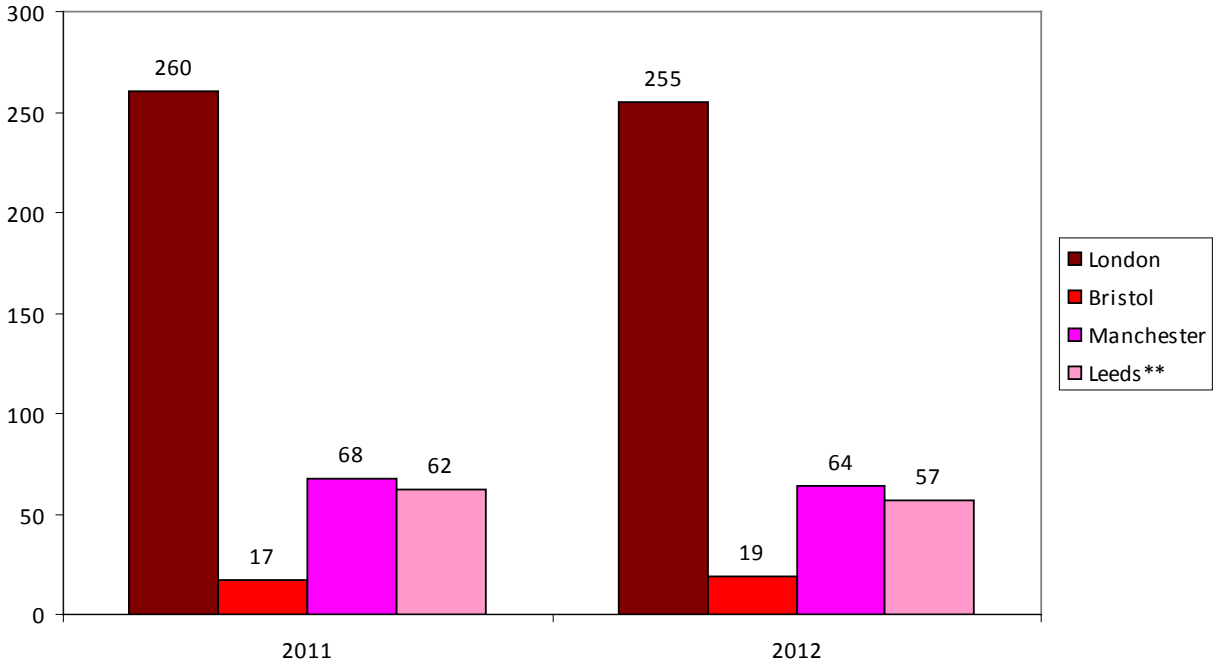
	London	Bristol	Manchester	Leeds
Heard trials - % of listed	22.3%	40.4%	52.9%	34.5%



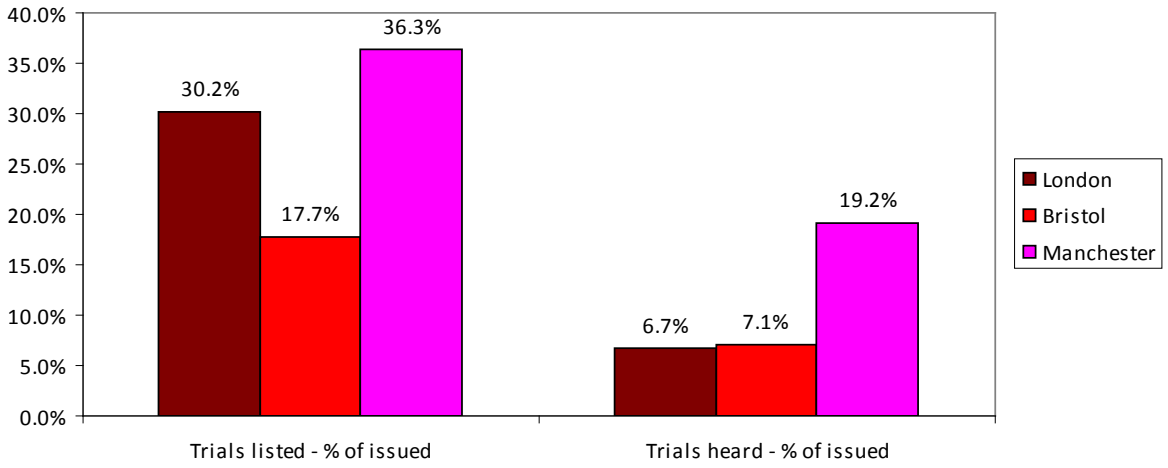
Claims listed



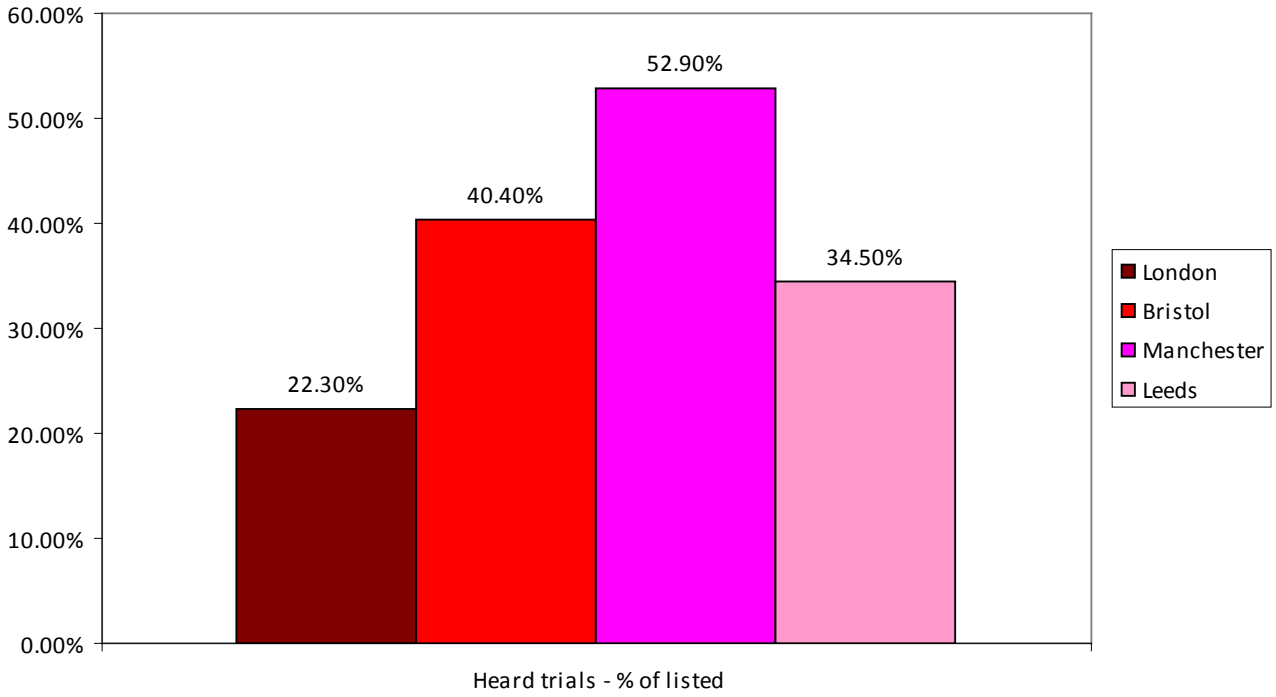
Trials heard



Trials listed - % of issued/Trials heard - % of issued (for year of 2012 as above)



London and Regional Comparative: Heard trials - % of listed



Annex 2: Statistics (part 2) Three Month Statistics

Back to contents

3 Month Statistics

Introduction

1. The following pie charts are the first-fruits of the 3 month form-filling exercise undertaken by all the London, Leeds and Manchester judiciary for the period March to May inclusive in 2013.

2. All the forms have been up-loaded onto spreadsheets for each city, capable of being interrogated separately or together. Thus far, London has been treated separately, and Leeds and Manchester together.

3. The spreadsheets are capable of being asked, and answering, an almost unlimited range of questions. The statistics shown below are selected from the answers to the limited questions that have been asked thus far, in the time available after the completion and uploading of the forms.

4. There comes a point, in particular in the regional context, where the specificity of the questions leads to answers which are unreliable because of the small available sample of the relevant information. Each hearing or piece of box work lasting longer than 5 minutes generates a separate form, and a separate entry in the spreadsheet. Thus a 6 minute interim application generates 1 form, as does a 3 month trial. Thus sample size is itself a less than perfect identifier of statistical reliability.

5. Trials and long interim applications have only been included if they ended during or after the 3 month period. Thus reserved judgments (and the time taken preparing them) are included only if they related to trials or hearings taking place within the relevant period. The result is that, because some judgments from such matters have still to be delivered, the reserved judgment figures are not yet complete, and therefore the proportion of judicial time taken up with judgment writing is currently understated. Furthermore it is feared that the general ending of the form filling at the end of May could have led to some judges not completing reserved judgment forms thereafter, even if handed down by now.

6. Although excluded from part 1, the London 'claims' for payment out of court have been included in part 2, where individual pieces of box work exceeded 5 minutes. This causes no distortion, because the number of these claims does represent a significant part of the Masters' workload.

7. We attempted to capture reliable statistics about the value of claims, but this proved

to be a disappointment. This is partly because many chancery cases are not about a monetary claim at all, and the value at risk from the grant of withholding of an injunction or declaration is not something which, however painfully aware of it, the parties are required to divulge. It is often a sensitive commercial matter which the parties would prefer to keep confidential. It is also partly the result of the fact that many pieces of work do not require the parties to specify the amount claimed, even when that is the purpose of the claim.

8. The same attempt and disappointment is true about the costs involved in the matters subjected to analysis. Although one or more parties frequently produce costs schedules, this is by no means the case for all types of work, and only a minority of costs orders are for liquidated sums. Furthermore it is usually only the successful party's costs that get reviewed by the court.

9. Further interrogation of the spreadsheets may release some reliable statistics about values at risk and costs but, in the time available, nothing has yet survived our scrutiny to be worth publishing here.

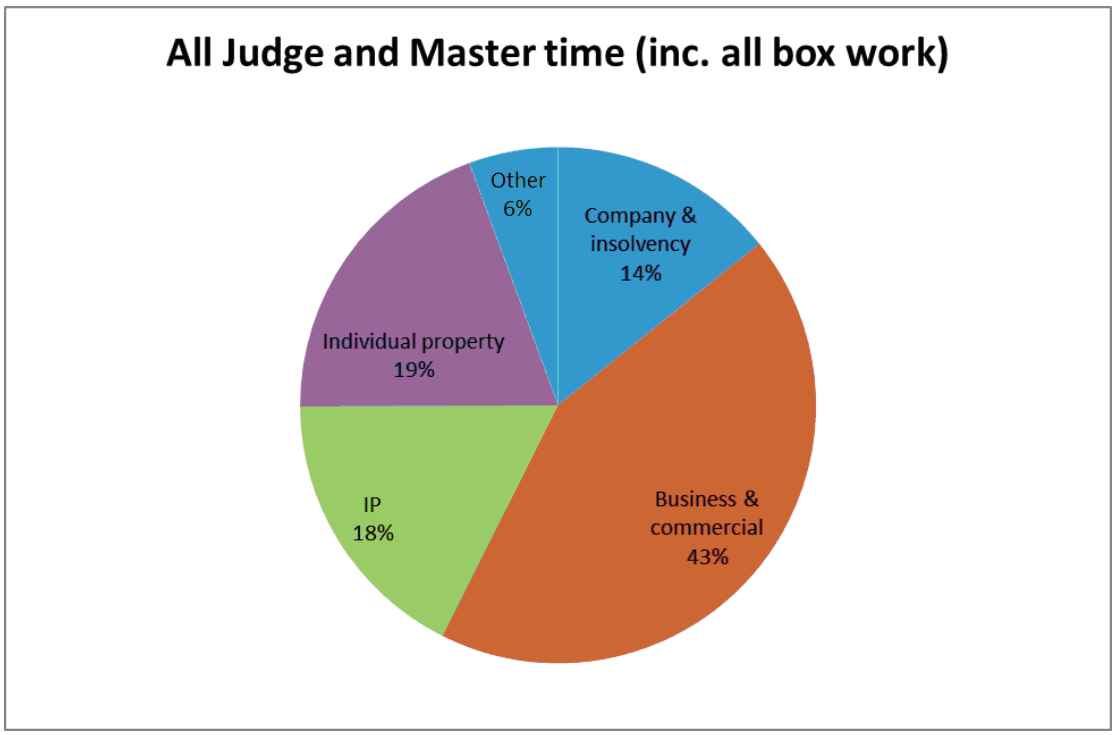
10. Some other fruits of the form-filling exercise have found their way into the final report, without being set out in this Annex. One example is the proportion of bankruptcy hearings involving litigants in person.

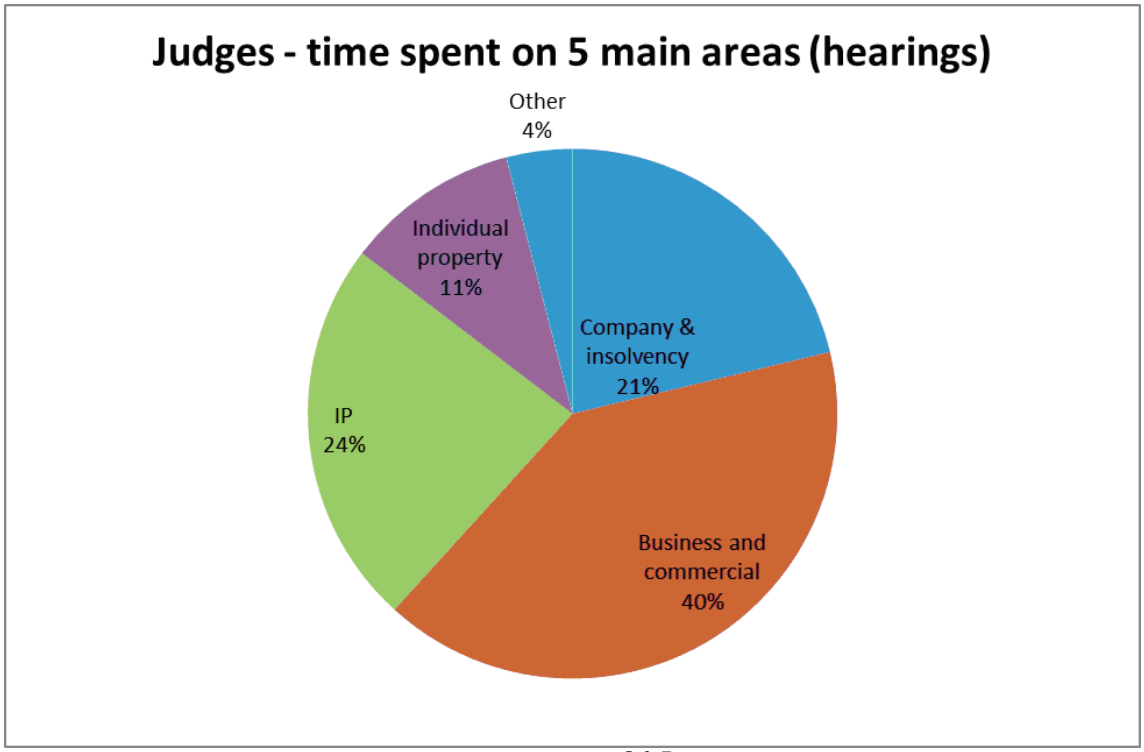
11. Generally, the insolvency work of Registrars and District Judges will be understated, because they were not asked to fill in forms about work items (hearings or on paper) taking less than 5 minutes. There are very many of them, at least in London.

12. Finally, the health warnings about statistical accuracy in chapter 1 of the final report are repeated. Judges are not trained in form filling, and many understandably regard it as an unwelcome distraction from the job in hand. The reader should not be lulled into a false perception of accuracy by the apparently confident expression of precise percentages in the pie charts.

London (Rolls Building)

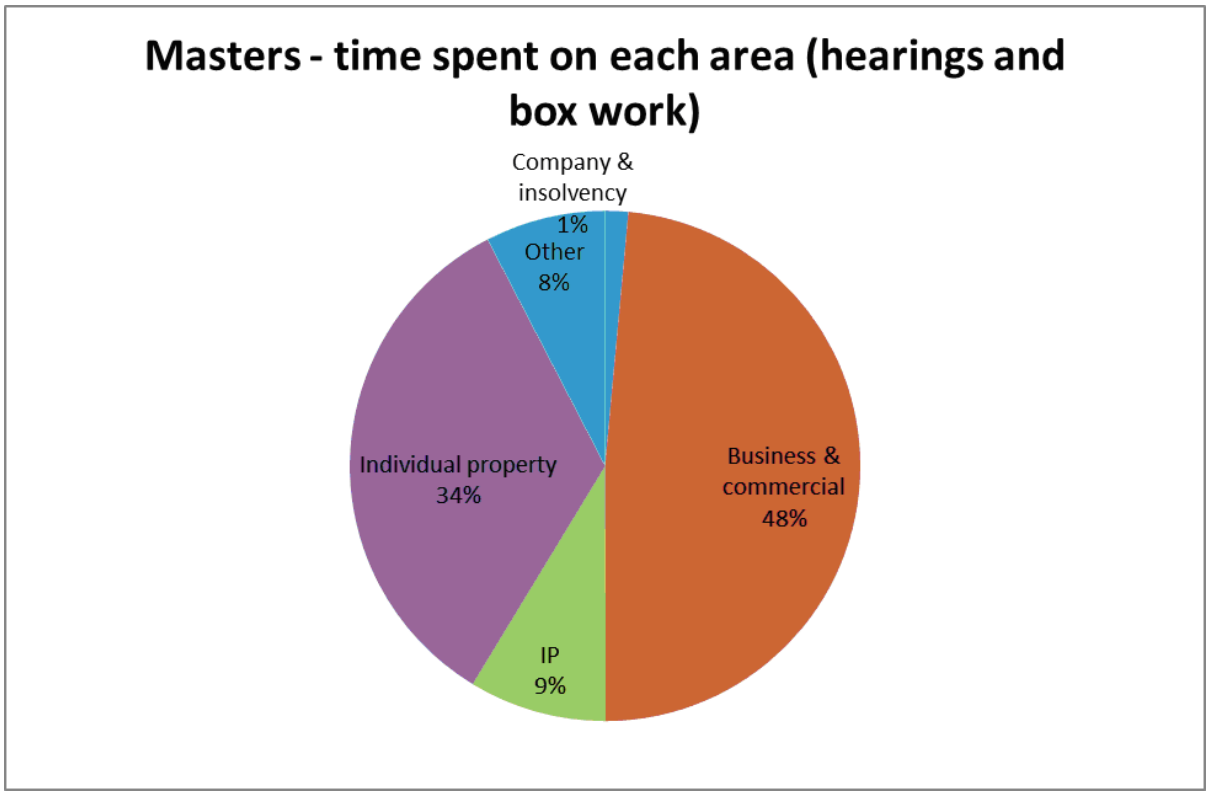
Time Spent On The Four Areas Of Work Described In The Report





Notes:

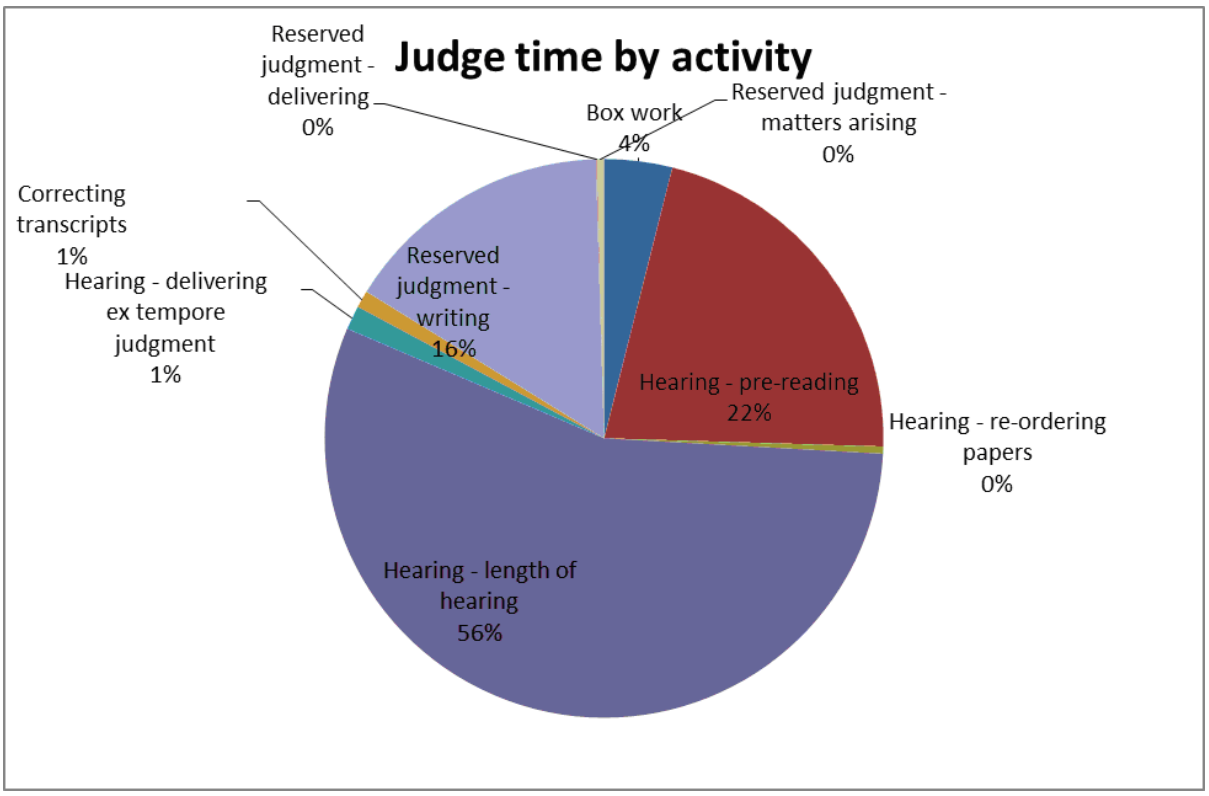
- In this and all charts about time spent by judges, appellate work (including tribunal work) is excluded, except where the chart expressly states otherwise.
- The items which we have treated as comprising these four areas sufficiently appear from the charts describing each area. See paragraphs 1.41 – 42 and 12.2 of the report for a discussion of the limitations of this (and any) categorisation.
- 'Other' includes types of work which do not fit within any of the 4 main categories analysed in the report.

