THE JACKSON REPORT ON COSTS IN CIVIL LITIGATION

CHANCERY JUDGES' RESPONSE

MARCH 2010

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1. This is the report of a working party (Briggs, Norris and Floyd JJ) set up by the Chancellor immediately following the publication of Jackson LJ's Final Report, to formulate a response to it on behalf of the Chancery judges. Our terms of reference are as follows:

> To consider the implications for the conduct of business in the Chancery Division both in and out of London of the introduction of the recommendations of Jackson LJ set out in his Final Report published on 14th January 2010, how they may be best implemented and to advise.

2. Our report has been prepared under some pressure of time, but we have been able to carry out some very limited consultation, in particular with the Chief Master, the Chief Registrar, the Senior Costs Judge, the Senior Resident Judge at the Central London Civil Justice Centre and with judges outside London. We have also consulted fully with all the Chancery High Court Judges. The contents of this report are nonetheless ours, but are fully endorsed by the Chancery HCJs. It may therefore be treated as the Chancery HCJ's response to the Final Report, within the terms of reference.

3. We very much welcome the main thrust of the Final Report, and expect that its implementation in the Chancery Division will bring about a real improvement in the provision of access to justice at proportionate cost.

4. We also welcome most, but not quite all, of the detailed recommendations, so far as they impact on Chancery work. Some important recommendations will not impact on the Chancery Division, and the fact that much of its work is not

about (or primarily about) claims for money means that some of the recommendations will only work in the Chancery Division if adjusted. Furthermore we have been unsure whether Jackson LJ envisaged that some of his general recommendations (e.g. about case management) were intended to be implemented in the Chancery Division, but we have addressed their Chancery implications nonetheless.

5. We have focused our work in particular upon implementation, including the rule changes, culture changes and educational requirements which the recommendations in the Final Report will require. We have assumed that additional resources (apart from education) are unlikely to be made available, in current economic conditions, for the implementation of those recommendations which call for increased work by the court (as opposed to the parties). In our view that constraint is likely adversely to affect the full implementation of some of the case and costs management recommendations, if the knock-on consequence of a substantial lengthening in waiting times is to be avoided, as we believe it should be. Judicial time is fully deployed already in keeping those waiting times under reasonable control, and waiting for justice is as much an impediment to access to justice as is excessive cost, even if its effect is more evenly distributed.

6. Finally, we draw attention to some aspects of the adverse effect of high costs upon the fairness of Chancery litigation which are not addressed in the Final Report, in the hope that they might be given due consideration as adjuncts to the implementation process.

1(a) CFAs AND ATE INSURANCE PREMIUMS

7. The Final Report recommends that success fees under CFAs and ATE Insurance premiums should cease to be recoverable from the losing party. CFAs with success fees are, however, still to be permissible as between the client and its lawyers (para 2.2, page xvi and Chapters 9 and 10). At present such sums are recoverable subject to safeguards.

8. We strongly support the recommendations.

9. The Final Report recognises that if the recommendation to abolish the recoverability of success fees is accepted, then other steps may need to be taken to assist claimants with litigation funding, so that access to justice is not impeded. One of the measures recommended by the Report is to adjust the rules relating to claimant's Part 36 offers. Another is qualified one-way costs shifting. Yet another is the CLAF or SLAS. We deal with all these separately elsewhere.

10. In addition to these suggestions the Report suggests, again as a countermeasure to the abolition of the recovery of success fees and ATE insurance, an increase in the level of general damages of 10% in any tort which "causes suffering to individuals". This is aimed primarily at personal injury, nuisance and defamation, and will have, as it seems to us, no relevance to litigation commonly conducted in the Chancery Division. In cases where there are no general damages awarded for pain and suffering, there is no scope for adjusting the normal principle of awarding damages, which is to render the injured party whole, no more and no less.

11. The Report suggests that the recommendation to prevent recoverability of success fees can be implemented by the repeal of Section 58A(6) of the Courts and Legal Services Act 1990 and all rules made pursuant to that provision. This will allow matters to revert to the position prior to April 1990, when CFAs were permissible, but not recoverable.

