RESPONSE BY GREENWOODS SOLICITORS TO INVITATION BY THE CJC TO COMMENT ON THE IMPACT OF THE 'JACKSON REFORMS'

1. Our primary concern is that the reforms, and the way in which they have been applied on many occasions, particularly since the decision in *Mitchell* **,** have resulted in an abandonment of the principle of achieving justice between the parties to litigation in favour of process.

2. The focus is now on strict compliance with rules and procedure and not on the courts assisting parties to resolve disputes, if necessary by the holding of a trial. This is a difficult concept to explain to clients.

3. While it is accepted that there are solicitors who are inefficient and cases where sanctions are appropriate, the way in which rules are currently applied also prevents the majority of competent practitioners from working consensually. If one party meets with unavoidable difficulty they are obliged to make an application to the court, inevitably increasing the volume of applications passing through the courts. The other party is left in the invidious position of considering whether to consent to the application (the 'boot could be on the other foot') or whether they owe a duty to their client to oppose the application on the basis that in the current climate that is the appropriate course to take. Why should such steps be necessary if the parties can otherwise comply with directions within a timescale that has no impact at all on court resources or any future hearing date?

4. The ways in which the rules are being applied simply do not reflect or take into account the realities of daily practise. The march towards absolute efficiency conflicts with the parallel move to reduce costs and thus income and the ability to generate a meaningful profit. Parties who meet this high standard are obliged to front load and thus increase costs. Work is done in anticipation that it *may* be required, as there is little opportunity now to take stock of how the case develops before expense is incurred. Clients see this reflected in costs budgets and are alarmed by what they see.

5. While this approach may serve to reduce the number of cases currently in litigation the risk is that it will generate unnecessary claims in the future, as claims for professional negligence are brought against those guilty of technical breaches of the rules.

6. Some may perceive a desire to reduce claims and thus the need for courts and judges: a potentially huge saving to the government in the short term. The public is entitled to access to justice, without delay and without having to travel to some remote trial centre.

7. At a time when the legal profession is being forced to comply strictly with all rules and practice directions, it is also obliged to accept

inactivity and inconsistency on the part of the judiciary. Some judges are applying *Jackson* rigidly (while sometimes expressing their regret in doing so); others are not. However, the solicitor must always prepare on a worst case basis.

8. In all multi-track cases a considerable amount of time and cost is required to generate costs budgets, in default of which the penalties are clear. But the reality is that very few judges are prepared to deal with cost budgeting. In some cases separate hearings have been scheduled for many months after the first CMC; but in others the issue of costs budgeting has simply been ignored by the judges.

9. For the reasons set out below, we do not believe that this approach is either reasonable or necessary.

10. The downward pressure on fees, particularly through the removal of success fees and the introduction of fixed and tariff costs, has already begun to drive greater efficiency in working methods and the desire to settle claims. Coupled with the new approach to proportionality and the increase in issues based costs orders, there is far less inclination on parties to delay or play 'tactical games'.

11. Although qualified one-way costs shifting is not universally popular with defendants in personal injury claims, it does serve as another disincentive to litigate certain claims. It is too early to be sure but the exceptions to the QOCS rules do appear to be limiting the number of 'try-on' cases that might otherwise be anticipated when a claimant seemingly has little to lose by bringing a claim.

<u>Conclusions</u>

12. The courts' service exists at public expense to provide a system of justice. It should be available to those who are unable to settle their disputes by alternative means. Judges involved in case management should be there as facilitators, assisting the parties to exchange evidence and, if necessary to prepare for trial. Competent parties should, within reason, be in a position to agree variations in court directions, provided that in doing so they do not materially disturb the court timetable or the date set for a hearing. Clients deserve that the focus of activity should be on the case.

    Sadly, in the current environment, all of these are deemed to be secondary to the requirement to keep the courts happy. This does not achieve justice between the parties.

13. We submit that this criticism is echoed in words quoted recently in a seminar by Tom Petts and originating in an 1885 judgment by Underhill LJ:

"..... `it is a well established principle that the object of the courts is to decide the rights of parties and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights.... I know of no kind of error or mistake which, if not fraudulent or intended to overreach, the court ought not to correct, if it can be done without injustice to the other party. Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy and I do not regard such amendment as a matter of favour and grace`..... Nevertheless Bowens LJ observations are a salutary warning against too schoolmasterly an approach".