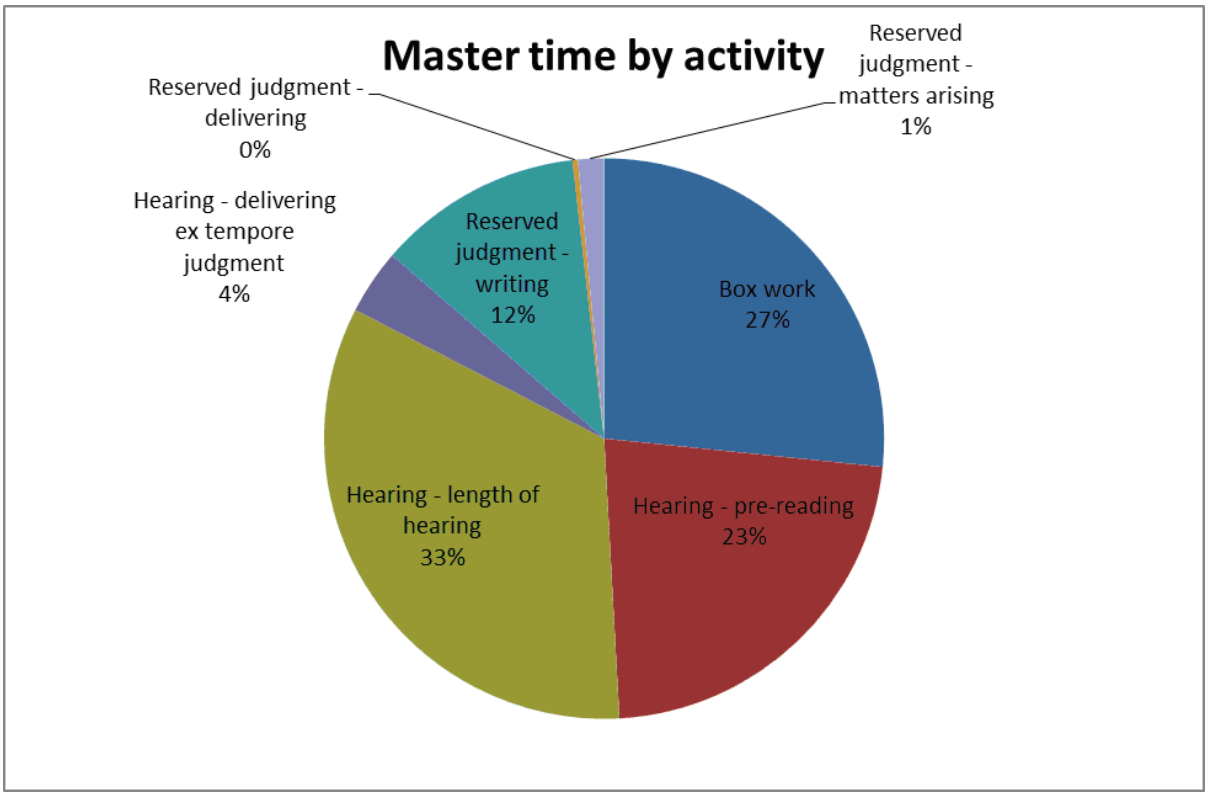


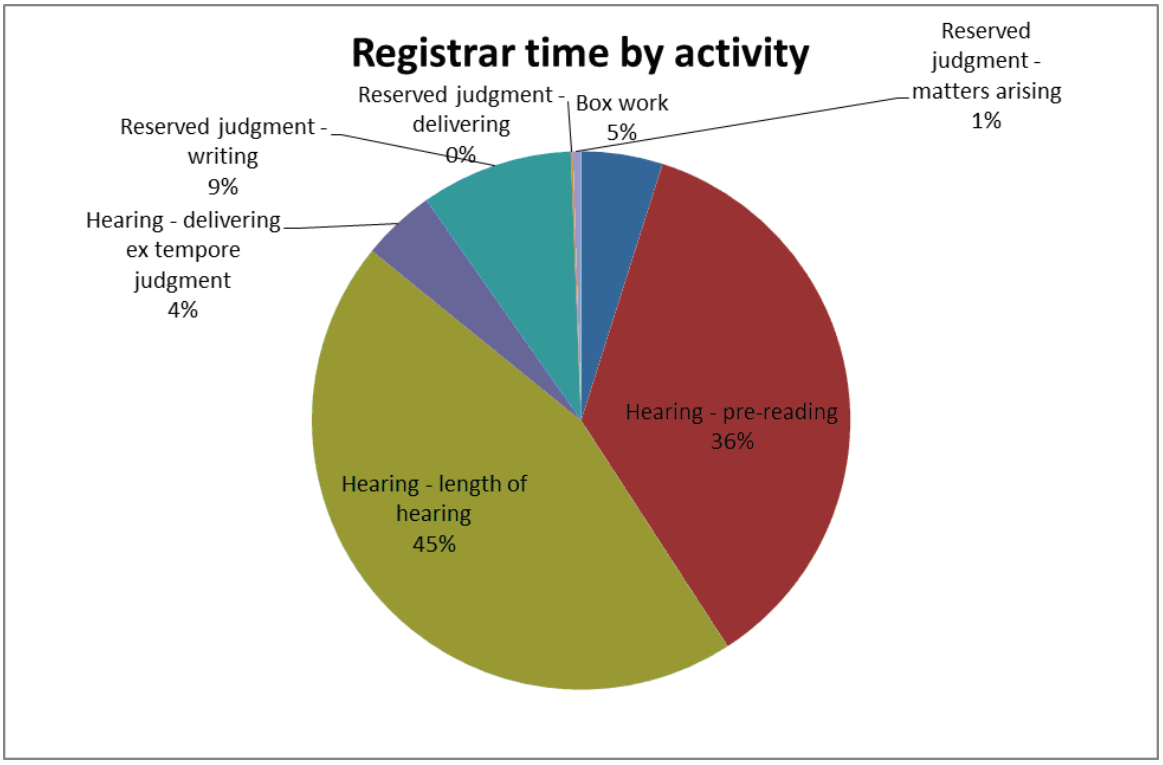
Note:

- This chart is reflective of the fact that Masters do not deal with patents, registered designs or any significant company or insolvency work

Time spent on different activities







Notes:

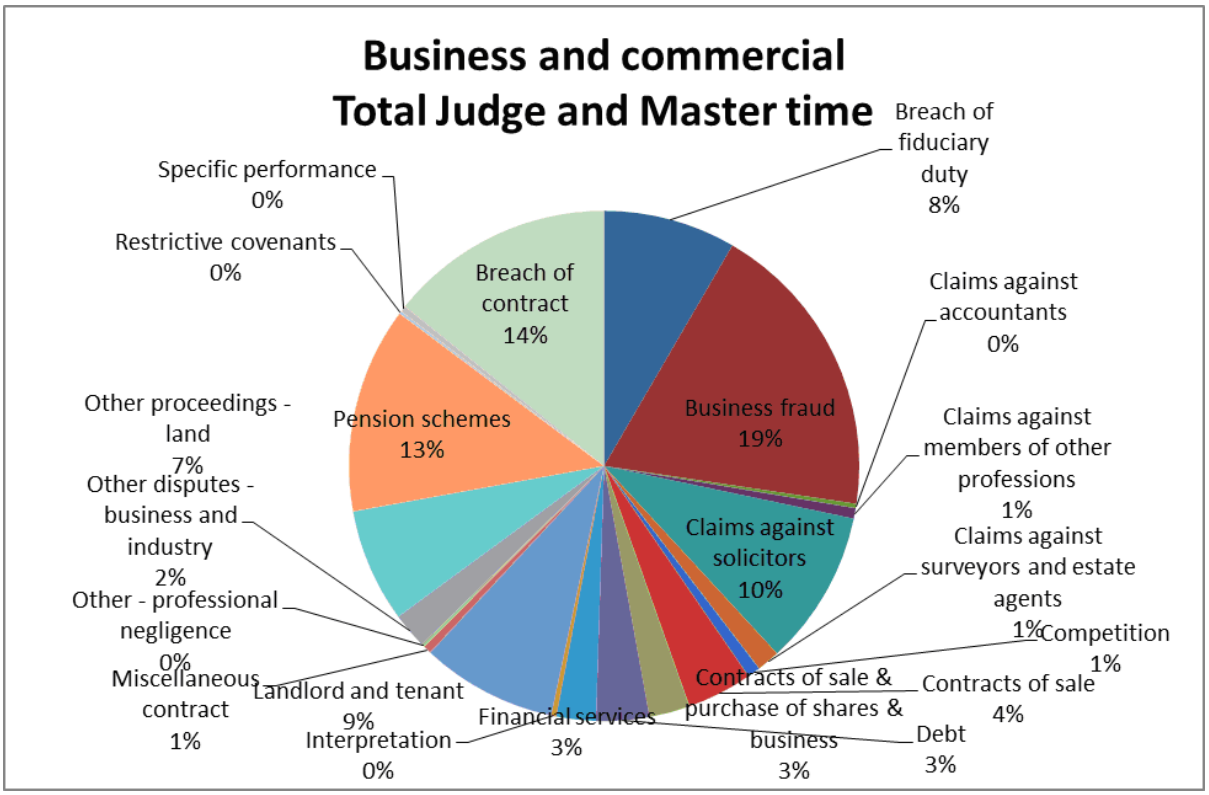
- Judgment writing in all 3 of the above charts is almost certainly understated, for the reasons given in the Introduction to Part 2.

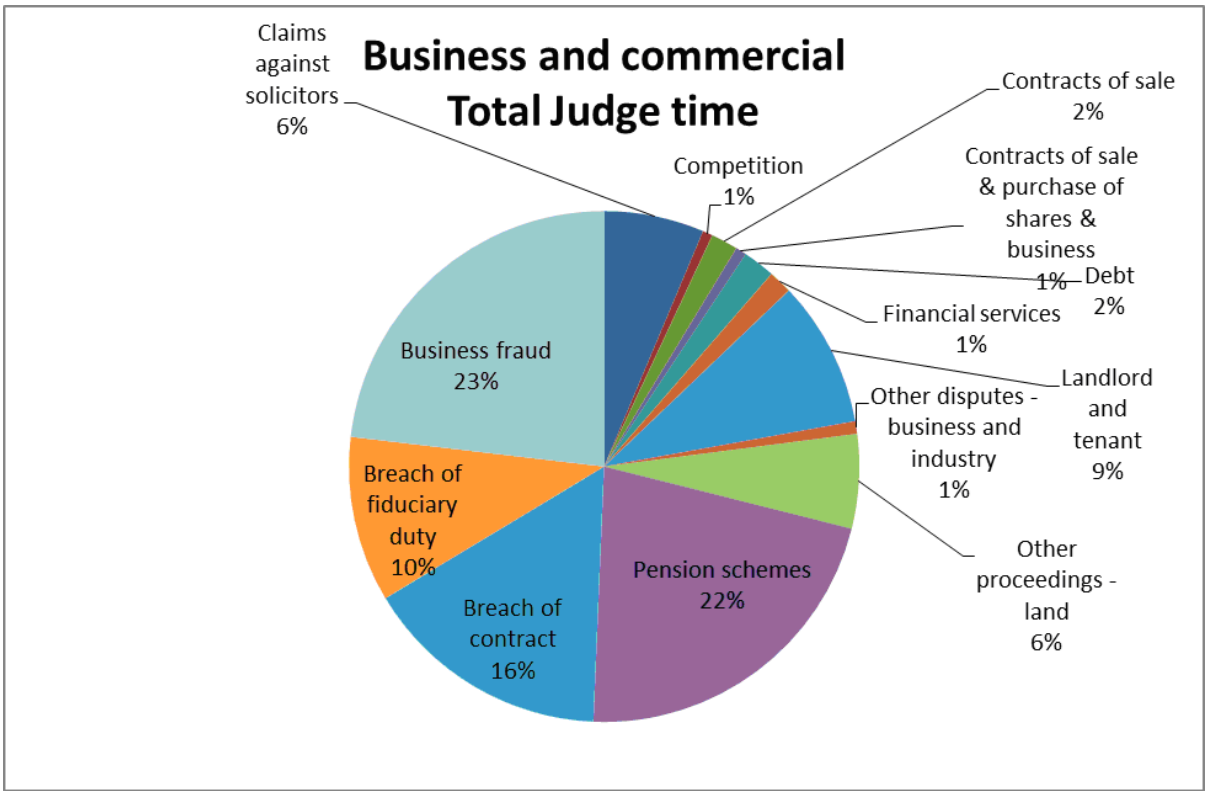
- So is Registrars' box work, probably because a large part of it consists of multiple cases taking less than 5 minutes each, none of which were required to be made the subject of form filling.

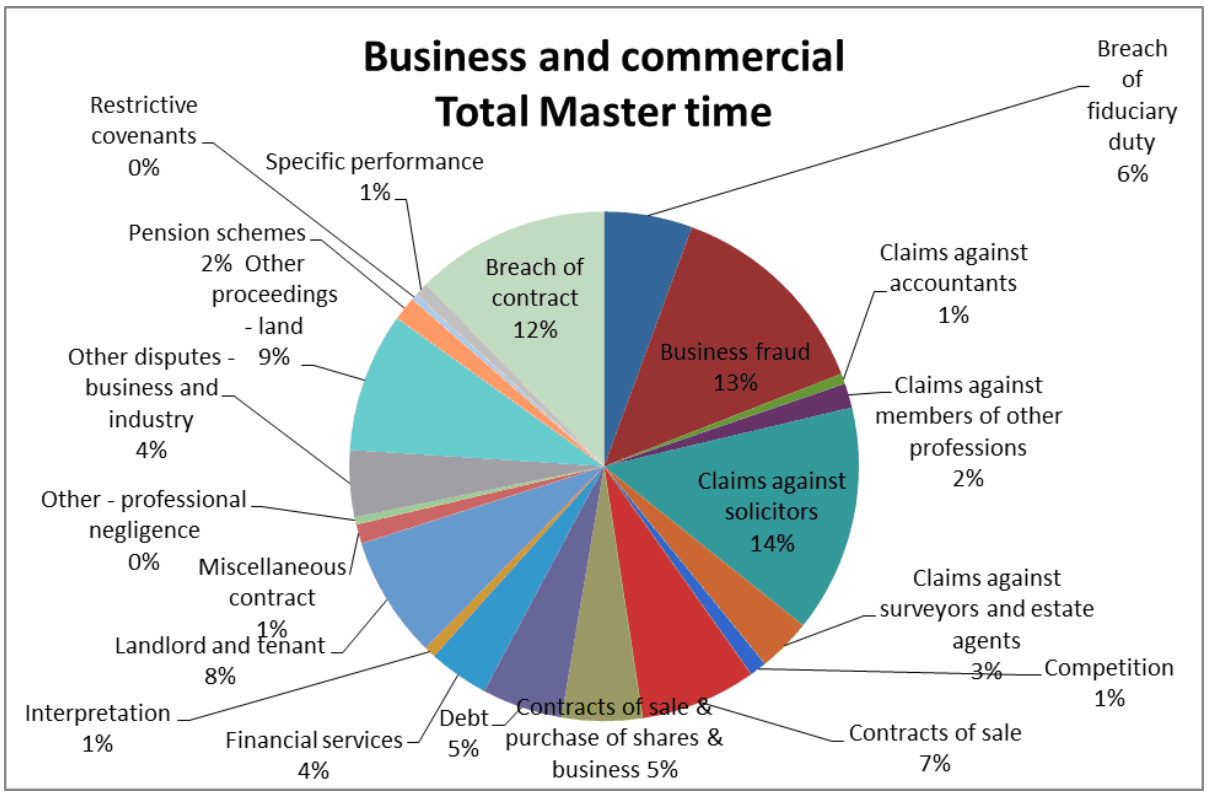
Analysis Of Each Main Field

1. Business & Commercial

Time Spent On Each Part Of The Work




Business and commercial
Total Judge time
Claims against solicitors 6%
Competition 1%
Contracts of sale 2%
Contracts of sale & purchase of shares & business 1%
Debt 2%
Financial services 1%
Landlord and tenant 9%
Other disputes - business and industry 1%
Other proceedings - land 6%
Pension schemes 22%
Breach of contract 16%
Breach of fiduciary duty 10%
Business fraud 23%



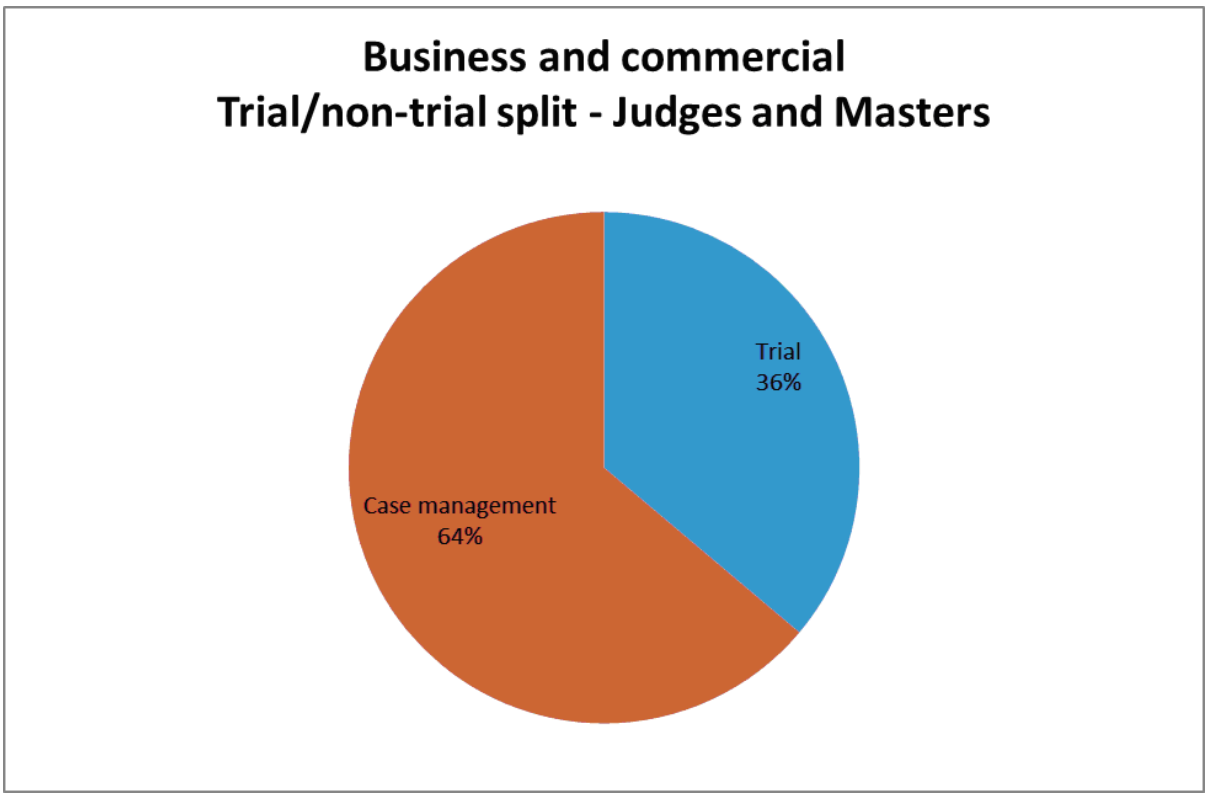
Trial non-trial split

Notes:

- In every chart where the trial and non-trial time is split, the sector described as 'case management' includes everything other than trial. Thus it includes every interim application, whether for an injunction, summary judgment or strike-out, not merely CMCs or PTRs. Some, such as summary judgment, can final in their effect.

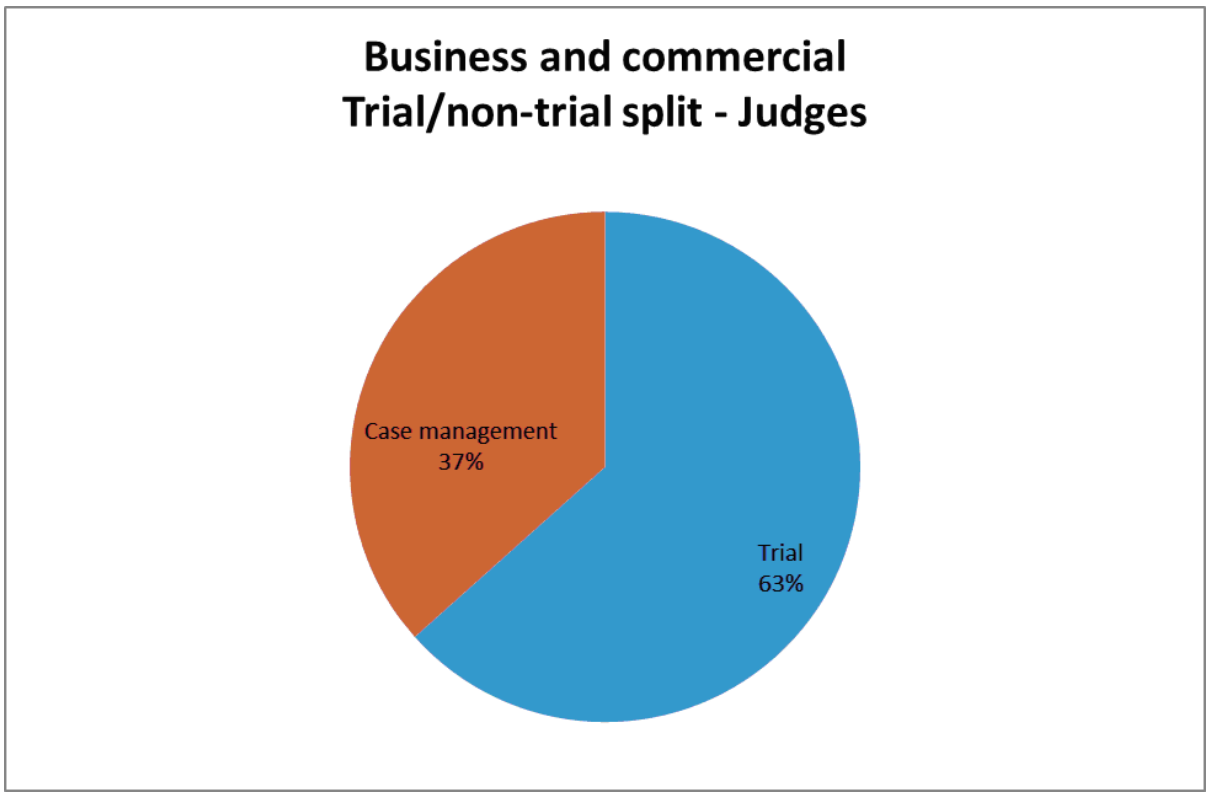
- One reason for this loose grouping of 'non-trial' work is that case management is often dealt with during or at the end of an application for an injunction or unsuccessful summary judgment application. It is not easy, and has proved impossible in the time available, to separate out pure case management into a watertight category.