12. We do not consider that this recommendation has any educational implications.

1(b) QUALIFIED ONE WAY COST SHIFTING ("OWCS")

13. The Final Report recommends that one means of avoiding the need for ATE insurance premiums at all would be to provide for qualified one way costs shifting ("OWCS") in certain classes of litigation (paragraphs 2.6-2.7, page xvii and Chapter 19 paragraph 6.1, Chapter 30 para 5.1 (i), Chapter 32 paragraph 7.1(i)(b)).

14. OWCS means that ordinarily the claimant will not be required to pay the defendant's costs if the claim is unsuccessful, but the defendant will be required to pay the claimant's costs if the claim is successful. Unreasonable behaviour may operate to lift the claimant's protection. The financial resources available to the parties may also justify return to two-way costs shifting in particular cases.

15. As to the classes of litigation for which OWCS is recommended, the Report makes a firm recommendation that it be implemented for personal injuries litigation, clinical negligence, judicial review and defamation. None of these are claims brought in the Chancery Division.

16. The factors which are said to make personal injuries litigation suitable for OWCS are:

i) Claimants are successful in the majority of cases;

ii) It is a paradigm of an asymmetric relationship;

iii) It is less expensive than the use of ATE insurance which is widely used for PI;

iv) It is not new: this is what the legal aid shield provided for.

17. It is clear that for any category of work to be suitable for OWCS it must be (a) clearly definable (b) so definable in advance and (c) have characteristics similar to those identified above. We have considered whether there is any such category of work in the Chancery Division. We do not think there is. Individual cases may display an asymmetric relationship: but the same category of case may also involve parties who are symmetric, or for whom the relationship is asymmetric in the opposite sense.

18. Nevertheless we consider that there is wide scope for using the existing discretionary costs powers under the rules to level the playing field in cases which display the kind of asymmetry about which Jackson LJ is concerned. Costs-capping and general costs budgeting and management are examples of powers which can be used from an early stage in the case. If these powers are used sensibly, they can prevent less wealthy litigants from being discouraged from pursuing reasonable cases on the grounds that they may be liable to pay the costs bill incurred by their more wealthy opponents.

2(a) CONTINGENCY FEES

19. The Final report recommends that full contingency fees be permitted, subject to safeguards (para 3.3 page xviii and Chapter 12 para 5.1). By "full contingency fees" are meant fees which are calculated by reference to a percentage of the client's monetary recovery. Under the recommendation, the amount recoverable will not exceed that which is recoverable under a normal fee agreement. Contingency fee agreements will be regulated and will not be valid unless the client has received independent legal advice. Contingency fees, and their associated charges such as insurance and independent legal advice will lead to an increase in costs.

20. This issue was extensively debated during the consultation process. We see the logic of the arguments presented in the Report, that having set off down the road of permitting CFAs it is hard to rationalise not going the full distance to full contingency fees. Such fees are already in use in employment tribunals.

21. We do not think that contingency fees will be very widely used in the Chancery Division because only a proportion of cases involve a monetary recovery. To the extent that they are used, we cannot see that different considerations should apply there from elsewhere.

22. It is intended that the regulations should include a provision about the maximum percentage of the damages that can be payable to the lawyer. These regulations will have to make suitable alternative provision for non-monetary claims or the non-monetary element of mixed claims. Moreover in some cases involving very substantial sums of money, for example those involving collective redress, the regulations should provide a sliding scale of the

percentage depending on the value of the claim, or even capping of the absolute amount.

2(b) CLAF and SLAS

23. The Recommendation is that financial modelling be undertaken to ascertain the financial viability of one or more contingency legal aid funds (CLAFs) or a supplementary legal aid scheme (SLAS) after and subject to any decision by Government on the other recommendations in the Report (para 3.4 page xix and Chapter 13 para 4.1). The reason for the latter qualification is that the availability of recoverable success fees and ATE insurance might affect the viability of the financial model for a CLAF or SLAS.