- It is important to note that these statistics do not reflect a 'post Jackson' picture of the relationship between case management and trial. This is because the period chosen preceded the time when the Jackson reforms began to have a measurable impact, in terms of increasing the case management time per case, as they undoubtedly will. Monitoring of that effect, from October to December 2013, is now being carried out by the Masters, but the results are not available in time for publication of this report.



Note:

- This chart may appear surprising, but it bears out the concern in paragraphs 1.112 – 113 of the report that savings in trial times alone will be insufficient to balance the increases in case management time flowing from the implementation of the Jackson reforms.

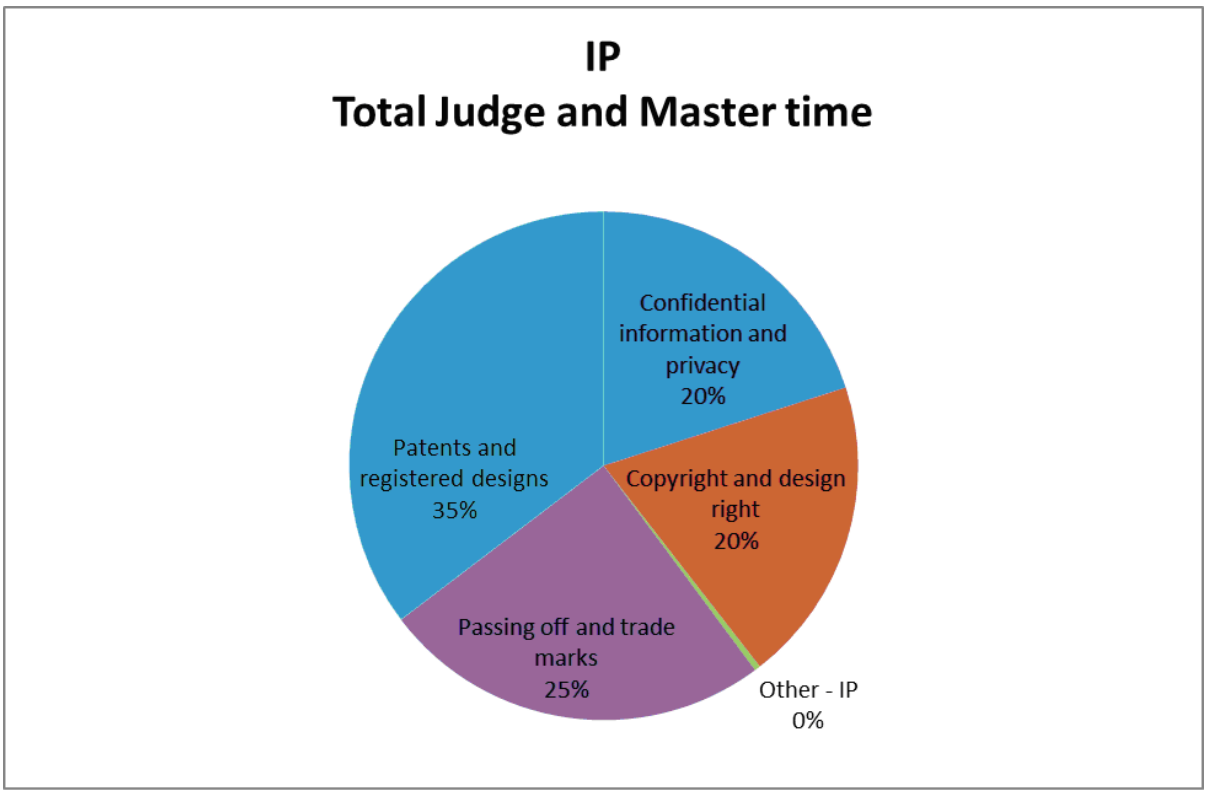


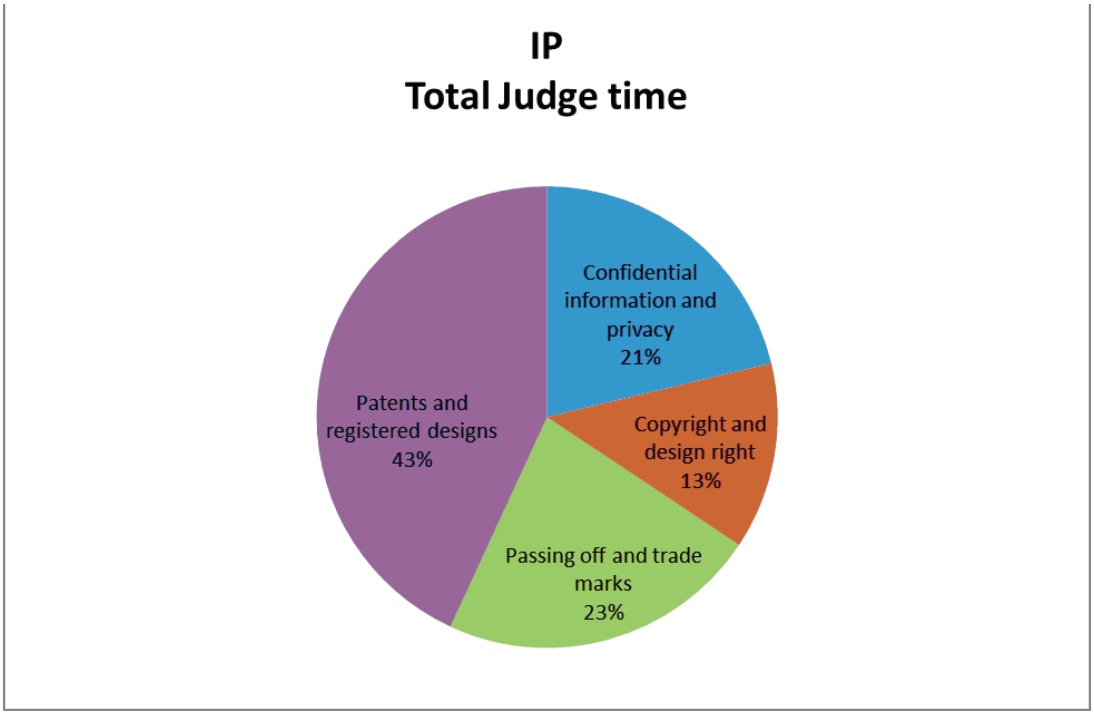
Note:

- For a Division in which most case management is done by Masters, the size of the case management burden affecting Judges may appear to be large. But it includes all interlocutory work, for the reasons set out above.

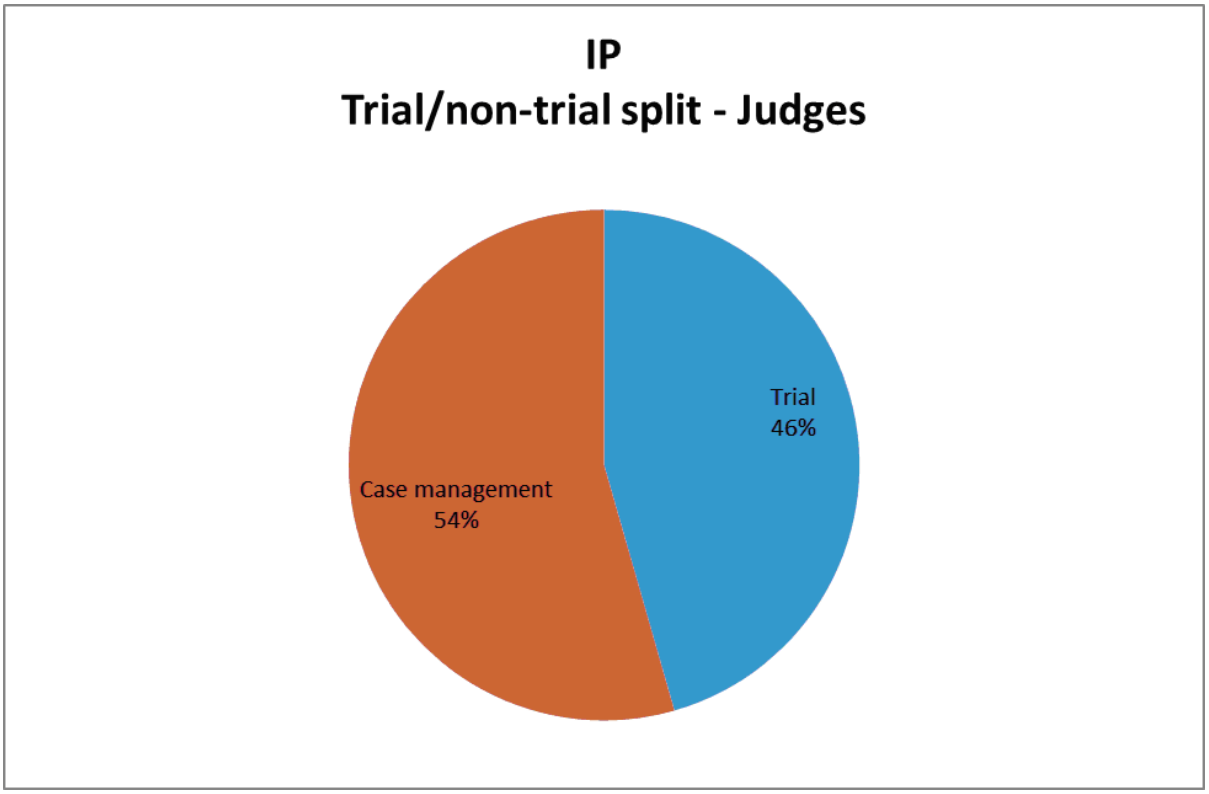
2. Intellectual Property

Time Spent On Each Part Of The Work





Trial non-trial split

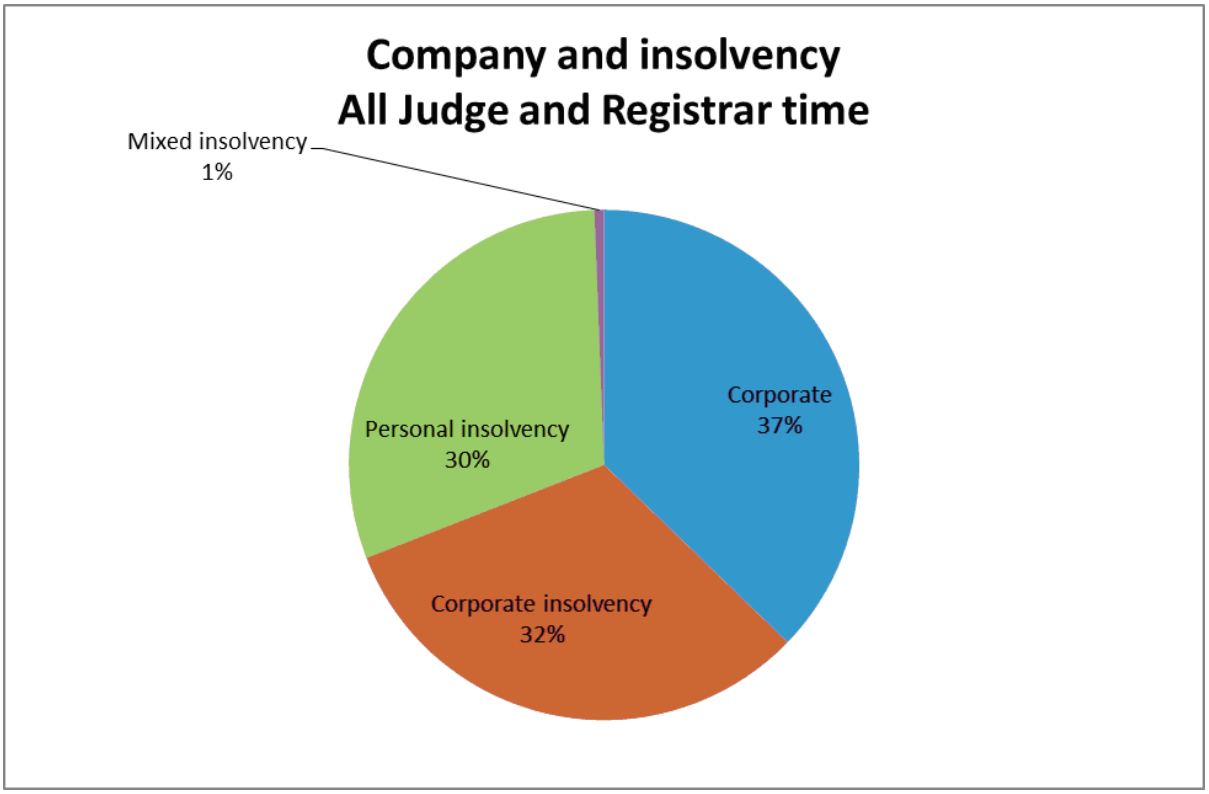


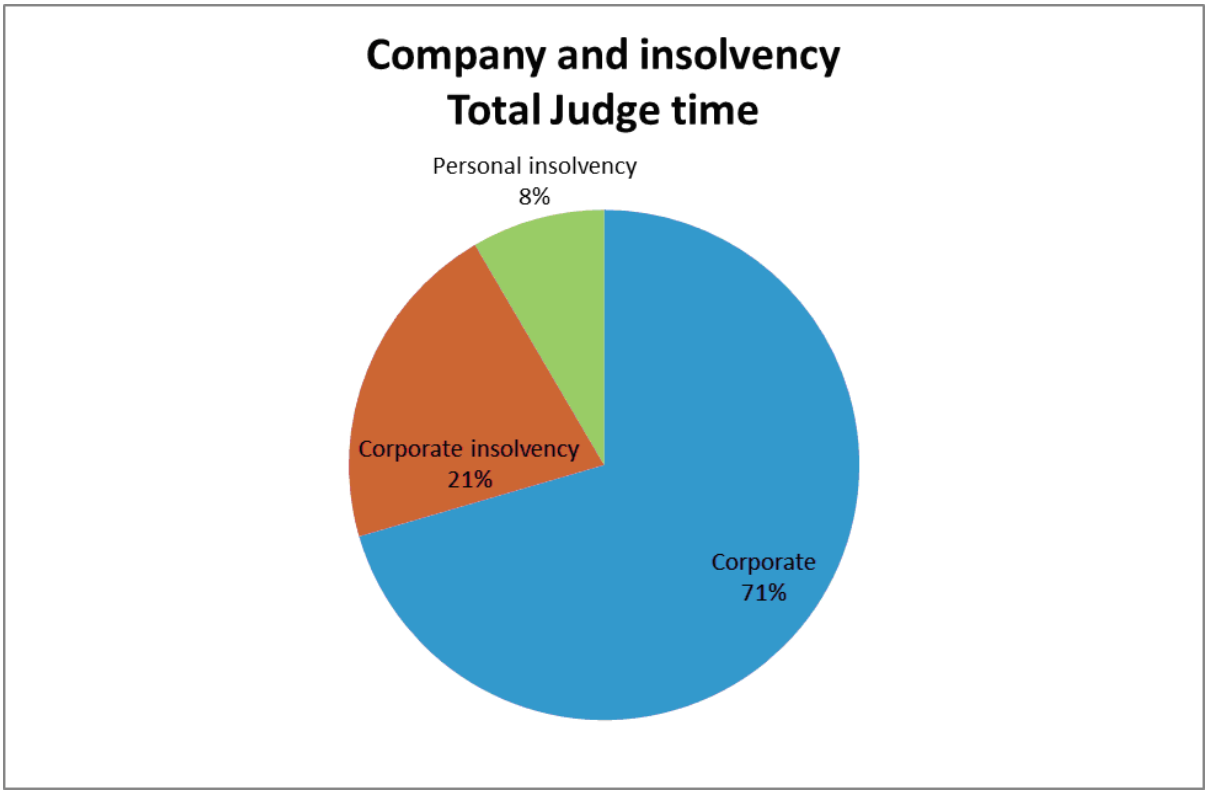
3. Company And Insolvency

Note:

- All the charts under this heading (that have Registrar time included) understate that part of the bankruptcy and insolvency workload which consists of the routine handling of un-opposed bankruptcy and winding up petitions. This is because most of it takes less than 5 minutes per case, and is therefore not the subject of form filling.

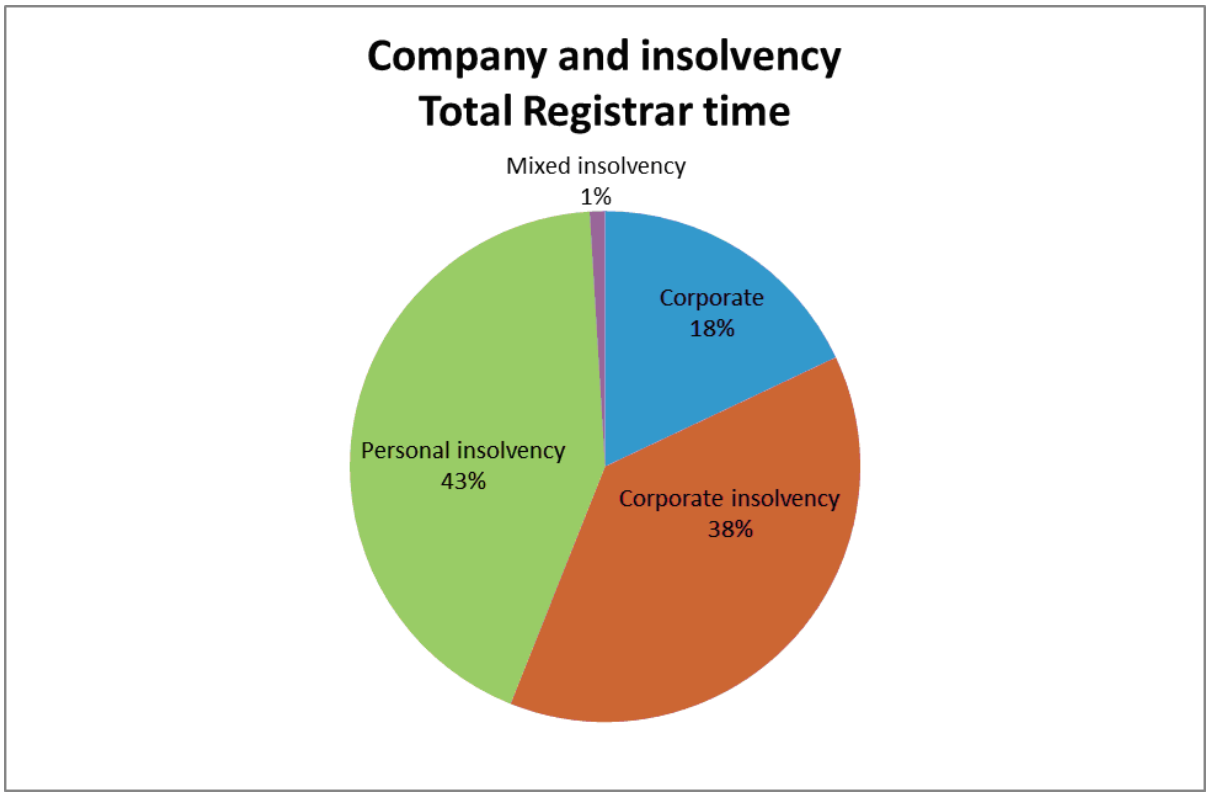
Time spent on each part of the work



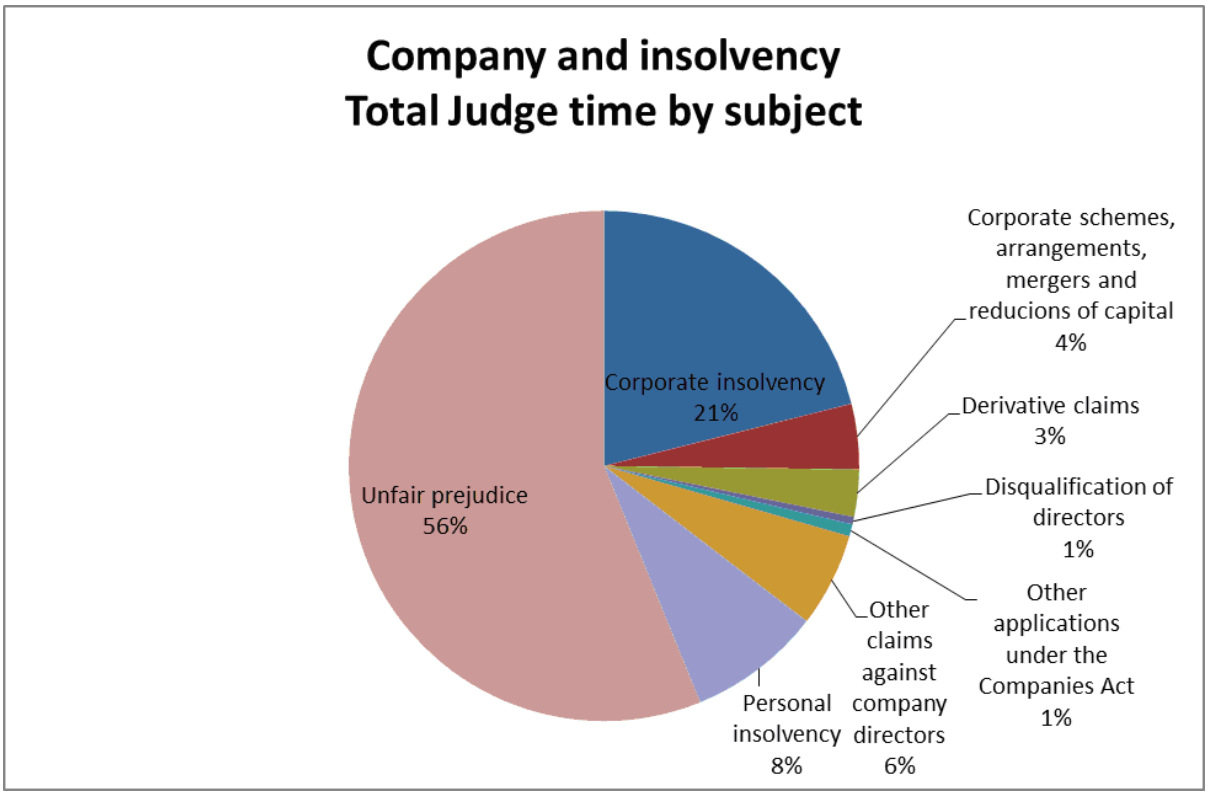


Note:

- The very high level of Corporate, as against Corporate Insolvency in the above chart is probably the one-off result of there being two large unfair prejudice trials being heard during the period under review, and no correspondingly large insolvency cases: see the chart on total Judge time by subject below, where the segment on unfair prejudice is (although correct) abnormally large.



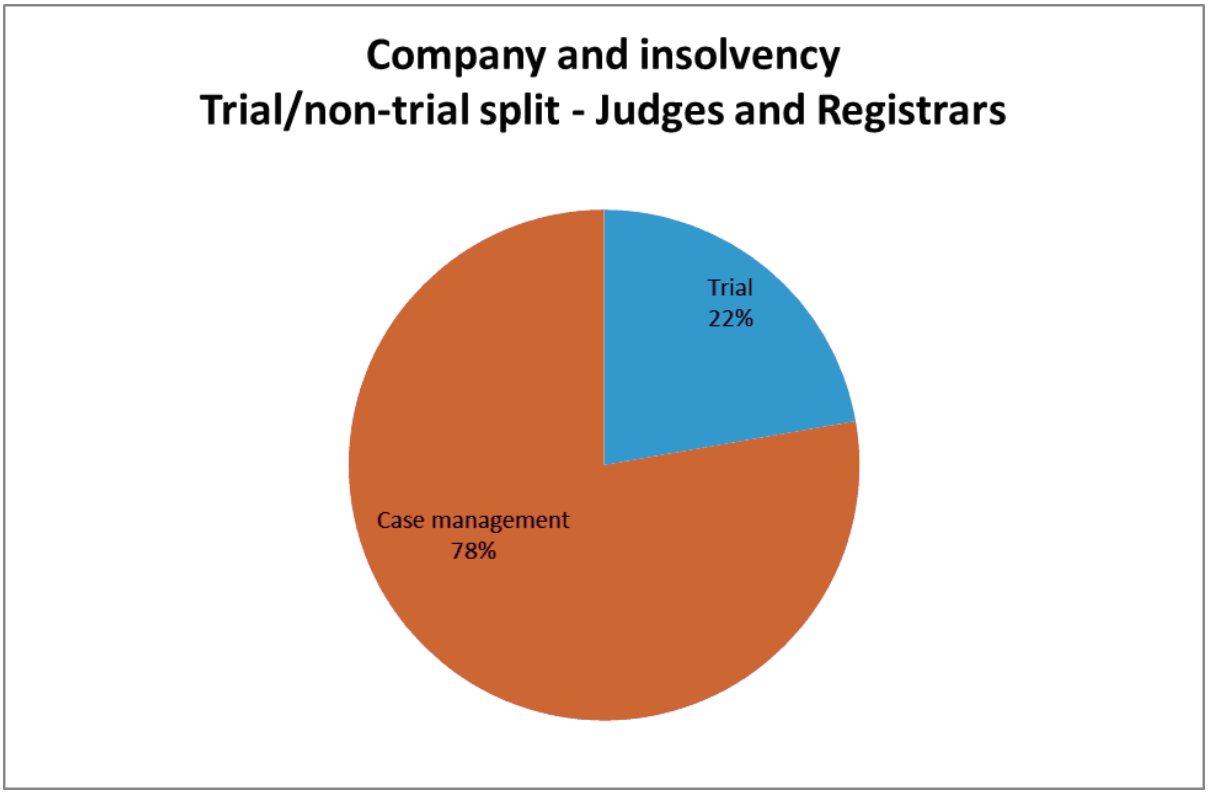
Company work subdivided

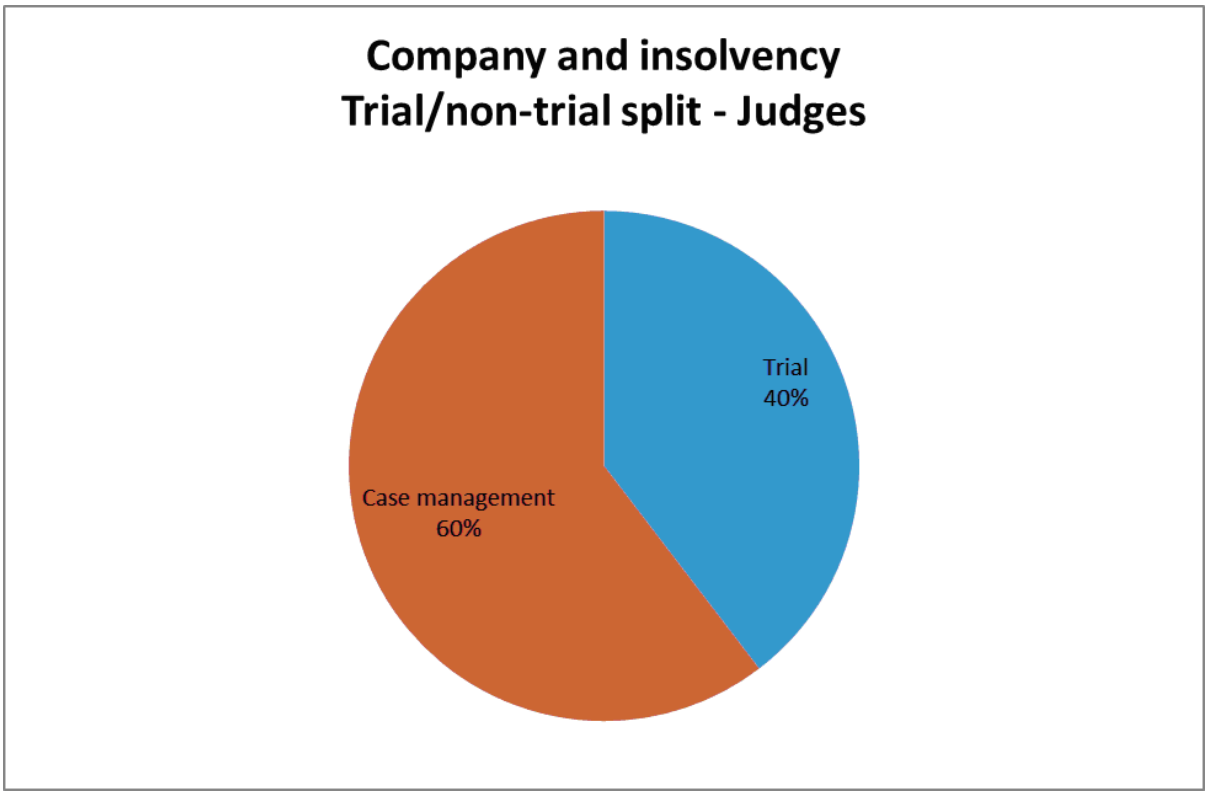


Note:

- The segment on unfair prejudice is abnormally large. Although correct, it reflects the fact that 2 large trials of this type occurred during the period under review.

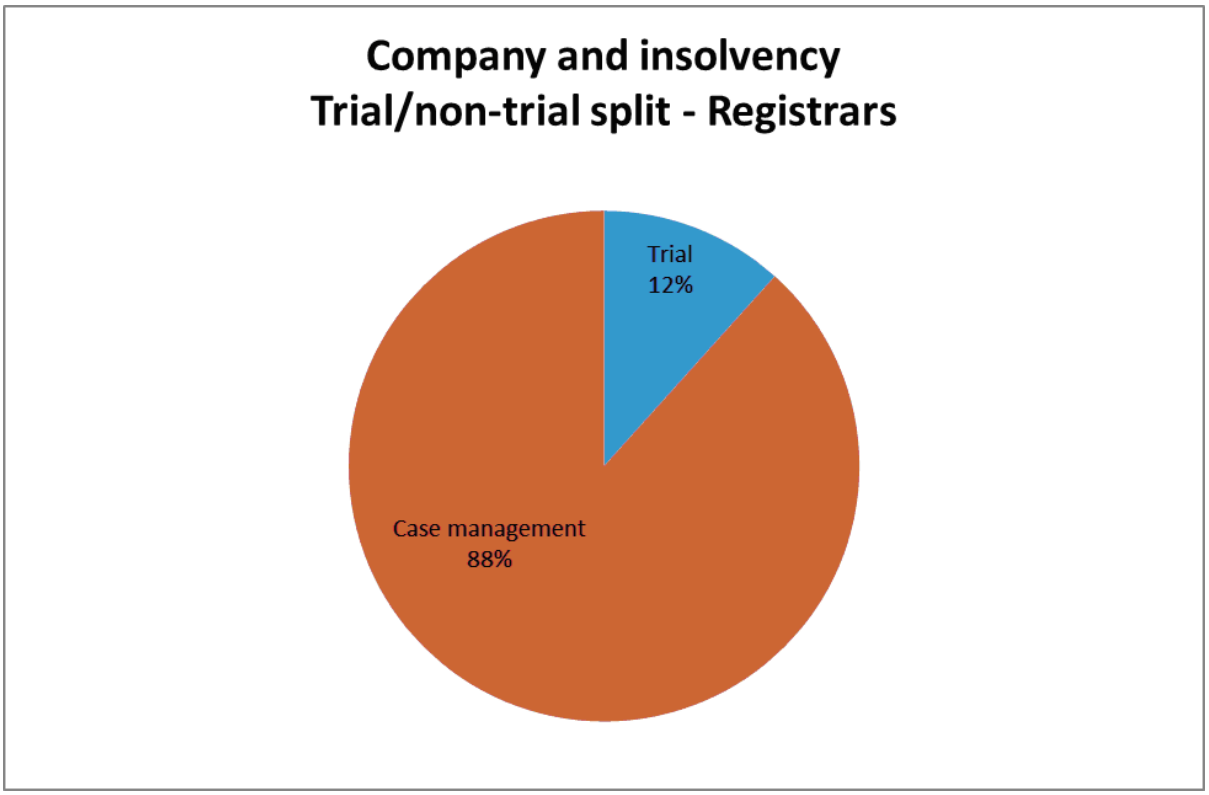
Trial non-trial split





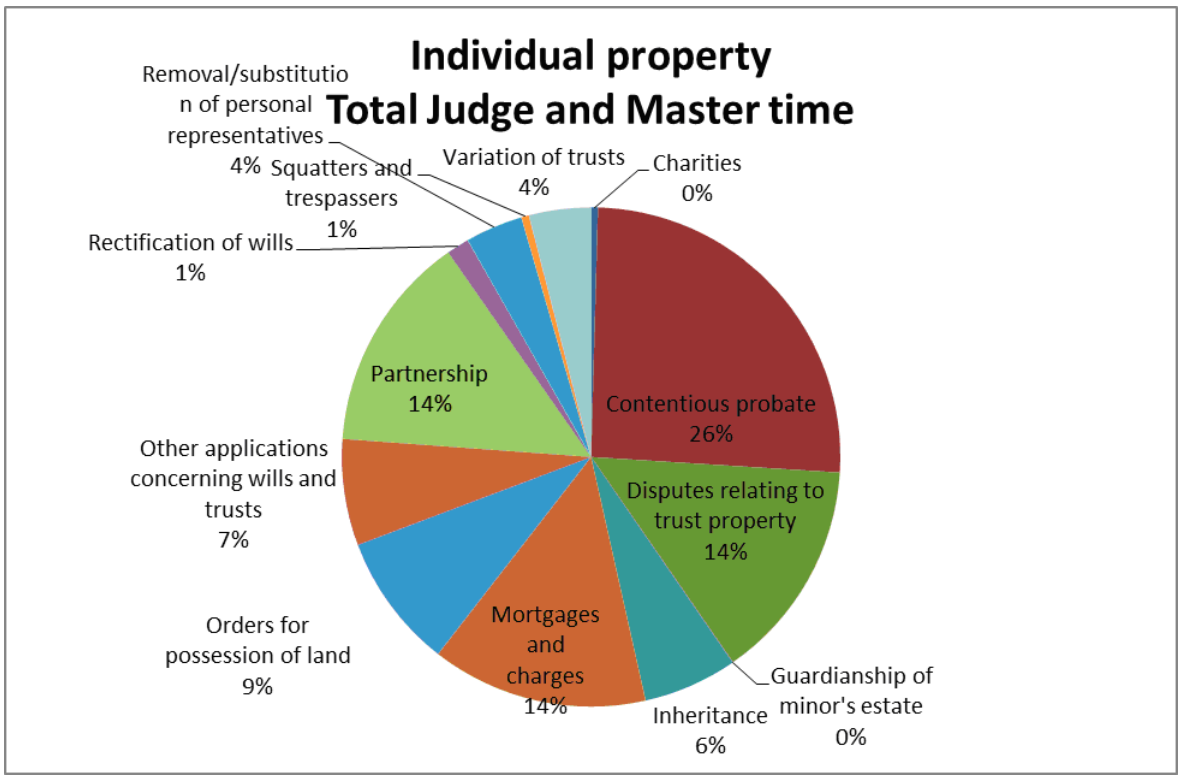
Note:

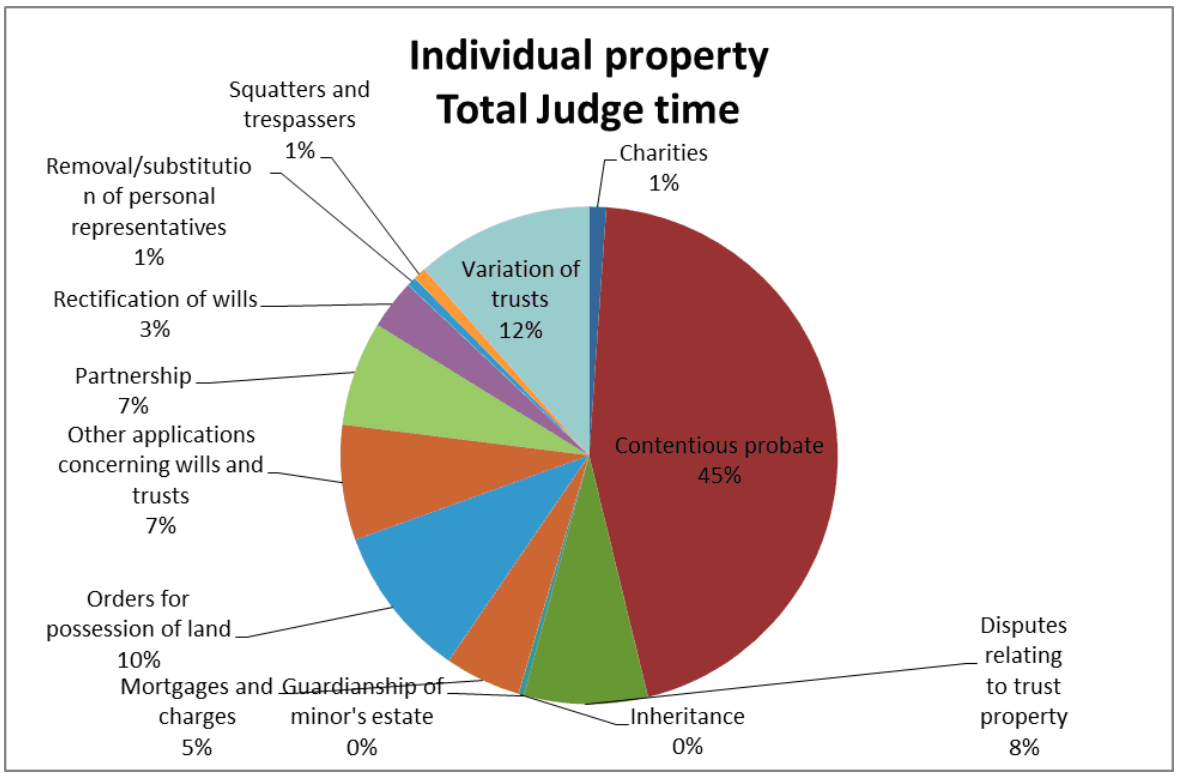
- This suggests an abnormally large amount of case management of company and insolvency work by judges. A significant number of the largest insolvency cases are case managed by Judges, but I am fairly sure that the 3 month period under review is atypical in this respect.



4. Individual Property

Time spent on each part of the work

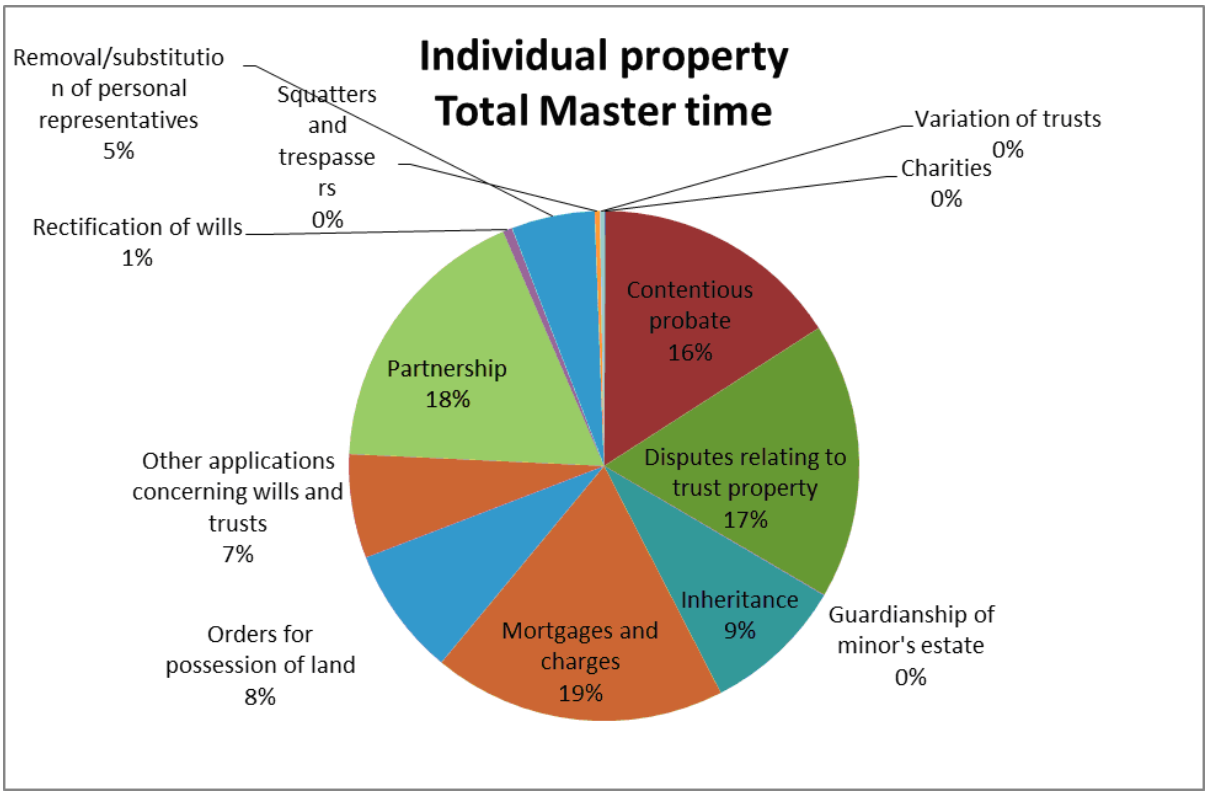




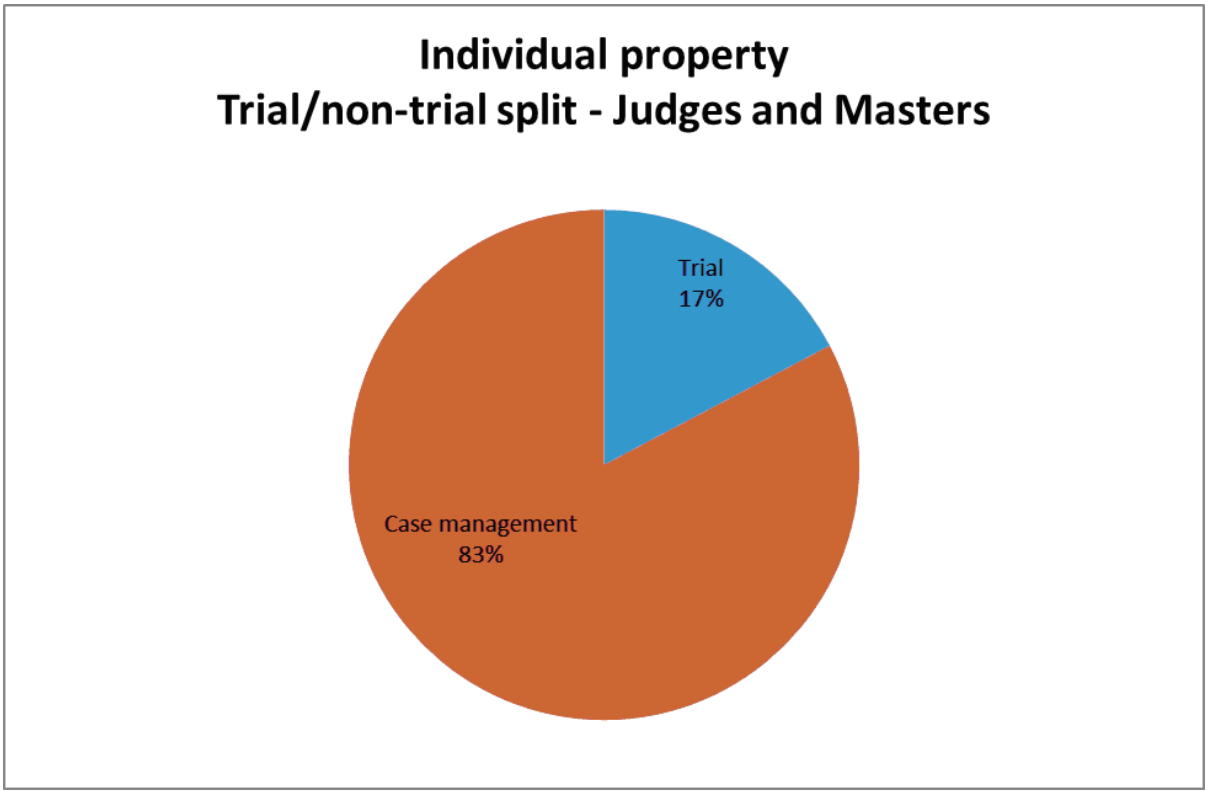
Notes:

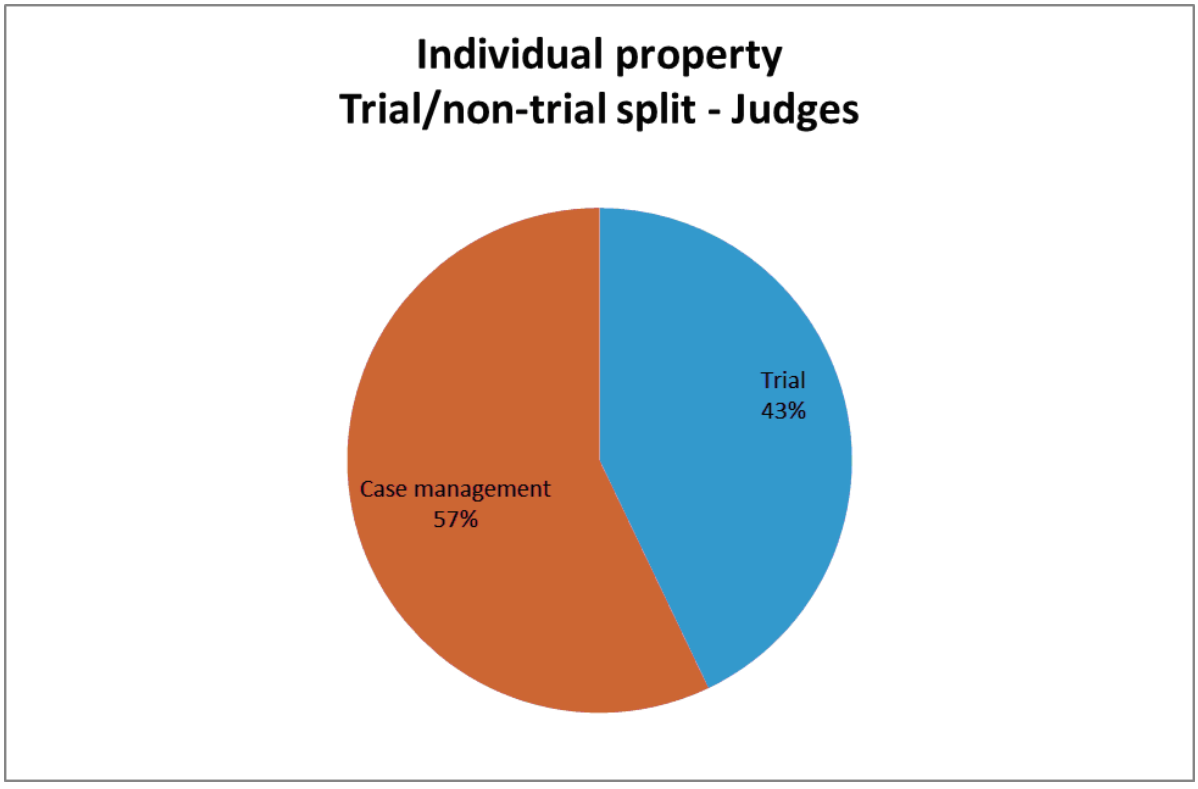
- The trial time for Contentious Probate cases is uncomfortably large, but probably not atypical. The proposals about Financial Dispute Resolution in chapter 5 of the report are designed to bring this figure down significantly.