24. A CLAF or SLAS is self-funding scheme for funding litigation which is proposed as an alternative in the event of changes to the existing scheme of CFAs. A CLAF is a free-standing fund. A SLAS is a self funding scheme bolted on to an existing statutory legal aid scheme, and is intended to provide assistance to litigants without sufficient means to conduct litigation. The schemes allow the stronger cases to subsidise the weaker, by providing for a levy on damages or other recovery.

25. Given that one-way costs shifting is not a viable option for the Chancery Division, and that other proposals such as the changes to Part 36 cannot provide funding assistance, we consider that CLAFs or a SLAS provide the best, in fact the only real, alternative to recoverable CFAs and ATE insurance. Moreover the increase in costs to which this form of funding leads is spread more evenly amongst those who participate in the scheme than is the case with CFAs and contingency fees. We strongly support the recommendation.

26. Currently a SLAS exists in Hong Kong (where CFAs and contingency fees are not permitted at all). A scheme for class actions only exists in Ontario and Quebec. South Australia has a SLAS set up with a seeding grant of Aus $1million. A similar fund in Western Australia failed, but a new fund is being set up. Victoria has a charitable fund (CCF) for which lawyers act pro bono or on no win no fee. All these funds deduct between 5 and 15% of damages as a levy to be paid into the fund. Seed funding (probably significantly greater than the sums raised in Australia) is obviously required before such a fund could get up and running here.

27. The statutory framework for a CLAF already exists in Section 58B of the 1990 Act, but has not yet been brought into force. If it is brought into force, the Lord Chancellor will have to make regulations with which the CLAF must comply, and the Rules Committee will have to make rules governing the costs orders which may be made in litigation funded by a CLAF.

28. Assuming that success fees under CFAs are rendered irrecoverable (thus restricting or removing this competing alternative form of funding), we suspect that the viability of the financial model for a CLAF will still depend on a number of factors including (i) will the CLAF, or the claimant be liable for adverse costs orders if the funded case fails? (ii) will funding costs be recoverable by the funded party from the losing party? We suspect that, consistently with the rest of Jackson LJ's report the answers to these questions may be (i) that the CLAF must accept liability for adverse costs orders and (ii) the levy will not be recoverable.

29. Given the desirability of the realisation of some form of CLAF, we have considered whether protection should be afforded to the CLAF and its client from adverse costs orders. However, to grant the claimant and the fund protection from adverse costs orders would amount in effect to one way costs shifting, which we do not support. On the other hand, making the CLAF liable for adverse costs orders may affect the viability of the financial model. Any intermediate proposal would give rise to uncertainty, and make the CLAF less attractive as a means of funding. On balance we consider therefore that the best option is for liability for adverse costs orders to be accepted by the CLAF, and for this to be built into the financial model, either by block-insuring against the risk, or by adjusting the levy. This would all be subject to the court's wide discretion as to the incidence of, and amount of recoverable costs.

30. We do not support recovery of the costs of funding from the losing party, essentially for the reasons which Jackson LJ gives for abolishing the recoverability of CFA success fees and ATE insurance premiums. The costs of the CLAF will have to be met from the levy.

31. One problem with most Chancery cases would be the establishment of the value of the recovery on the basis of which the levy to the fund is to be calculated. Injunctions and declarations are not susceptible to the simple percentage of recovery treatment. But this problem is far from insuperable. In the context of the 10% uplift suggested for claimant's Part 36 offers, Jackson comments that courts should be able to form a view about this: likewise CLAFs. The appropriate levy in some cases may have to be the subject of

individual negotiation with the funding body. Another potential problem is that there will be no fund in the hands of the successful party in such a non-monetary case from which the CLAF levy can immediately be paid. But this problem can be dealt with by giving the CLAF a charge, similar to that given under legal aid schemes, over recovered or other property of the funded party, on suitable terms as to its enforcement. This, of course, may give rise to a longer gap between the supply of funding by the CLAF and recovery of its levy. The gap will have to be allowed for in the financial model, and met by seed funding.