- Nonetheless, as a later chart shows, trial time is a small overall proportion of the workload on this area of work.



Trial non-trial split





Note:

- Again, this suggests a surprisingly high level of case management (i.e. non-trial) work by Judges. At present it appears to be because there was an unusually small number of trials of this type of work during the period studied.

Regional Trial Centres

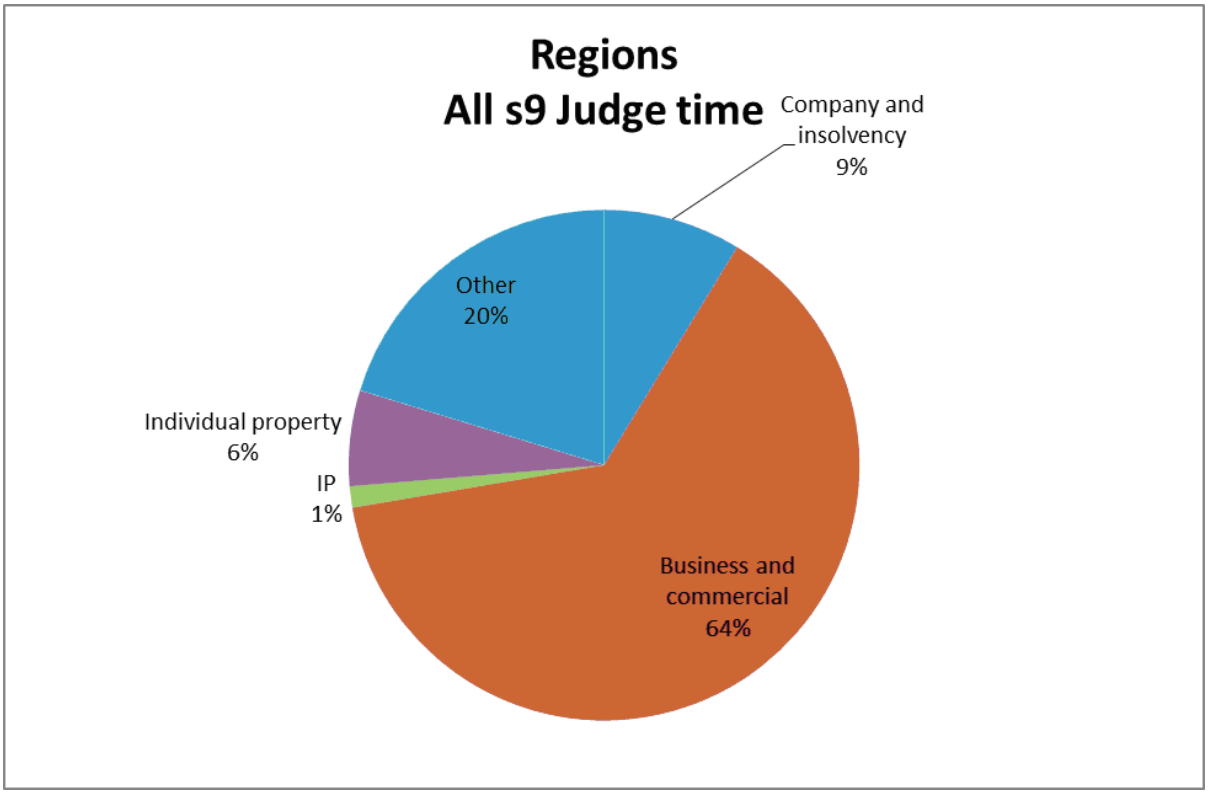
Notes:

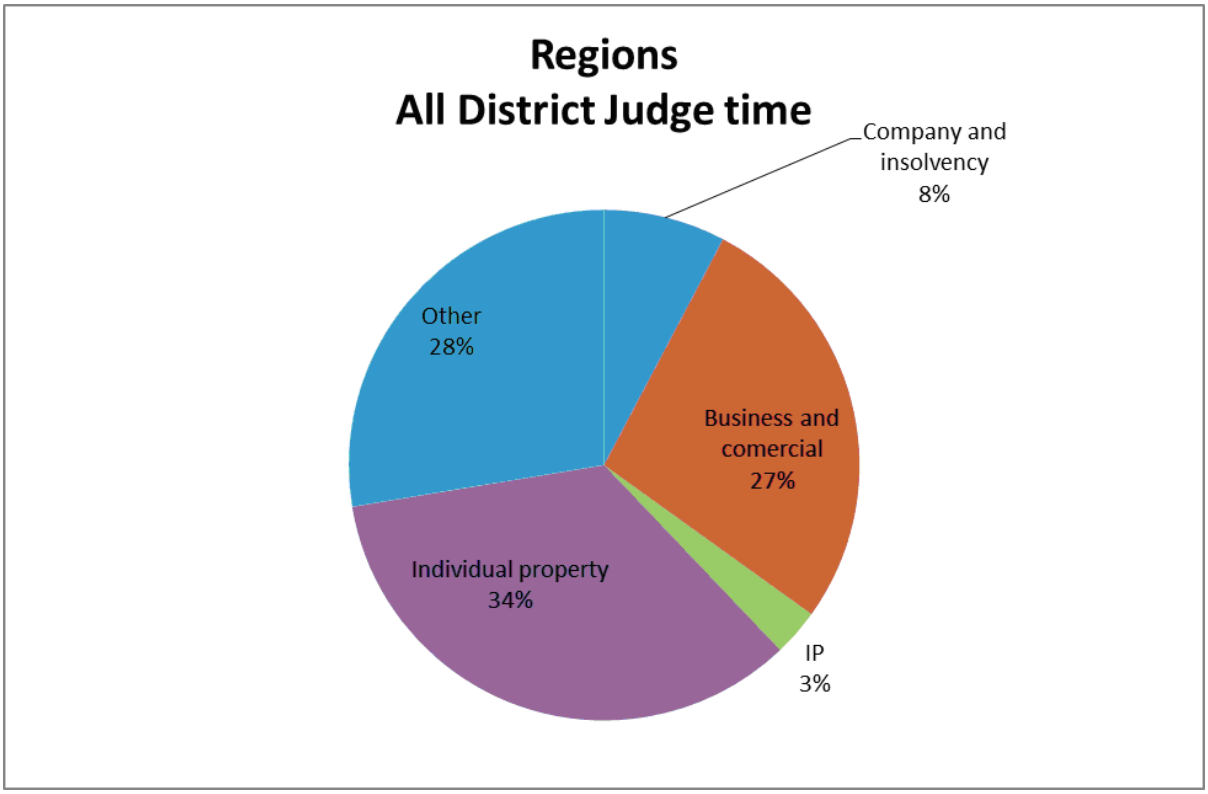
- Manchester and Leeds were asked to do the form filling, to provide sample, rather than comprehensive, statistics. They are the second and third largest trial centres, by workload and judicial resources.

- Due to the small number of forms completed, the results from both centres have been combined.

- Nonetheless the sample size does not permit useful interrogation at the levels of detail used in relation to London. The charts below set out the results of as much useful interrogation as has been possible in the time available thus far.

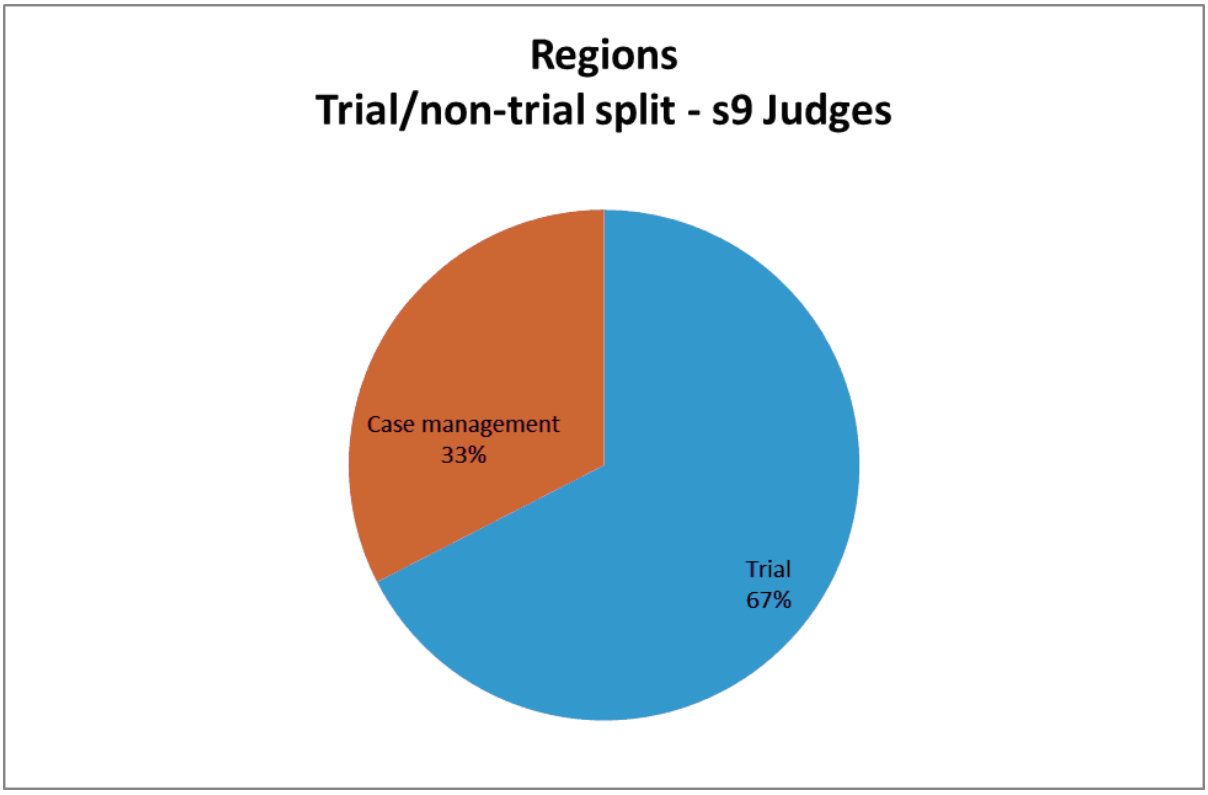
Time spent on the four main areas of work described in the report

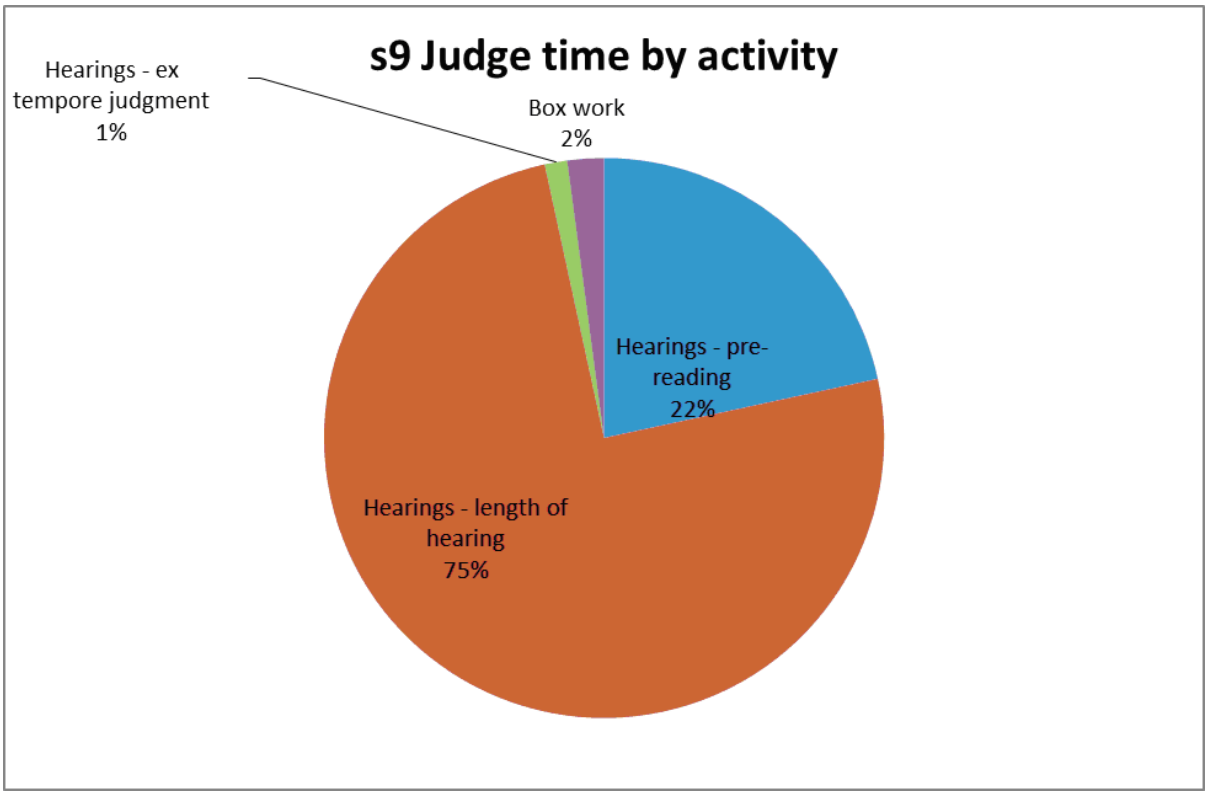




Notes:

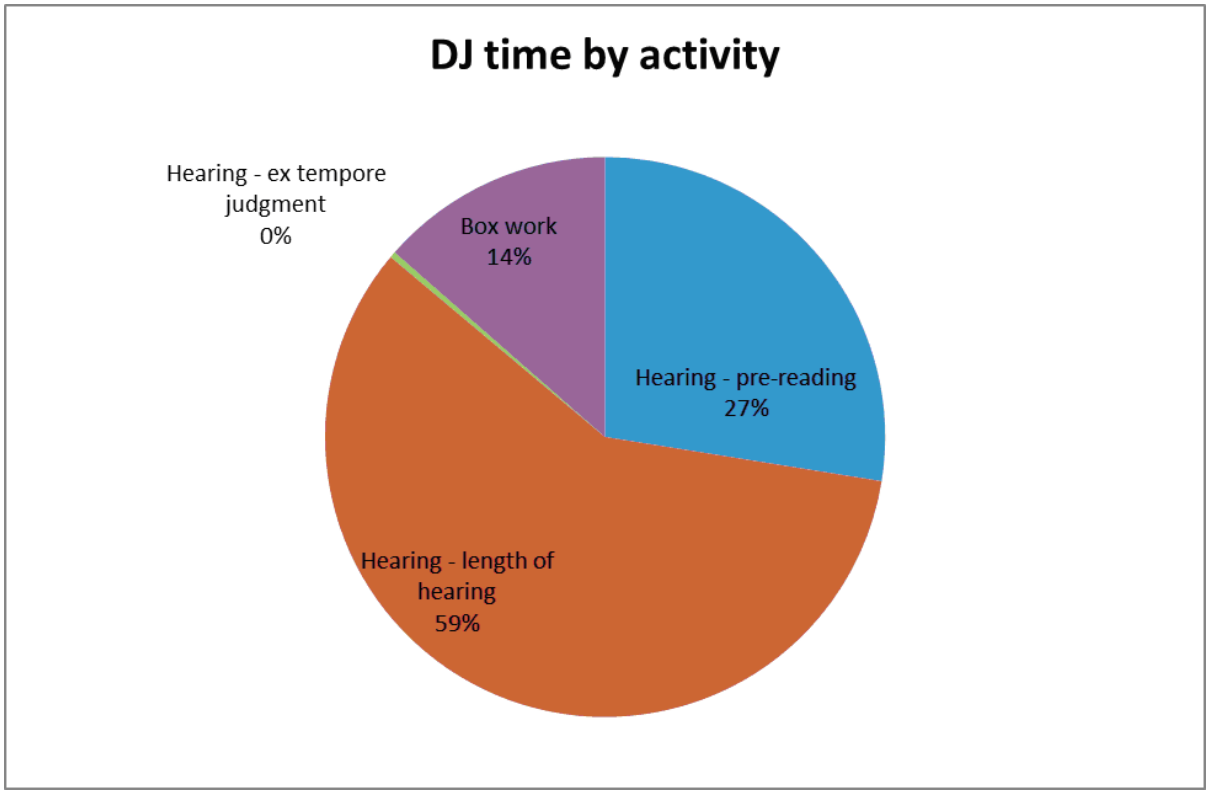
- Both charts show a surprisingly high proportion of 'other' work. The reason for this is likely to require discussion with the judges who filled in the forms. That has not been possible in the time available.
- The high level of Individual property work done by the District Judges is reflective of the work pattern in the regions generally.
- As with the Registrars in London, a significant part of the insolvency work will have escaped the exercise, because of the amount of pieces of work on bankruptcy and winding up which take less than 5 minutes.





Note:

- Judgment writing time has been excluded. This is because the returned forms from Manchester and Leeds contain so little about reserved judgments that inclusion would be unreliable.



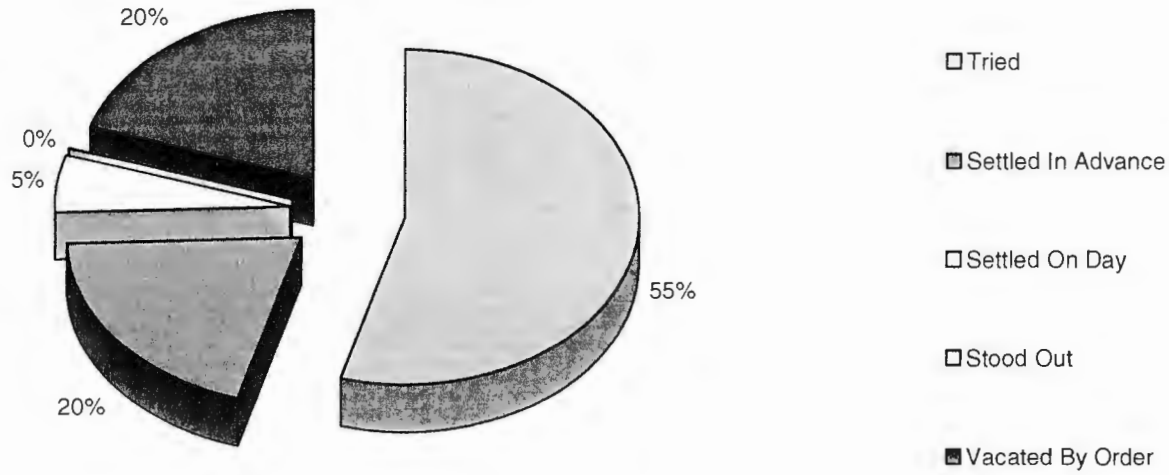
Note:

- Again, this chart understates the amount of District Judge box work, because all less than 5 minute pieces of work are excluded.