32. We consider that whoever is given the task of the financial modelling which Jackson LJ recommends should have access to the highest calibre advice from one or more City institutions

3. THE INDEMNITY PRINCIPLE

33. The Final Report recommends the abolition, subject to safeguards, of the common law indemnity principle, that is to say the principle which prevents a party recovering by way of costs sums which it is not itself liable to pay to its lawyer (Chapter 5 and para 4.1).

34. The main reason for the proposed abolition is that the indemnity principle has allowed parties to escape liability for paying costs on technical grounds connected with the enforceability of the arrangements between the receiving party and its lawyers. The proposed abolition was the subject of heated debate during the consultation.

35. We support the recommendation, subject to the safeguard proposed. The safeguard is to amend CPR 44.4(1) to require the court, when assessing the amounts of recoverable costs, to allow only reasonable amounts in respect of work actually and reasonably done and services actually and reasonably supplied for the benefit of the receiving party. Such sums will be recoverable even if those sums are not payable by the paying party to its lawyer.

36. The costs judge will therefore continue to assess an actual bill of costs, but will not be required to investigate the legal relationship between the lawyer and the receiving party.

37. We do not consider these proposals raise any specific Chancery or educational points.

4(a) and 4(b) THIRD PARTY FUNDING

38. The Final Report recommends that a satisfactory *voluntary* code should be drawn up for third party funders and that third party funders should be potentially liable for adverse costs orders (Chapter 11 and paragraph 6.1 page 124).

39. The Report comes down marginally in favour of a voluntary code. This is plainly an interim conclusion: see "in the first instance" (Chapter 11, paragraph 2.4). In the long term a number of questions, particularly measures to ensure capital adequacy of funders, will have to be revisited (Chapter 11 paragraph 3.4). There is a formal recommendation that the question of statutory regulation be revisited if and when the market expands (Chapter 11 paragraph 6.1(ii)).

40. On this basis we support the recommendation for an interim voluntary code. We do, however, strongly endorse the suggestion made in paragraphs 2.7 to 2.8 of the Report, that the current draft code is deficient in permitting funders to withdraw from litigation at any time on giving 21 days notice. This is a point also made by the specialist Chancery Judges in Leeds. We agree with Jackson LJ that the funder should be obliged to continue to provide whatever funding it originally agreed to provide. If the draft code is not amended in the way suggested, then the case for immediate compulsory regulation becomes stronger.

41. So far as the adverse costs orders are concerned, the main effect of the recommendation is to reverse the decision of the Court of Appeal in *Arkin v Borchard Lines Ltd.* [2005] EWCA Civ 655, that a third party funder should only be liable on an adverse costs order to the extent to which it has funded its own client and no further. We agree with Jackson LJ that this is wrong in principle and support this recommendation as well.

42. Neither recommendation has any special significance for the Chancery Division, or has any educational implications.

5. INTELLECTUAL PROPERTY CLAIMS

43. The main recommendations in the Final Report (see Chapter 24 and para 6.1 page 257) are the following:

    i) reform of the Patents County Court ("PCC") to provide a cost effective environment for the resolution of IP disputes as recommended by the Intellectual Property Court Users' Committee ("IPCUC") Working

Party and in particular a free standing court, the Intellectual Property County Court ("IPCC");

ii) a small claims and a fast track for the PCC;

iii) a specialist district judge for the PCC.

44. The Report also makes three other specific recommendations: (iv) amendment of the Patents Court Guide to give guidance on Statements of Case, (v) consultation with the IPCUC whether there should be more active case management in the Patents Court and (vi) consultation on whether there should be a pre-action protocol or whether the Patents Court Guide should give guidance on pre-action conduct.

Recommendation 1: IPCUC Working Party reforms of the Patents County Court ("PCC")

45. The Jackson Report recommends that the Final Report of the IPCUC Working Party be implemented. The IPCUC Final Report recommended the setting up of a free-standing Intellectual Property County Court ("IPCC"), and made proposals for a radically streamlined procedure as the default procedure for all claims in that Court. Currently an existing County Court can be designated a Patents County Court. In contrast, the IPCC would exist independently of any other county court, and should, we think, be formally part of the Chancery Division.