Chancery new issue

Year	volume
2009	285
2010	268
2011	354
2012	333
2013 (Jan – Apr)	108

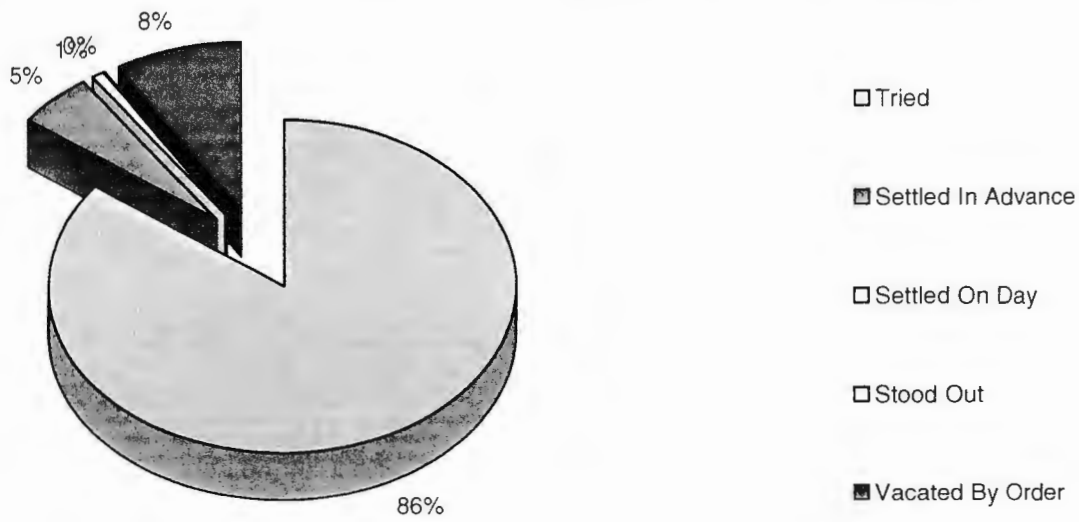
Manchester District Registry Chancery Division - Listing Statistics (Chancery)
Trials disposed of between 01 May 2012 and 30 April 2013



Date	Listed	Tried	Settled In Advance	Settled On Day	Stood Out	Vacated By Order
Totals	**110**	**60**	**22**	**6**	**0**	**22**
May 2012	7	3	1	0	0	3
June 2012	13	9	1	0	0	3
July 2012	6	3	1	1	0	1
August 2012	6	4	1	0	0	1
September 2012	7	6	0	0	0	1
October 2012	15	11	1	1	0	2
November 2012	16	8	3	0	0	5
December 2012	3	2	0	0	0	1
January 2013	9	3	3	2	0	1
February 2013	8	2	3	1	0	2
March 2013	8	6	2	0	0	0
April 2013	12	3	6	1	0	2

Manchester District Registry Chancery Division - Listing Statistics (Chancery)

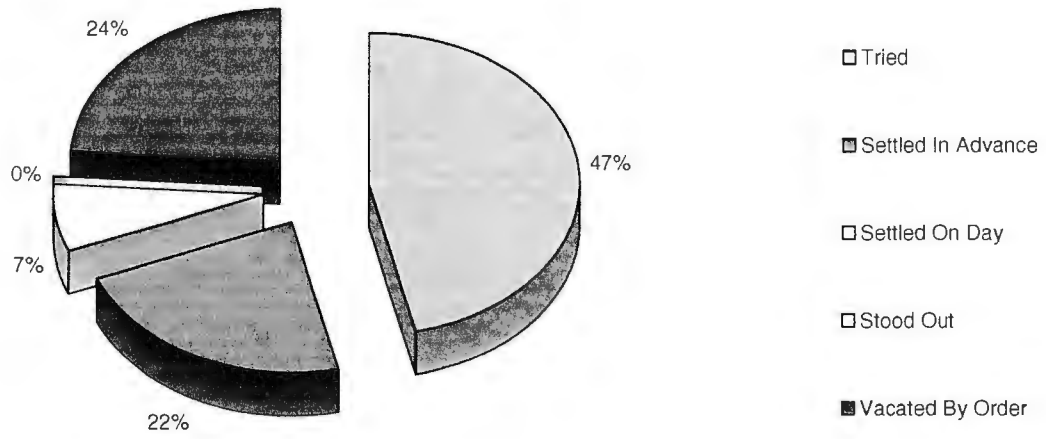
All Hearings disposed of between 01 May 2012 and 30 April 2013



Date	Listed	Tried	Settled In Advance	Settled On Day	Stood Out	Vacated By Order
Totals	**813**	**693**	**43**	**7**	**1**	**69**
May 2012	66	51	3	0	0	12
June 2012	66	54	4	0	0	8
July 2012	58	50	3	1	0	4
August 2012	64	59	1	0	0	4
September 2012	53	47	1	0	0	5
October 2012	79	69	1	1	0	8
November 2012	82	69	5	0	0	8
December 2012	51	49	0	0	0	2
January 2013	73	57	6	3	1	6
February 2013	78	66	6	1	0	5
March 2013	56	49	5	0	0	2
April 2013	87	73	8	1	0	5

Manchester District Registry Chancery Division - Listing Statistics (Chancery)

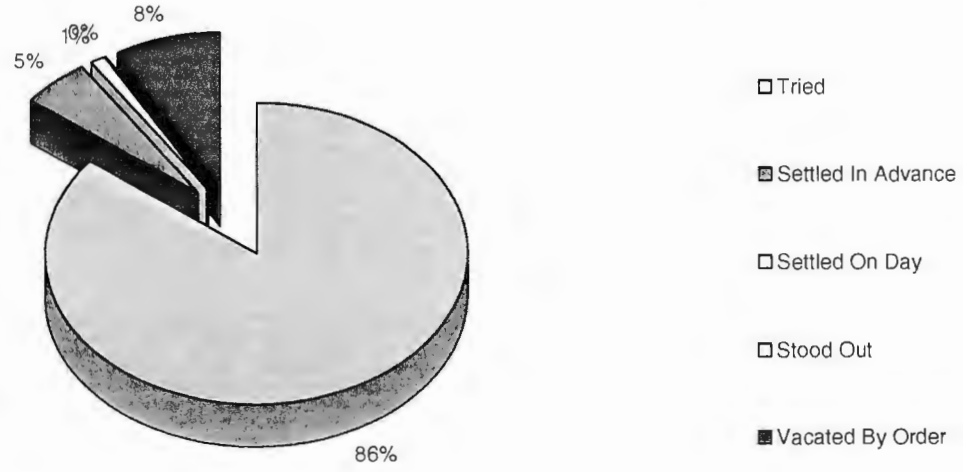
Trials disposed of between 01 May 2011 and 30 April 2012



Date	Listed	Tried	Settled In Advance	Settled On Day	Stood Out	Vacated By Order
Totals	**138**	**64**	**31**	**10**	**0**	**33**
May 2011	16	11	1	1	0	3
June 2011	15	9	4	0	0	2
July 2011	6	5	0	1	0	0
August 2011	10	3	1	2	0	4
September 2011	7	4	3	0	0	0
October 2011	16	6	4	2	0	4
November 2011	9	4	3	0	0	2
December 2011	11	4	4	0	0	3
January 2012	13	6	2	2	0	3
February 2012	17	6	5	0	0	6
March 2012	6	3	1	0	0	2
April 2012	12	3	3	2	0	4

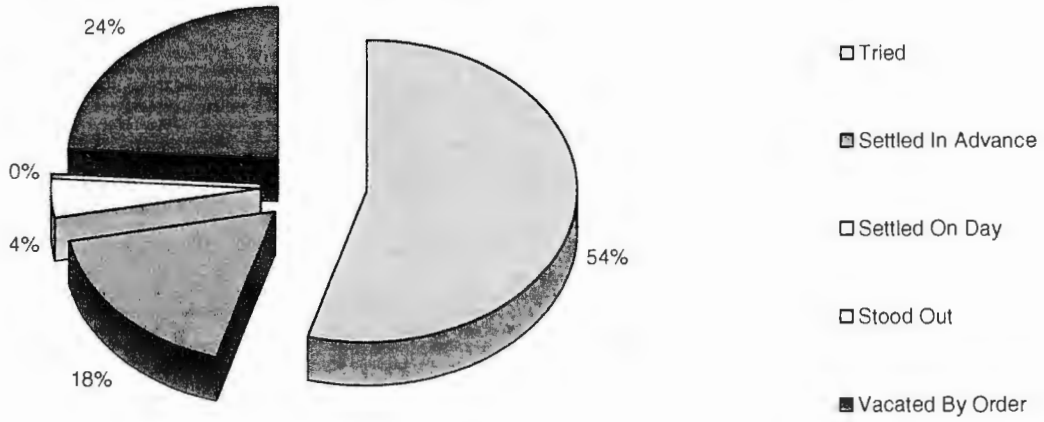
Manchester District Registry Chancery Division - Listing Statistics (Chancery)

All Hearings disposed of between 01 May 2011 and 30 April 2012



Date	Listed	Tried	Settled In Advance	Settled On Day	Stood Out	Vacated By Order
Totals	**846**	**723**	**45**	**10**	**0**	**68**
May 2011	78	67	2	1	0	8
June 2011	77	70	4	0	0	3
July 2011	79	72	2	1	0	4
August 2011	70	57	2	2	0	9
September 2011	85	78	4	0	0	3
October 2011	88	70	6	2	0	10
November 2011	68	59	3	0	0	6
December 2011	56	48	4	0	0	4
January 2012	53	42	5	2	0	4
February 2012	78	65	6	0	0	7
March 2012	75	68	3	0	0	4
April 2012	39	27	4	2	0	6

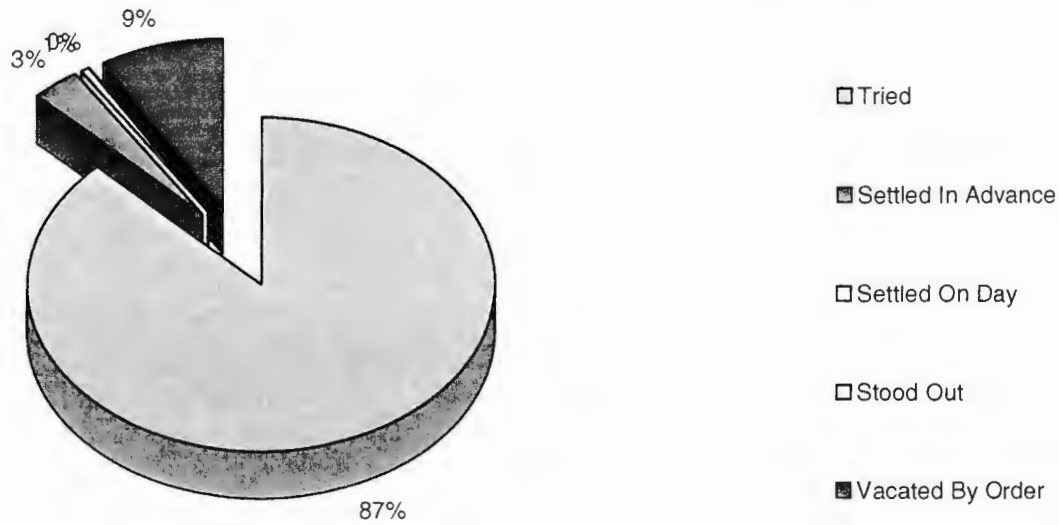
Manchester District Registry Chancery Division - Listing Statistics (Chancery)
Trials disposed of between 01 May 2010 and 30 April 2011



Date	Listed	Tried	Settled In Advance	Settled On Day	Stood Out	Vacated By Order
Totals	**125**	**68**	**22**	**5**	**0**	**30**
May 2010	19	10	1	1	0	7
June 2010	10	7	1	1	0	1
July 2010	4	2	0	1	0	1
August 2010	5	3	1	0	0	1
September 2010	11	8	1	1	0	1
October 2010	10	8	2	0	0	0
November 2010	12	5	2	1	0	4
December 2010	6	3	1	0	0	2
January 2011	13	7	4	0	0	2
February 2011	15	8	2	0	0	5
March 2011	11	3	4	0	0	4
April 2011	9	4	3	0	0	2

Manchester District Registry Chancery Division - Listing Statistics (Chancery)

All Hearings disposed of between 01 May 2010 and 30 April 2011

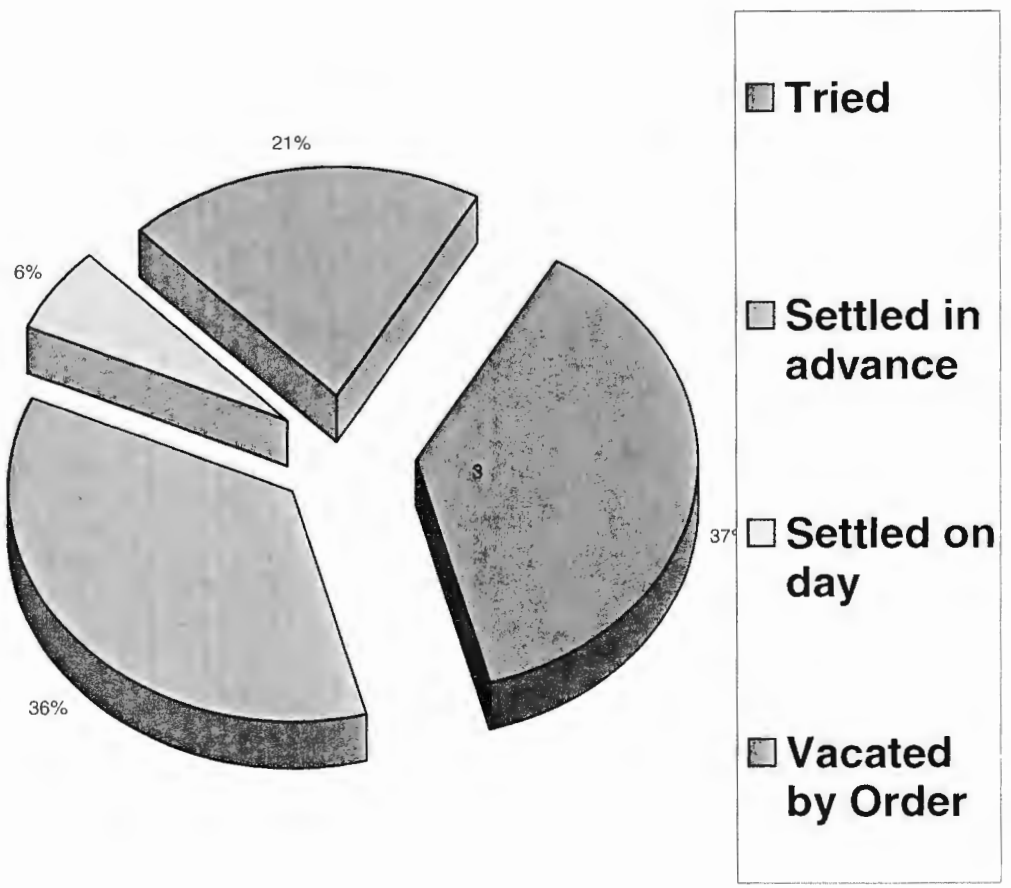


Date	Listed	Tried	Settled In Advance	Settled On Day	Stood Out	Vacated By Order
Totals	**949**	**830**	**32**	**5**	**1**	**81**
May 2010	88	69	3	1	0	15
June 2010	79	72	1	1	0	5
July 2010	68	62	0	1	0	5
August 2010	65	61	1	0	1	2
September 2010	84	76	2	1	0	5
October 2010	92	84	2	0	0	6
November 2010	85	72	5	1	0	7
December 2010	80	70	1	0	0	9
January 2011	56	49	4	0	0	3
February 2011	86	77	2	0	0	7
March 2011	90	75	7	0	0	8
April 2011	76	63	4	0	0	9

Manchester District Registry Chancery Division - DJ Trials
May 2012 - April 2013

Trials disposed of during this period

Month	Trials Listed	Tried	Settled in advance	Settled on day	Vacated by Order
May	11	4	4	2	1
June	8	2	3	0	3
July	10	3	4	2	1
August	8	0	6	2	0
September	7	1	5	0	1
October	15	7	5	0	3
November	9	2	3	0	4
December	7	4	3	0	0
January	12	4	4	0	4
February	11	6	0	0	5
March	5	1	3	0	1
April	9	8	0	1	0
Totals	112	42	40	7	23



Chancery waiting times for last 12 months 2012 - 2013

Waiting times for Chancery cases as at 13 May 2013

Time estimate	S9 Judges	Chancery DJ
30 minutes	Immediately	1 week
1 hour	immediately	1 week
1 day	5 weeks	7 weeks
2 days	6 weeks	8 weeks
3 days	9 weeks	9 weeks
5 days	14 weeks	9 weeks
6 days +	14 weeks	------

Waiting times for Chancery cases as at 24 January 2013

Time estimate	S9 Judges	Chancery DJ
30 minutes	Immediately	1 week
1 hour	immediately	8 week
1 day	4 weeks	3 weeks
2 days	4 weeks	3 weeks
3 days	5 weeks	5 weeks
5 days	11 weeks	11 weeks
6 days +	11 weeks	------

Waiting times for Chancery cases as at 8th October 2012

Time estimate	S9 Judges	Chancery DJ
30 minutes	Immediately	1 week
1 hour	immediately	1 week
1 day	4 weeks	2 weeks
2 days	4 weeks	4 weeks
3 days	5 weeks	9 weeks
5 days	7 weeks	11 weeks
6 days +	7 weeks	------

Waiting times for Chancery cases as at 15th May 2012

Time estimate	S9 Judges	Chancery DJ
30 minutes	Immediately	2 weeks
1 hour	immediately	2 weeks
1 day	2 weeks	3 weeks
2 days	2 weeks	4 weeks
3 days	2 weeks	6 weeks
5 days	4 weeks	8 weeks
6 days +	6 weeks	------

Annex 3: Current Published Guidance for Litigants in Person

1. The "Going to Court" series of 'nutshell' guides, produced by RCJ Advice and drafted by Advicenow.

2. The "Guide for LIPs" produced by the Civil Sub Committee of the Council of Circuit Judges (and which it is intended now also be translated into Welsh).

3. The "LIP Guide to Small Claims" produced by the CJC.

4. The QBD Interim Applications Guide for LIPs produced under the editorship of Foskett J.

5. The Guide to the Chancery Interim Applications Court for LIPs: see Annex 4.

6. The Bar Council's "Guide to Representing Yourself".

7. "Family Courts without a Lawyer: A Handbook for Litigants in Person" by Lucy Reed.

8. "A Basic Guide to the Court of Protection" (for LIPs) by Victoria Butler-Cole.

Annex 4: Interim Applications In The Chancery Division: A Guide For Litigants In Person

Back to contents

1. There is copied below the newly published guide to the Chancery Interim Applications Court referred to in chapter 9. Its production was inspired by the publication, earlier this year, of a similar guide for the Queens Bench Applications Court, pioneered and mainly drafted by Foskett J. The Chancery Division is heavily indebted to him both for his setting of an example, and for the content of his guide, on which the chancery guide is based.

2. I made an initial start on the chancery guide, and the experience taught me how vital it is to obtain the input and advice of litigant in person facing agencies when preparing material for their use. In this instance both Advicenow and the Personal Support Unit provided invaluable advice and comment on my early faltering efforts, including a complete re-draft of the first few pages. Thereafter the project was transformed and completed by Asplin J with, so she tells me, very helpful input on user-friendly formatting and presentation from Jo Pennington, the Publications and Web Editor at the Judicial Office.

JUDICIARY OF
ENGLAND AND WALES

Interim Applications in the Chancery Division:

A Guide for Litigants in Person

July 2013

Contents

Section A: Introduction

This introduction gives you a quick overview of interim applications and answers some common questions about them. More detail on the process is given later in the guide.

What are interim applications?

1. An "interim" application involves asking the court to do something, by applying for an order or a direction. It is called 'interim' because it is something that you need to ask for before the full trial of the claim. Sometimes interim applications concern aspects of the management of a case, such as fixing a trial date. More often they are applications for interim injunctions, where a party (one side in a case) asks the court to deal with actual or prevent a threatened injustice where it may be too late to have it dealt with at trial. An example of this would be an application to prevent a party from selling the property in dispute in the proceedings before the trial can take place. In that case, the injunction (the order preventing the sale) would last, at most, until a full trial can take place.

2. More examples of the kind of issues commonly dealt with by the Applications judge are freezing assets until trial to prevent them being dissipated, enforcing garden leave or covenants in a contracts of employment until trial, delivery up of documents and restraining advertisement of winding up petitions.

How do interim applications work?

3. Every day when the courts are open a Chancery judge sits in court 10 in the Rolls Building to hear interim applications. (S)he is called the Applications judge. They are normally a different person from the judge who will make the final decision at the trial of the actual case.

4. The Applications judge is likely to have many applications to deal with in a single day. An interim application should take no longer than **two hours**

The Rolls Building, Fetter Lane, London

in total. This includes time for the judge to read the papers, hear all parties and give a decision. Usually applications are dealt with in a much shorter period than this. This is to ensure that the judge is always available to hear urgent applications within a short time of being asked to do so. If the application cannot be dealt with within two hours, the judge will usually order it to be dealt with on another day.

5. So that the judge can deal with an application within two hours, (s)he will need to read the papers in the case beforehand to be able to understand what the case is about. Often the judge has to do this on the previous day. There is usually not enough time on the day.

6. This means that it is very important that you get your papers to court in good order and in plenty of time for the judge to read them before the application. The general rule is that you should get your papers to the court **by 10.30am on the day before the hearing**.

7. If for some good reason you can't manage this then you should get your papers to court as soon as you can. If your application is really urgent you should bring the papers to court with you.

What evidence is necessary?

8. Applications are always dealt with on written evidence, usually in the form of witness statements. Copies of relevant documents referred to in the witness statements should be attached to them. They are called exhibits. At the hearing of the application, witnesses do not give evidence orally and are not cross-examined.

- **So that the judge can deal with an application within two hours, it is very important that you get your papers to the court by 10.30am on the day before the hearing.**

What happens on the day?

9. You need not worry about the formalities. Lawyers will address the judge as 'My Lord' or 'My Lady' and you should try to do so. However, as longs as you show courtesy and respect, the judge will not mind. We say more about how to conduct yourself at the hearing in **section E**.

10. The proceedings are recorded so that a transcript of the judgment can be obtained if necessary. However, transcripts are costly and it is unusual for a judge to order a transcript at the public expense, unless it is really necessary and you prove that you cannot afford to pay for one.

11. The proceedings are normally held in public so that other members of the public and the media may be present. This is so that justice is done, and seen to be done, in the open. If you have some special reason for asking the court to sit in private, you will need to explain that to the judge before the hearing of your application begins.

Section B: Giving notice (telling the opposing party about your application)

12. It is a basic principle of fairness and justice that, except in special circumstances (see paragraph 14 below) a party or parties against whom an application is made must be given a proper opportunity to put their case to the court, and for that purpose to prepare evidence and legal argument beforehand.

13. The court's rules lay down a period of time, in advance of the date for the hearing of your application, before which you must notify the other parties of the application which you wish to make. Unless exceptional circumstances apply, if you make an application to the interim applications court you must give notice to the party against whom you seek an order. In the same way, any party seeking an order against you must give you notice.