46. A small proportion of the proposals for the IPCC require primary legislation, in particular the setting up of the PCC as a free standing court, and new rules about transfer. Many of the procedural reforms, however, can be implemented

by Order in Council, and by modification to CPR Part 63 and the Practice Direction. Much of the hard work on drafting these has already been done by Arnold J, and the recommendations have already been through an extensive consultation process via the IPCUC working party. However, in a meeting with representatives of the United Kingdom Intellectual Property Office ("UKIPO") (an influential body in the passage of any IP legislation) Kitchin, Floyd and Arnold JJ were told that implementation of the entire package of reforms, if it included the primary legislation, could be a lengthy process.

47. There are considerations militating in favour of getting the substance of the new procedures implemented relatively quickly:

- The existing PCC exists as part of the Central London County Court, although it is important to note that it is both geographically and administratively much closer to the High Court. Thus, until it was destroyed by fire in 2009, the PCC sat in Field House, off Chancery Lane. Thereafter it moved to St Dunstan's House, currently the home of some Commercial and TCC judges. This option will disappear with the opening of the Rolls Building in 2011. The listing of cases in the PCC has for some years been the responsibility of Chancery Listing in the RCJ.

- Nevertheless, because the PCC is formally part of the Central London County Court, claims are still required to be issued from that court rather than from the Chancery Registry. This has been the cause of dissatisfaction amongst court users, who have to go to different places to issue and list their cases. Moreover when cases are transferred from another County Court, they are transferred first to Central London and

thereafter to the PCC with consequent administrative confusion and delays.

- There is good evidence that the work of the PCC is on the increase. In the 12 months to December 2009 178 cases were issued in or transferred to the PCC, compared to less than half that number in 2008. The trend is continuing into 2010. If the demand identified by the IPCUC Working Party materialises, the number of cases is likely to be yet larger. The case for an efficient and CLCC-independent system of issuing and processing claims is therefore an urgent one.

- HHJ Collins CBE strongly supports the idea of effecting a complete separation of the PCC from the CLCC, and sooner rather than later.

- A competition is currently under way at the JAC to find a replacement for HHJ Fysh QC who retires as the Judge of the PCC in the summer of 2010. It is obviously desirable that the new procedures should be in place when the appointee takes office, presumably at the beginning of the new legal year.

48. The formal creation of the new IPCC requires primary legislation which we have been advised is unlikely even to be set in motion until after the General Election. We consider that most if not all of the procedural changes can be implemented by SI, Rule and Practice Direction changes, and that this should be put in motion, using Arnold J's drafts, as soon as possible.

49. In the meantime we consider that we face two immediate problems: (a) where to locate the Patents County Court and (b) how to administer the issue and processing of cases which are issued there.

50. As to the first of these questions we consider that there is a powerful case for keeping the PCC, as it is at present, close to the High Court, and preferably under the same roof. The reasons are:

i) the reforms accepted and endorsed by the Jackson Report for the PCC are radical and far-reaching. Their aim is to achieve justice with high efficiency and low cost, and to attract international work which is being lost to other EPC countries which enjoy parallel national jurisdiction. It is therefore vital that the Court be launched with the best available and most straightforward administrative structure. Likewise it would be highly embarrassing if proceedings were made cumbersome or inefficient through the absence of proper support;

ii) listing is already handled by Chancery Listing: it is obviously important that the court is in close proximity to the Listing Office;

iii) the IPCUC report recommended, and Jackson LJ accepted, that the existing High Court Patents Judges should be able to sit in the PCC as and when required. This will be cumbersome if the Court is not located where those judges currently sit;

iv) the Patents County Court Judge is now and will continue to be a Deputy High Court Judge and will sit in the Chancery Division and in the Patents Court when the need arises;

v) the present system has worked well, except insofar as links are maintained with the CLCC. It would be wrong to move in any

direction which required more involvement of the CLCC rather than less.

51. We recognise nevertheless that the space for further judges in the Rolls Building when the Chancery Division moves there in 2011 will be limited. If the PCC Judge is to be located elsewhere, for example in the RCJ, steps will have to be taken to ensure that (a) there is adequate clerking support to enable papers to be transferred rapidly to and from the Rolls Building and (b) proper liaison is maintained between the Patents Court and the PCC to ensure mobility of judicial resources between the courts.

52. As to the second question, the need to sever the remaining links with the Central London County Court is a pressing one. Experience has shown that separating issue and listing is not a practical solution. The increase in business already occurring and likely to continue means that a solution needs to be found quickly. Whatever decision is taken as to the location of the PCC, we consider that both the issue and the listing of cases should be handled within the Chancery Division.

53. Accordingly we recommend that, pending the creation of the IPCC, the procedural reforms for the PCC should be implemented as far as possible by Rule and Practice Direction, and that the PCC:

i) should remain geographically close to the Chancery Division and, if physically possible, move with it to the Rolls Building; and

ii) whether or not (a) is accepted, should be wholly administered by the Chancery Division, both as to issue of proceedings and listing.

Recommendation 2: Small Claims and Fast Tracks

54. In addition the Jackson Report recommends that a small claims track and a fast track be created within the PCC.

55. Currently, all claims to which Part 63 applies, that is to say all intellectual property claims, are allocated to the multi-track: see CPR 63.1(3).

56. We support these recommendations. We do not think that quite the same degree of urgency applies to the implementation of these recommendations which have not yet been the subject of full consultation. Moreover the implementation will require amendments to the CPR which go beyond those which have already been drafted, and will have to be dovetailed with whatever amendments are made to the small claims and fast tracks elsewhere.

57. If the recommendation is accepted, the Rules will need to be amended so as to allow for allocation of intellectual property claims to the small claims track and the fast track. CPR 63.1(3) should be deleted. Those parts of the CPR which are currently disapplied by Part 63 will need to be made applicable to the PCC and tailored accordingly. Rule 63.4(A) will need to be replaced.

58. The Patents Court Guide, paragraph 2, will need to be amended so as to indicate that claims in the Patents Court and the Patents County Court are not automatically allocated to the multitrack, and that claims within the appropriate value bands may be allocated to the small claims track and the fast track as appropriate. Claim forms will need to make some attempt to specify a value, even if it is simply to indicate that it is in excess of £25,000

59. CPR 16.3 provides for statements of value to be included in claim forms. The information required is tailored to accord with the allocation criteria. The Rule should be amended to provide for statements of value relevant to allocation in the PCC.

Recommendation 3: District Judge for the PCC

60. The Jackson Report recommends that there should be one or more district judges, deputy district judges or recorders with specialist experience available to sit in the PCC in order to deal with small claims and fast track cases. The body of the report suggests that an alternative which merits consideration "is the possibility that UKIPO hearing officers (with appropriate qualifications) could serve as deputy district judges".

61. The UKIPO is considering its position in relation to the latter suggestion. Without expressing a concluded view, we consider that there might be a concern amongst litigants about officials from the UKIPO deciding disputes of this nature. The UKIPO has a function of promoting IP, and granting IP rights. Whilst its hearing officers do decide contested hearings within the Office, we are not convinced that any extension of this function would be desirable. It should be remembered that much fast track and small claims work will not involve lawyers: litigants in person are often particularly prone to perceptions of bias. In addition IPO Hearing Officers are unlikely to have the necessary qualification to become district judges.

62. It is impossible to gauge the level of demand for the new procedures in the PCC, and whether there is justification for a full time DJ or DDJ. It is entirely

possible that there will be a sufficient demand. We consider that the necessary enabling powers to create a full time appointment should be put in place, so that the position could be filled as and when a business case for an appointment can be made.

63. In the past, experienced practitioners have sat from time to time in the PCC, as Recorders or Assistant Recorders. We consider that this practice should be allowed to continue. No change will be necessary to implement it. The system will give the court needed flexibility. Recorders could initially be called in to deal with small claims and fast track cases if the judge has inadequate time to deal with them.