- **Generally, the application notice must be served at least 3 days before the court is to deal with the application.**
- **This means three full working days**
- **Weekends, Bank Holidays, Christmas Day and Good Friday are not included.**

14. The general rule is that the application notice (which is the formal document setting out what you want the court to order and why - an example of which is in the Appendix) must be served on the party or parties against whom the order is sought at least three days before the court is to deal with the application. This means three clear days, i.e. there must be three full working days between the date of service of the application notice and the date of the hearing. Consequently weekends, Bank Holidays, Christmas Day and Good Friday are not included. By way of general example, if the day fixed for a hearing is a Friday, the last day for service is the Monday of that week; if the day fixed for a hearing is a Monday, the last day for service is Tuesday of the previous week. Copies of any written evidence which you wish to use in court must be served on the other parties at the same time.

15. The judge does have power to shorten this period, but will only do so if no unfairness will be caused to the other parties, or if they agree.

16. There are detailed rules about how to serve documents on other parties. The main methods are by post and by hand. Where it is not possible to give the notice required by

the rules, the judge will have expected informal notice (for example, by telephone, fax or e-mail) to be given except in the very exceptional circumstances referred to in the next two paragraphs.

17. The judge will not deal with an application made without notice unless either there is exceptional urgency or there is a real need for secrecy. A need for the order to be made in less than three clear days from the making of the application is no excuse for not giving the other party as much informal notice as possible. It is very rare for the judge to accept that the urgency is so great that, for example, a telephone call cannot be made or an email sent, in sufficient time for the other parties or their lawyers to attend court. The judge will be unlikely to accept that the application is too urgent for notice to be given if you have left it until the last moment before making your application.

18. If there is a real need for secrecy it must be demonstrated and explained in your written evidence. If this is not done, or if (as often happens) the judge does not regard your reasons for secrecy as sufficient, the order will not be made without notice. If you still want the order, the application will have to be made again after notice has been given to the other parties, as required by the rules or as directed by the judge.

19. Whenever you make an application without notifying the other parties in time for them to attend, you are required to inform the court about anything you think might count against you being granted the order you want. A good way to think about this very important requirement is to ask yourself what the opposing parties might want to tell the court in order to prevent the order being made, if they were present. This is called the full disclosure duty. If you obtain such an order without having made such full disclosure, you could face an application from the other parties to set aside the order, and for an order that you pay the other parties' costs. The court may do this even if, had you made full disclosure, the order you asked for would still have been made. By this means the judge spells out the importance of the full disclosure duty.

- **If you make an application without notice, you must inform the court about anything you think might count against you.**
- **This is called the full disclosure duty.**
- **If you obtain such an order without full disclosure, you could face having the order set aside, or paying the costs of the other party.**

Section C: The way to present your documents

20. You will not be turned away or not listened to if you are forced to present some or all of your documentation in handwritten form. However, you must understand that the judge will have many pages of documentation to read each day, so that clearly typed and properly spaced material is always preferred. If you can present your documents in this way, or in clearly readable handwriting, the judge will have a much better chance of understanding your case in advance, so that your task of explaining it orally in court will be that much easier. If you have not been able to type your documents the Personal Support Unit ('PSU') at the Royal Courts of Justice (Room M104 in the main Law Courts in the Strand) may be able to help with a modest amount of office work in an emergency depending on their resources. (For more information about the PSU see **section H**.)

21. A font-size of not less than 12 should be used, and easy-to-read fonts such as Times New Roman or Arial should be adopted. The document should be double or 1.5 spaced. It is best to write or type on one side only, because it is much easier to copy. Try to keep your written material as short and simple as you can. The judge will not welcome a large number of pages with a great deal of irrelevant material.

22. The court's rules require professional legal representatives to prepare what are called Skeleton Arguments, and to make them available in time for the judge's pre-reading. A Skeleton Argument is meant to be a short written introduction to the judge, enabling him/her to pre-read effectively, to get an early understanding of what the case is about, and the reasons why the party for whom the document is prepared should be successful. It will usually be very helpful if you do the same. You

Presenting documents - a quick checklist

- **Typed if at all possible**
- **Font size of not less than 12**
- **Easy-to-read fonts, e.g. Arial or Times New Roman**
- **Double- or 1.5-spaced text**
- **Keep everything as short and simple as possible**
- **If you can, prepare a short 'Skeleton Argument'**

do not need to use legal jargon. Think of the document as your short position statement about the case. **There is an example of a Skeleton Argument in the Appendix.**

23. If you are preparing a Skeleton Argument (or position statement), start by telling the judge what the application is about and what you want the judge to do. Then concentrate on putting your strongest arguments as you see them in a short series of numbered paragraphs towards the beginning of the document. Then, if you wish, develop them in a little more detail later. However, do try to keep what you have to say short and simple. Remember that the judge may have to pre-read up to 30 skeleton arguments before the day's hearing starts. Explain in your Skeleton Argument what additional documents the judge really needs to pre-read, and how long you think it will take to do so. The judge will, if necessary, ask you questions at the hearing to understand your argument more clearly.

24. If you are the applicant, you will have to prepare a page-numbered set of documents ("the hearing bundle") for the court, for the other parties and, of course, for yourself. This is to ensure that everyone in court has the same material available. This is dealt with in **section D**.

25. Although this guidance is addressed to you, the obligations are the same for represented parties and you can be assured that the judge will expect the same approach from them. If other parties are represented, they may agree to prepare the hearing bundle, and include in it the documents you want to use in court. You will need to ask them if they will do so well in advance.

Section D: The documents you need to prepare

26. This will depend on whether you are the person making the application ('the applicant') or whether you are on the receiving end of an application ('the respondent').

27. Some very helpful guidance is given by the RCJ Citizens Advice Bureau ('CAB') in the form of two leaflets that can be downloaded from their website - **www.rcjadvice.org.uk/civil-law**.

They are as follows:

- Thinking of going to court, leaflet 4: **http://www.rcjadvice.org.uk/wp-content/uploads/2012/12/leaflet4-51112.pdf**
- Thinking of going to court, leaflet 5: **http://www.rcjadvice.org.uk/wp-content/uploads/2012/12/leaflet5-51112.pdf**

28. If you have not obtained any legal advice previously, it is recommended that you consider these leaflets with care before embarking on any proceedings and, if possible, take the advice of the CAB or some other organisation providing free legal advice. You will also find a useful description of the applications process in chapter 5 of the Chancery Guide. You can access it online at **www.justice.gov.uk/courts/rcj-rolls-building/chancery-division**.

29. You can obtain a copy of a blank Application Notice on which to set out the details of your application by going to **www.justice.gov.uk/forms/hmcts**, and inserting N244 in the "Find a court form" box. Press "search court forms" at the bottom of the box and then choose to download form N244.

If you are the applicant:

30. If you have an application to make in existing proceedings (whether you are the claimant or defendant), you will need to prepare the appropriate documentation and lodge it with the court in advance of the hearing. You must lodge the documentation with the court at Counter 9 on the ground floor of the Rolls Building. Or you can post the documents to Chancery Judges' Listing Office, Rolls Building, 7 Rolls Buildings, London EC4 1NL, providing that you make sure that it will arrive in time.

31. You must lodge a set of documents with numbered pages, (called 'the hearing

bundle') **by 10.30am on the day before the date of the hearing**. The page numbering does not have to be typed, but it must be clear. Use a bold black pen and write the numbers of each page in sequence, preferably in the bottom right-hand corner of the page. (Sometimes other page numbers appear on documents: make sure that the number you enter is clear.)

32. If you want to rely on reported legal cases or passages from legal text books in support of your case you should provide photocopies or print outs from the internet for the judge. If the case is very long and you only want to rely on a short passage you should provide the first few pages of the case and then the pages with the parts you want to rely on. Similarly if you want to rely on a passage from a text book, you should provide a copy of the title page of the book and then a copy of the relevant passages. You should notify the other party of the names and dates of the cases and text books you will be referring to as far in advance as possible.

33. The hearing bundle should preferably contain three sections with the following documents in the following order:

Section 1

- Skeleton Argument or position statement (if you wish)
- Application Notice
- A draft of the order you seek. That is what you want the court to do (if you can).
- Chronology of main events in the case (e.g., central facts of the case and Application, Particulars of Claim, Defence, orders made and so on in date order)

Section 2

- Any Witness Statement(s) relied upon, including documents referred to in them (called exhibits)
- Any Witness Statements in response, including exhibits (if supplied to you by other parties)

Section 3

- Copies of any previously reported legal cases you want to rely on (or in a separate bundle if there are a number

If you are the respondent:

34. If you are responding to an application and you have produced a witness statement or statements then send copies of them (with any exhibits) to the applicant in sufficient time to be included in the bundle they should be preparing. Your statement(s) should be put in that bundle. It is important that you provide a copy of your evidence to the applicant in time for it to be read and studied, before the hearing. Otherwise the applicant may ask for an adjournment for time to consider your evidence. If the judge does adjourn the case, and thinks that you could reasonably have provided your evidence to the applicant earlier, then you may be ordered to pay the costs wasted by the adjournment.

35. If you have not prepared your documents in time in order to get into the applicant's bundle, bring them to the court beforehand if you can, and hand them in at Counter 9. If you cannot do that, bring them to court with you and give them to the usher.

36. If you have prepared a Skeleton Argument, get it to Counter 9 if you can by 10.30am on the day before the date of the hearing. Or you can email it to the court at **chancery.applications.skeletons@hmcts.gsi.gov.uk** by the same time. Make sure that your email clearly identifies your case. You should also send a copy of your Skeleton Argument to the applicant or if all else fails bring it to the hearing with you and give it to the usher with copies for the applicant if one has not been sent to them previously. If you want to refer to any reported legal cases or text books, give the names of the cases to the applicant in good time. Bring copies yourself. You should follow the guidance about cases and text books at paragraph 30 above.

Preparing a hearing bundle - quick checklist

Lodge this by 10.30am on the day before the hearing. Number the pages.

Section 1

- **Skeleton Argument or position statement (if you wish)**
- **Application Notice**
- **A draft of the order you seek (if you can).**
- **Chronology of main events in the case**

Section 2

- **Any Witness Statement(s) relied upon, and exhibits**
- **Any Witness Statements in response, including exhibits**

Section 3

- **Copies of reported legal cases you want to rely on (or in a separate bundle if there are a number)**

Useful leaflets/further information:

- **Thinking of going to court, leaflet 4**: **http://www.rcjadvice.org.uk/wp-content/uploads/2012/12/leaflet4-51112.pdf**
- **Thinking of going to court, leaflet 5**: **http://www.rcjadvice.org.uk/wp-content/uploads/2012/12/leaflet5-51112.pdf**
- **The Chancery Guide: www.justice.gov.uk/courts/rcj-rolls-building/chancery-division**

Section E: The hearing

37. Try to arrive at the Rolls Building at least an hour before your hearing. There can be queues at certain times of the day to get through the security screening at the entrance and you must then find your way to Court 10, on the second floor. Ask the way to it if you do not know where to go. Arriving early gives you a chance to relax and get your papers in order.

38. When you get to Court introduce yourself to the usher who will be in and out of the courtroom from time to time. If you have a 'McKenzie friend' with you (see **section G**), introduce that person also to the usher. If a representative of the PSU (see **section H**) is with you, ensure that the usher knows that that person is with you or ask that person to tell the usher.

- **It is possible that you will be handed some new document (e.g. a witness statement) that you have not seen before**
- **Read it if there is time before the hearing**
- **Do not worry - the barrister/ solicitor must tell the judge that you have only been given it shortly before the hearing**
- **The judge will ensure you are not disadvantaged by this.**

39. Except when the court is sitting in private, you should go into Court 10 before 10.30am.

40. You may find that if there is a barrister or solicitor appearing for the other party in your case he or she will come up to you and introduce themselves. That is perfectly normal. They will do so as a matter of courtesy and professional obligation. They may wish to explain some aspect of what they propose to do or say at the hearing. This is not a matter that should cause you concern: listen carefully and try to understand what is being said. If you do not fully understand, ask them to repeat or explain it.

41. It is possible that you will be handed some new document (e.g. a witness statement) that you have not seen before. Accept it if it is offered to you and read it if there is time before the

hearing of your case commences. Do not worry that such a document has been given to you. The barrister/solicitor will be under an obligation to tell the judge that you have only been given the document shortly before the hearing. If he/she does not do so, tell the judge yourself when you are asked to speak. The judge will ensure that you are not disadvantaged by this.

42. When you go into court for the hearing, sit where the usher directs you. This will usually be in the front row. The judge will usually first go through the list of cases for the day to find out how long each one is likely to take. When your case is called out, if your opponent is a lawyer he/she will usually tell the court how long the case will take after discussion with you. If your opponent is also a litigant in person, then whichever of you is the applicant should stand and tell the court your time estimate. Usually parties stand to address the judge, but if that is difficult for you the judge will not require you to do so. If you do remain seated, it is important that you speak clearly so that the judge can hear what you have to say. The acoustics are very good in the Rolls Building, so this should not be a problem.

43. If your case is not listed or called out, do not worry. The judge will ask at the end of the run through the list if there are any unlisted matters. That is your opportunity to tell the judge about yours, and how long you think it will take.

44. The judge will then announce the order in which (s)he will deal with the day's cases, usually dealing with the shortest cases first. You may have quite a wait before yours is called on. Sometimes the judge will release the parties in cases lower down the list, so they can leave court for a while and return at an appointed time. It is your responsibility to be in court when your case is reached. If you leave court in the meantime, keep in touch

with the usher to find out how the list is progressing. Sometimes it goes faster than expected.

45. When your case is reached it will be announced, usually by the associate (the court official sitting in front of the judge). If you are the respondent to the application, and there is a barrister/solicitor representing the applicant they will explain to the judge what the application is about. Since the judge will usually have read the papers, it is likely that the judge will have questions for the barrister/solicitor. The proceedings will often be in the form of a dialogue or conversation between the judge and the parties rather than the judge playing no active part until all parties have had their say. This does not mean that the judge has made up his/her mind, or is anything other than impartial.

The hearing will often be in the form of a dialogue or conversation between the judge and the parties rather than the judge playing no active part until all parties have had their say. This does not mean that the judge has made up his/her mind, or is anything other than impartial.

46. You should listen carefully to what is said. Have something to write with and a piece of paper or a notebook with you to note down any point of significance from your point of view.

47. When the barrister/solicitor representing the applicant has concluded, the judge will turn to you and ask what your position is in relation to the application. Again, given that the judge will have read the papers provided they have been lodged on time, it is likely that the judge will invite you to confirm that (s)he has understood your arguments correctly. Listen carefully and, if necessary, ask the judge to repeat anything you do not understand. If the judge has understood your position clearly, then say so. If you think the judge has not understood fully, then also say so and explain (politely) why.

48. The judge may ask you to develop your argument a little further. If so, do try to do so briefly and, if the judge is making a note, at a speed that enables the note to be taken. Watch the judge's pen.

49. After you have made your representations, the judge may ask the applicant's representative for any response.

50. If you are the applicant, the roles set out above are, at least in theory, reversed. The judge will probably tell you that (s)he has read the papers and will ask for confirmation that (s)he has understood the nature of your application. Whilst the judge will usually give you the opportunity to develop your arguments, you can anticipate that there will be a

dialogue between you and the judge. Most judges find this the best way to get to the bottom of the issues in an application.

51. When you have presented your case for the order you seek, the judge will invite the respondent to respond and you will be given the final word before the judge decides what order to make.

52. Sometimes, in particular if you have not sent in a Skeleton Argument, or if the judge has not had the opportunity to pre-read, the judge may ask the other party's lawyer to provide a short neutral explanation of what the case is about, before asking you to speak, even if you are the applicant. This does not mean that you will not get a full opportunity to explain your case, just that the judge may think that it is a quicker way to get to the heart of the matter.

53. The judge will probably give a decision there and then – or possibly leave the courtroom for a short while when a few notes are made before giving a decision on the application.

54. If you are the applicant and successful, the judge will usually ask the associate to prepare an order giving effect to the decision. If you are the respondent and the other (represented) side is successful, the judge may ask the barrister/solicitor for that party to prepare a draft order giving effect to the decision to be submitted to the judge for consideration, usually after showing it to you for your comments.

Section F: Costs and permission to appeal

55. The judge will usually want to deal with the costs of the hearing. If you are the losing party, you will usually be ordered to pay the costs of the successful party. We cannot deal with that issue in detail in this Guide.

56. If you are the successful party, you may be entitled to ask for an order for costs in your favour. Again, we cannot deal with that in detail in this Guide, but if you are proposing to ask for an award of costs in your favour you should bring with you a written summary of the costs and out of pocket expenses that you have incurred (eg. train fares and photocopying charges) plus three copies in case they are needed. You will need to consider CPR Part 48.6 and the Costs Practice Direction, paragraph 52.

57. If you are the losing party and you believe you have grounds for appeal, at the end of the hearing you should ask the judge for permission to appeal to the Court of Appeal. The judge will only grant permission to appeal if (s)he considers that the appeal has a real prospect of success, or if there is some other good reason for doing so. If permission is refused by the judge, you have the right to ask the Court of Appeal for permission to appeal. You should ask the usher or the associate for the form on which the judge will have set out brief reasons for giving or refusing permission to appeal.

Section G: 'McKenzie Friend'

58. This is an expression used to describe someone who comes along to the hearing to assist you.

59. You can find out what a 'McKenzie Friend' may and may not do in a Practice Guidance Note that you can find at: **http://www.judiciary.gov.uk/Resources/JCO/Documents/Guidance/mckenzie-friends-practice-guidance-july-2010.pdf**

Generally, the McKenzie Friend has no right to speak for you, but if there is good reason, the judge may exceptionally allow it, if you ask, and explain why.

Section H: The Personal Support Unit at the RCJ

60. If you do not have a 'McKenzie Friend', but want some emotional and practical support from someone, the Personal Support Unit in the Royal Courts of Justice may be able to assist you. Their volunteers cannot give you legal advice and generally do not address the court on your behalf, but they can help by talking through your case with you, helping you get your thoughts and documents in order, showing you the way to where you ought to be and providing support during a hearing.

61. The website of the PSU is: **http://thepsu.org/our_network/royal-courts-of-justice/** and their email address is: **rcj@thepsu.org.uk**. They operate a walk-in service, but you can also make appointments by ringing 0207 947 7701 or 7703, between 09.30 am and 4.30 pm, Mondays to Fridays.

62. The office of the PSU at the Royal Courts of Justice can be found in room M104. Ask the way at the Information Desk in the Main Hall just after the security check area. The PSU does not at the moment have a permanent presence in the Rolls Building. If you want their assistance for a hearing in the Rolls Building it is best to contact them at the Royal Courts of Justice at least a day before your hearing, by phone or by going there in person.

Section I: Representing companies

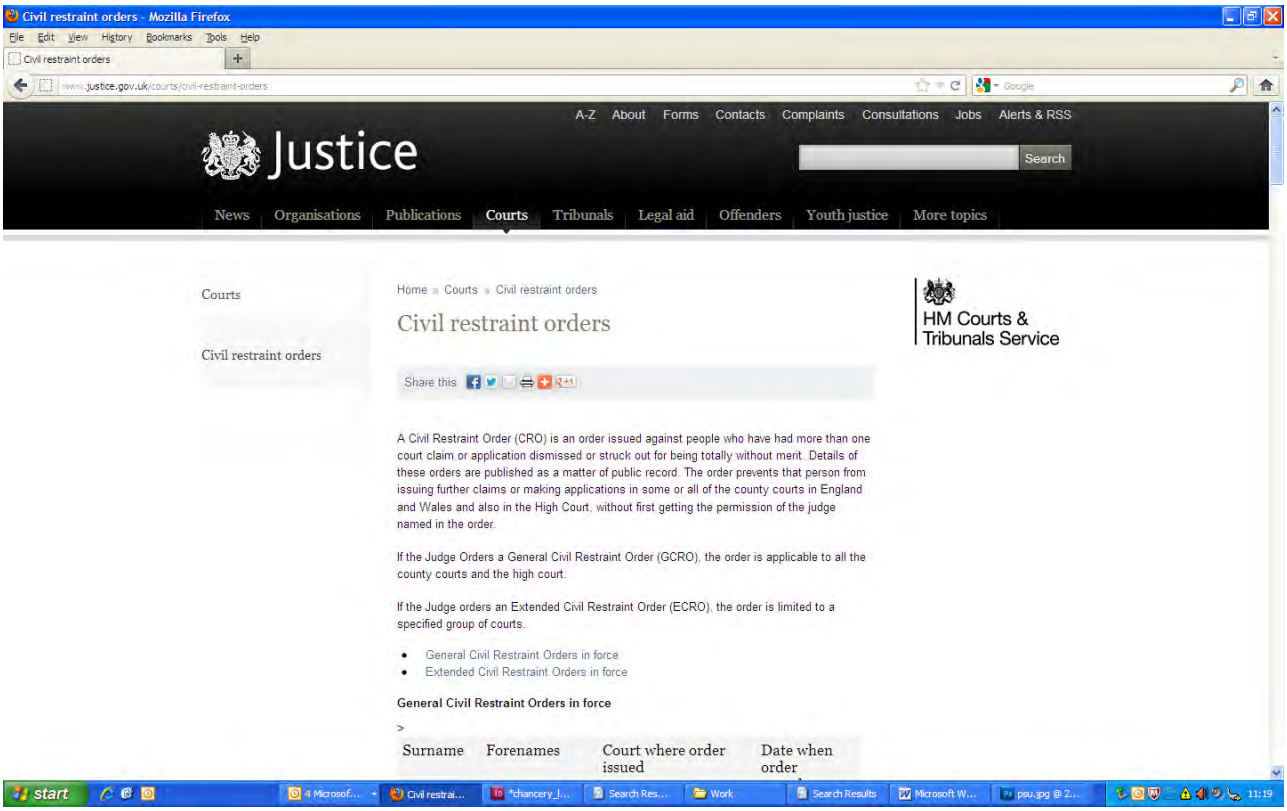
63. If you want to represent a company (or a limited liability partnership or other entity) in court, then you must obtain the judge's permission to do so. Companies and similar entities do not have the automatic right to be represented by persons who are not lawyers. In cases where it is difficult for the company to obtain professional representation the judge may allow an authorised director or employee to do so.

Companies and similar entities do not have the automatic right to be represented by persons who are not lawyers, but in cases where it is difficult for the company to obtain professional representation the judge may allow an authorised director or employee to do so.

64. You should come prepared to demonstrate that you have the company's authority to appear on its behalf. It is best to obtain the authority of the board of directors or managing director, properly recorded in writing. If you are the only director you will usually need to provide documentary proof of that. Being a shareholder or even a controlling shareholder will not generally be enough.

Section J: Civil restraint orders

65. You will need to understand that if you are the applicant and the judge considers your application to be "totally without merit" (i.e. hopeless) you may run the risk of being made the subject of a civil restraint order. A litigant who brings repeated hopeless applications, or who tries to litigate again issues that have previously been dealt with by the court, will almost invariably be considered as a candidate for such an order. If such an order is made, you will not be able to make certain applications to the court without first getting the written permission of a judge.



The Ministry of Justice maintains an online Civil Restraint Orders database

Section K: List of Terms

Applicant(s) – person or persons seeking the order or direction of the court.

Application Notice – the formal court document which the Applicant needs to complete and file at court setting out what (s)he wants the court to do and why.

Chronology - List of relevant events and documents in date order.

Ex parte - a term which is old fashioned but still used to mean an application which is made with only the applicant present, without notice to the respondent.

Exhibits – relevant documents referred to in and attached to a Witness Statement.

Hearing Bundle – paginated set of copies of relevant documents containing the materials referred to in paragraph 29 Section D.

Inter partes – a term which is old fashioned but is still used to mean a hearing where both the applicant and the respondent is present at the hearing and where the respondent has had notice of the hearing.

Interim Application – an application to the court asking it to order or direct something, before the full trial of the claim.

Respondent(s) – the person or persons against whom the order or directions are sought and who may want to persuade the court not to make the order.

Skeleton Argument – short position statement explaining your case and why the order or direction should be made on (if you are the Respondent) why it should not be made.

Witness Statement – the document in which a witness sets out the facts of which (s)he is aware which are relevant to the case and swears that they are true.

Appendix: Document bundle

On the following pages you will find a sample document bundle (based on a made-up case) to help you in putting your own documents together to bring to court.

It contains:

- **Application Notice**
- **Witness statement**
- **Skeleton argument**
- **Chronology**

Application notice

For help in completing this form please read the notes for guidance form N244Notes.

Name of court **Rolls Building**	
Claim no.	HC000000000
Warrant no. (if applicable)	
Claimant's name (including ref.)	Mary Ann Barker
Defendant's name (including ref.)	George Brooker
Date	(date)

1. What is your name or, if you are a solicitor, the name of your firm?

Mary Ann Barker

2. Are you a ■ Claimant ☐ Defendant ☐ Legal Representative

☐ Other *(please specify)*

If you are a solicitor whom do you represent?

3. What order are you asking the court to make and why?

An order that the Defendant be prevented from selling the property known as 1 Peel Crescent, Alton, Hants before the outcome of this trial.
Alternatively, an order that half of the net proceeds of any sale are paid into a secure account until the outcome of the trial.
In these proceedings I am claiming that I have joint ownership of the above property. I am making this application because I believe the Defendant intends to sell the property without my consent before the outcome of the trial and move to Italy, where I will be unable to recover the funds if my claim is successful.

4. Have you attached a draft of the order you are applying for? ■ Yes ☐ No

5. How do you want to have this application dealt with? ■ at a hearing ☐ without a hearing

☐ at a telephone hearing

6. How long do you think the hearing will last? 1 Hours 0 Minutes

Is this time estimate agreed by all parties? ☐ Yes ■ No

7. Give details of any fixed trial date or period

8. What level of Judge does your hearing need? High Court

9. Who should be served with this application? The Defendant

10. What information will you be relying on, in support of your application?

- [x] the attached witness statement
- [ ] the statement of case
- [ ] the evidence set out in the box below

If necessary, please continue on a separate sheet.

_____

Statement of Truth

(I believe) (The applicant believes) that the facts stated in this section (and any continuation sheets) are true.

Signed _____Mary Ann Barker_____ Dated _____

Applicant~~('s Legal Representative)('s litigation friend)~~

Full name _____

Name of applicant's legal representative's firm _____

Position or office held _____
(if signing on behalf of firm or company)

11. Signature and address details

Signed _____ Dated _____
Applicant('s Legal Representative's)('s litigation friend)

Position or office held _____
(if signing on behalf of firm or company)

Applicant's address to which documents about this application should be sent

Postcode

If applicable	
Phone no.	
Fax no.	
DX no.	
Ref no.	

E-mail address	

Witness Statement:

IN THE HIGH COURT OF JUSTICE **Claim No: HC000000000**

CHANCERY DIVISION

B E T W E E N

MARY ANN BAKER

Claimant

and

GEORGE BROOKER

Defendant

WITNESS STATEMENT of MARY ANN BAKER

I, Mary Ann Baker of 1 Peel Crescent, Alton Hampshire will say as follows:

1. I am the Claimant in this case and the Applicant. I live a 1 Peel Cresent, Alton, Hampshire (the Property). I have lived there since 1991 when I moved there with the Defendant, George Brooker. He moved out when our relationship came to an end. The facts set out in this statement are from my own knowledge unless I state that they are not. Where I refer to information supplied by others, I believe

it to be true.

2. Although we moved in together, the title to the Property was registered in George's sole name. At the time George said it would be easier to just have him sign everything, and I agreed. He said it didn't matter anyway, because we both knew that we both owned the Property.

3. It was always our intention to live together and share ownership of the Property. We agreed to share the monthly payments on the mortgage, so each month I would send money to George, which he would then use to pay the mortgage. We shared all the other expenses of the household. For example, he paid for the boiler to be repaired a few years ago, and I paid for the outside to be repainted. We split all the regular bills equally.

4. This arrangement carried on until George moved out. We haven't talked since then, and I felt uncomfortable about continuing to send him money. Unfortunately we separated on very bad terms, and I no longer feel able to trust him. I have attached some documents to this witness statement which show the payments I made while we were living together.
5. I believe I have half ownership in the Property because that is what we agreed, and because of all the payment's I've made on the mortgage over the past twenty years. However George does not agree, and says the Property is entirely his. He thinks he can do what he wants with it.

6. I have heard from some friends that the Property is about to be put on the market for sale. I was really shocked by this. I don't think it's right that George can just sell the Property when I own it as well.

7. When I confronted him about it he said I must be mad to think I owned the Property, and everything was in his name so he could do what he wanted. He knew I had started these proceedings but when I pointed out that he should at least wait for the trial he became angry and defensive and said I couldn't tell him what to do.

8. As a compromise, I suggested that instead he could pay half the sale proceeds into a safe account with the bank, until the case has been decided. However he refused even to do that. I am worried that he will go ahead with trying to sell the Property now to spite me.

9. I know that George is planning to move to Italy soon, as he speaks fluent Italian and has told me he wants to live and work there. I believe he wants to use the money from the Property to pay some business debts in this country first, and to fund his emigration. I believe he intends to do this as soon as possible, and certainly before the trial.

10. I am very worried that if he sells the Property and goes to Italy then I will have no hope of getting my share of the sale proceeds back. I understand legal proceedings in Italy are very slow, and I don't know how I would go there to fight

my case.

11. I find all of this very stressful. I don't think it's fair that George should just be able to sell the house, so I want him to be prevented from doing this, or at least made to put the proceeds of sale into a safe account. I have tried to sort this out amicably with George but unfortunately he won't cooperate, so I feel I have no choice but to come to court and ask for help.

STATEMENT OF TRUTH

I believe that the facts stated in this witness statement are true.

Signed……..

Dated…….

Claim No:

HC000000000

IN THE HIGH COURT OF JUSTICE

CHANCERY DIVISION

B E T W E E N

MARY ANN BAKER

Claimant

and

GEORGE BROOKER

Defendant

WITNESS STATEMENT OF MARY ANN BAKER

Supporting Skeleton Argument:

IN THE HIGH COURT OF JUSTICE

CHANCERY DIVISION

BETWEEN

MARY ANN BAKER

Claimant

and

GEORGE BROOKER

Defendant

CLAIMANT'S SKELETON ARGUMENT

Introduction

1. I am the claimant in this case. The Defendant is my former partner. We separated 6 months ago. I am asking the court to declare that I have a half share in the ownership of the house in which we lived for 20 years, 1 Peel Crescent, Alton, Hants, which is registered in his sole name. I started this claim on (*date*).
2. The purpose of this application is to ask the court to prevent the defendant from selling the house before my claim can be dealt with at trial. I have asked the defendant not to do so, but he has refused. He says that the house belongs entirely to him, and that he can do what he wants with it.
3. I do not want to prevent a sale in which the share which I claim is protected. But the defendant has refused even to promise to put a half share of the sale proceeds in a safe account until the trial. I would be content if the court was to order him to do this, as a

condition for being able to sell the house now, as long as he gets a fair price for the house. I believe that the house is worth £500,000. There is a £200,000 mortgage on it.

Pre Reading

4. I have set out the history of the purchase of the house, and the payments I made in relation to it, in a witness statement which I would ask the judge to read. I have attached copies of the documents which I have been able to find showing my payments, but I do not think that the judge needs to read those before the hearing. I sent my witness statement to the defendant with my Application Notice on (*date*).
5. I have today received a witness statement in answer from the defendant which the judge may also wish to read. I have signed a very short witness statement in reply. I have put copies of all the statements and documents in a file which I have taken to the court. It should take about 30 minutes to read all 3 statements.

Reasons for my Application

6. I am afraid that the defendant will not wait for the trial before trying to sell the house. He has told me that he intends to leave the country to go and work in Italy. He is a fluent Italian speaker and I believe his intention to emigrate to be a serious one, even though he denies it in his witness statement.
7. I know that the defendant has business debts in this country which he wishes to pay before he leaves. I do not think he has any assets apart from his share in the house.
8. Mutual friends have told me that they have heard that the house is about to be put on the market for sale.

9. I have been told that the trial cannot take place for 9 months. This would give the defendant plenty of time to sell the house in the meantime.

10. Despite the defendant's attempt to rubbish my case in his witness statement, I believe that I have a real case which deserves a trial. But I accept that the court cannot decide it today. It is very much my word against the defendant's about what we agreed when the house was bought.

11. If the trial takes place after the house has been sold, I very much fear that the defendant will by then have left the country with the sale proceeds. I understand that it is very difficult to make a claim in Italy without very long delays. I do not speak Italian, and would find it very difficult to travel there to pursue a claim.

Time estimate

12. If the judge has time to read the witness statements beforehand, I hope that my application would not take more than 1 hour. I do not think that the defendant has legal representation.

Mary Ann Baker

(*date*)

Chronology:

IN THE HIGH COURT OF JUSTICE **Claim No: HC000000000**

CHANCERY DIVISION

B E T W E E N

MARY ANN BAKER

Claimant

and

GEORGE BROOKER

Defendant

CHRONOLOGY

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19 September 1991	Claimant moves into the Property with the Defendant
17 January 2004	Defendant pays to repair broken boiler
6 March 2007	Claimant pays to repaint outside of the Property
10 January 2013	Defendant moves out of the Property
15 April 2013	Claimant commences proceedings
27 May 2013	Claimant hears that the Defendant is planning to sell the Property
14 June 2013	Claimant issues interim application notice
20 June 2013	Claimant sends witness statement to Defendant
30 June 2013	Defendant sends witness statement in reply
3 July 2013	Claimant sends short second witness statement

Claim No: HC000000000

IN THE HIGH COURT OF JUSTICE

CHANCERY DIVISION

B E T W E E N

MARY ANN BAKER

Claimant

and

GEORGE BROOKER

Defendant

CHRONOLOGY

Annex 5: Trial Overruns in London during 2013

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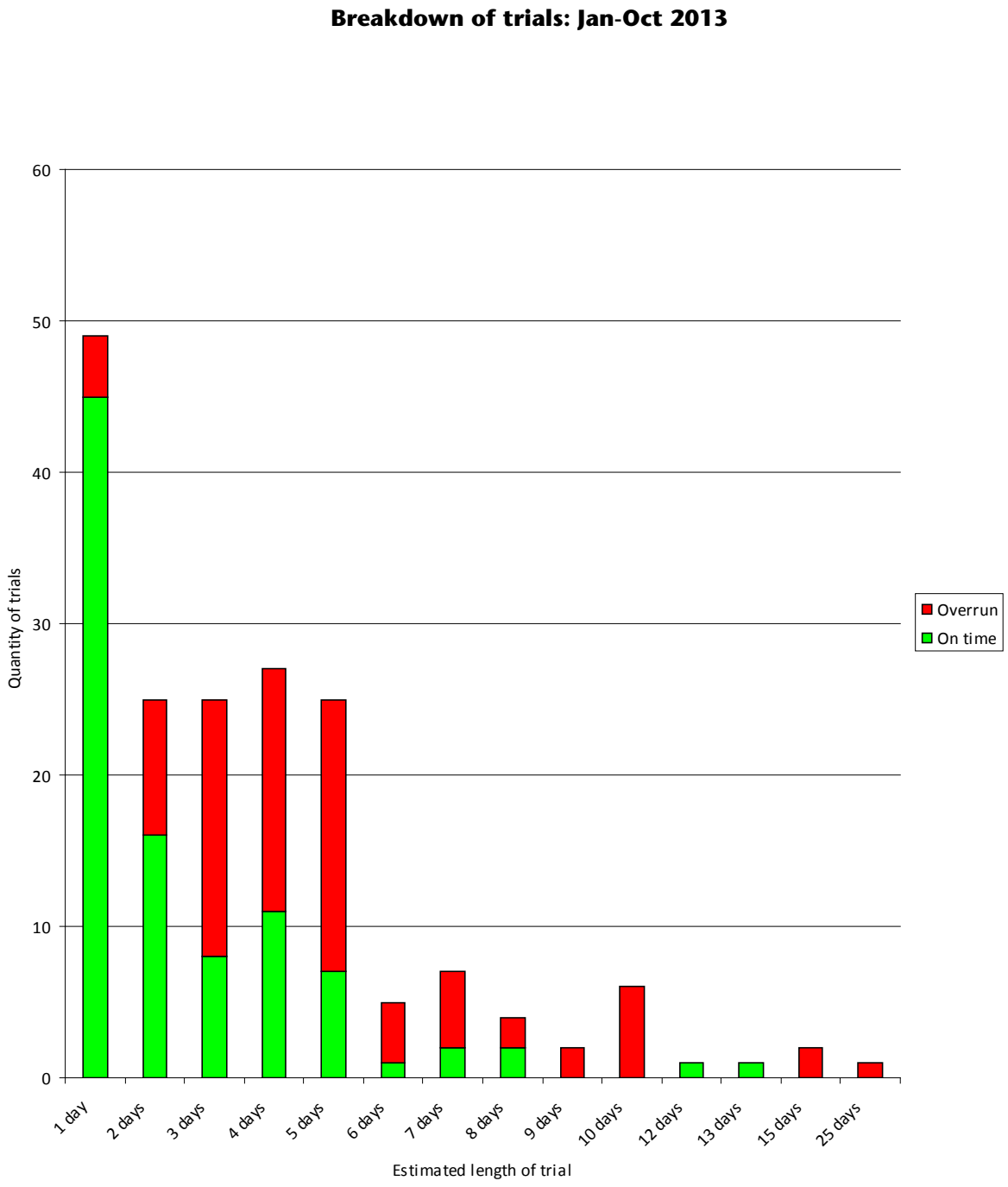
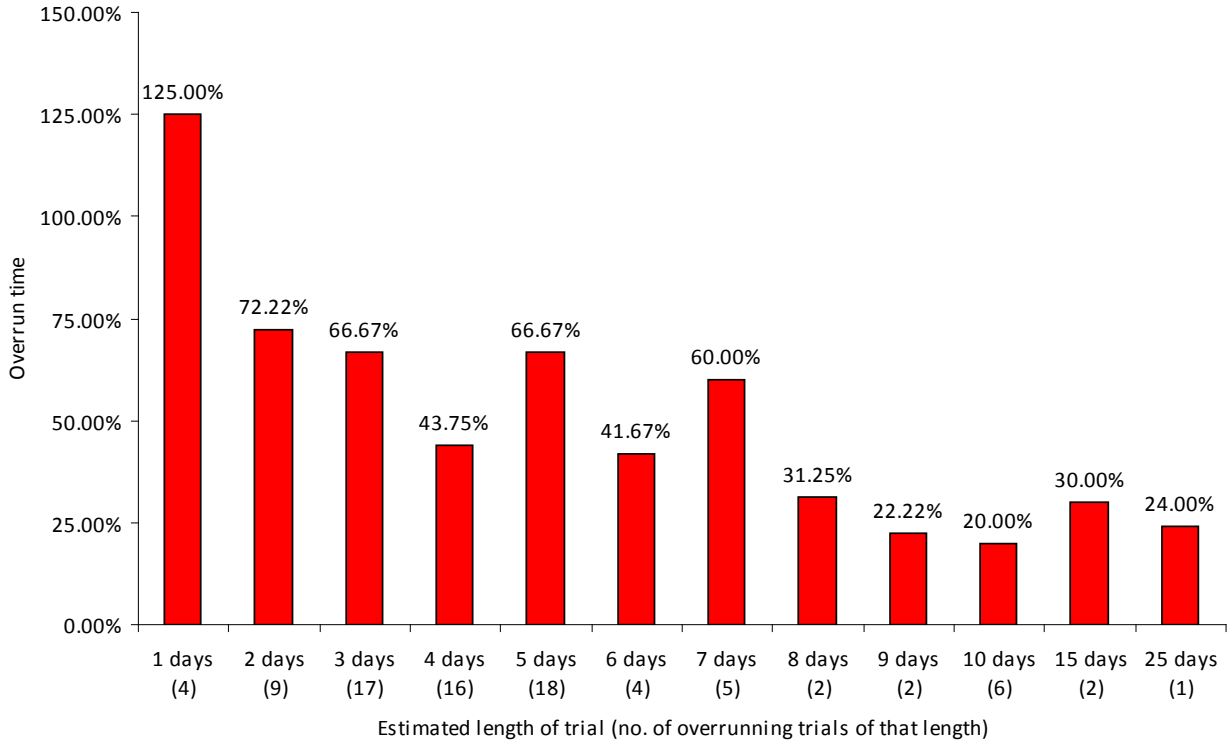


Average overrun time where overrun occurred



Notes:

- The underlying statistics shown in these graphs have been provided by the chancery Listing Office, as the most recently available.
- They run from January to October 2013, but exclude the vacations, in which few trials take place.
- The total number of trials overrunning is 86.
- The total number of trials completed during period is 180.
- The proportion of trials which overran their estimates is 47.8%
- Only 4 of 49 one day trials overran their estimates. This is less impressive than it looks, because the Listing Office treats any estimate of one day or less as a one day estimate. If the one day trials are ignored, 62.6% of trials overran their estimates.

- The overrunning trials outran their estimates by a total of 207 days.
- The aggregate estimate of the trials which overran was 435 days.
- The overrunning trials exceeded their estimates by an average of 47.6%. If one day trials are ignored, the excess reduces only to 46.9%.
- There was no large variation, month by month, in the proportion of trials which overran.

Annex 6: Draft Triage Guidelines for London

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Draft Guidelines For Allocation Of Cases To A Management Track

A. Factors Pointing to Full Docketing to a Judge

(i) The heaviest claims where the trial is estimated to last 15 days or more and there is the potential for reducing the length of the trial process by active case management by the trial Judge

(ii) Claims involving extensive and prolonged pre-trial interim injunctive applications which have been or will in any event be required to be dealt with by a Judge.

(iii) Claims giving rise to major issues as to the extent of disclosure.

(iv) Claims which by their subject matter require the specialist knowledge of a specialist Judge such as patent claims, the more complex IP claims, and those commercial claims whose subject matter is highly involved or technical such as sophisticated types of commercial instrument or securitization, complex pension trust claims and some large multi jurisdiction trust and estate claims.

(v) Cases that are subject to a Group Litigation Order and other substantial group claims requiring active case management by a Judge assigned to try them.

(vi) Urgent claims requiring expedition and determination by a Judge within weeks or a few months.

(vii) Claims which are particularly high profile or highly commercially sensitive.

(viii) Claims involving one or more litigants in person, which are unsuitable for trial by a Master.

(ix) Cases where full docketing is requested, but this is not conclusive.

B. Factors Pointing to Management by Master and Trial by Judge

(i) Cases unlikely to need more than standard directions.

(ii) Cases where it is perceived that there is a good prospect of settlement before trial.

(iii) Cases where FDR may be appropriate, or where active engagement by the court in ADR may be inappropriate by the trial Judge.

(iv) Cases (however large) where it is perceived that the parties are proceeding proportionately and in cooperation with each other in preparation for trial.

(v) Cases of modest value or likely trial duration.

(vi) Cases where the parties request it, although this is not conclusive.

(vii) Cases where, for whatever reason, there is perceived a serious risk that the application of a Judge to case management would be a waste of resources.

C. Factors pointing to Full Docketing to a Master

(i) Cases where the parties consent to trial by a Master.

(ii) Cases of small value, but where chancery expertise may be more important than the appraisal of conflicting oral evidence.

(iii) Cases about individual (and in particular family) property.

(iv) Part 8 cases of the type currently conducted by the Masters throughout.

(v) Cases where quantum or accounts are the only real issues.

Annex 7: Summary Of Requests For Further Feedback

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Notes:

1. These requests were made in the provisional report.

2. Each request is followed by a reference to the paragraph of the Final Report in which the response to it is described in context

- Whether there should continue to be a prohibition on Masters and District Judges granting, discharging or varying injunctions which involve a consideration of the balance of convenience. (3.6 – 3.8)
- Whether any of the jurisdictional restraints on Masters should be retained, or other restraints imposed. (3.15 – 3.16)
- The number of management tracks to be incorporated into the triage process. (4.23 – 4.24)
- Whether to run a partnership management track pilot and, if so, for what types of case. (4.24)
- The guidelines to be used for allocation of incoming cases, and business & commercial cases in particular, to a management track. (4.31 – 4.36 and Annex 6)
- Whether to divide up the Masters into 3 teams for triage and case management. (4.35)
- The extent to which the triage process should be used by the Registrars, and for what types of case. (4.37 – 4.38)
- The content of a new cross examination convention. (7.42)
- The amount of judgment writing time to build in to trial timetables. (7.56 – 7.57)
- The success or otherwise of the 'while you wait' order service in the Interim Applications Court. (8.26 – 8.28)
- The subject matter of a chancery guide for litigants in person. (9.94)

- Whether local working groups should lead training for dealing with litigants in person. (9.102)
- Whether all or any of the regional trial centres should adopt a 4 day trial week. (10.42)
- Whether some company and insolvency matters should be dealt with administratively, rather than in court and, if so, which. (11.32)
- How to improve the listing arrangements for trials by Registrars. (11.42 – 11.45)
- Whether we need a third scientifically qualified patents Judge. Would it lead to a specialist shortfall elsewhere? (13.18-19)
- Whether patent cases should have special listing priority. (13.22 – 13.27)
- Content of chancery annual report. (15.8 – 15.9)
- Content of Chancery website. (15.10 – 15.11)
- Whether some chancery conferences should be held in public. (15.13 – 15.14)