64. Once the small claims and fast track are running, it may be desirable either to appoint a DJ or DDJ or to train up, as Jackson suggest, a DJ from amongst the existing bench. Operational decisions such as these should be taken in the light of figures as to the usage of the court.

Recommendations 4 to 6

65. These recommendations are: amendment of the Patents Court Guide to give guidance on Statements of Case in the PCC; consultation with the IPCUC on whether there should be more active case management in the Patents Court and consultation on whether there should be a pre-action protocol or whether the Patents Court Guide should give guidance on pre-action conduct.

66. We support these recommendations in general, although we would point out that a previous attempt to create a pre-action protocol ran into difficulty over the "threats" provisions. Unless and until those provisions are rationalised or

abolished, any further attempt is likely to meet the same difficulty. These are, however, all matters which can be taken forward with the IPCUC which meets regularly.

67. We do not think that these proposals for IP litigation require any general judicial education. Once the new judge is in place there will be a need for wide publicity to be given to the new procedures. In part this can be done by amendment to the Guide, but the new judge will have a role to play as well.

7(a): PART 8 CLAIMS: ALLOCATION TO FAST TRACK

68. The Report recommends (p.285 para 3.3) that Part 8 be amended to enable the court to allocate the case to the fast track at any time (thereby enabling the parties to gain the full benefit of the fixed costs regime for fast track cases). At present this cannot be done before the first hearing of the Part 8 claim.

69. The immediate impact of this will be to increase costs by requiring parties to all Part 8 claims to file allocation questionnaires (a requirement from which they are currently exempt). It will also use court time by requiring a DJ to consider allocation (which currently awaits the first hearing).

70. Experience suggests that the number of Part 8 claims in the County Court Chancery List is small. Straightforward Part 8 claims are generally issued in the High Court with a view to their being dealt with by a Master or Chancery Specialist District Judge. The example given in the Report (p.285 para 3.2) of the boundary dispute which turns upon the interpretation of a small number of documents is rare: almost invariably such cases also involve claims to adverse possession and/or proprietary estoppel and are converted into Part 7 claims at

the first hearing (when they could in any event be allocated to the fast track). Likewise the other example of claims to shares in domestic property. The practical advantage gained by implementation is therefore likely to be small. (The real generator of costs in these specific cases is the emotional investment of the parties themselves, which causes the litigation to proceed at fever pitch: as the work of HHJ Oliver-Jones QC has shown, the demise of locally based mediation schemes has undone much good work in this field.)

71. Furthermore, the time between issue of the Part 8 claim and the first hearing before a DJ is short. At the first hearing a Part 8 claim can (in an appropriate case) be allocated to the fast track already. Accelerating this by requiring the parties to all Part 8 claims to file an allocation questionnaire before the first hearing is a somewhat expensive way of gaining little advantage.

72. For implementation, an amendment to CPR Part 8 is needed. The allocation decision will be made by a District Judge (generally without a hearing). A Practice Direction should reinforce Jackson LJ's view that fast tracking Part 8 claims is suitable only for those disputes which are of lower value and where the legal and evidential issues are also reasonably straightforward. It should also state that the allocation decision must be made by a specialist Chancery DJ.

7(b) PART 7 CLAIMS: FAST TRACK

73. Jackson LJ recommends (p.168 paragraph 7.1) that the recoverable costs of cases in the fast track should be fixed. He has prepared two matrices of fixed costs for adoption in road traffic, employers' liability and public liability

cases. He proposes (p.163 paragraph 6.1) that in other fast track cases there should be an overall limit of £12,000 on recoverable costs pre-trial (court fees and the trial advocacy fee which is fixed under CPR Part 46 are on top), and that there should be matrices of fixed costs for special categories of fast track cases.

74. The fast track is about cases in the County Court. In addition to the Central London County Court, Court centres where there is a Chancery District Registry maintain a Chancery List in the County Court. Cases may be started in that List: or they may be transferred in from non-Chancery DRs under the Hart-Lloyd Guidelines. Cases in the County Court Chancery List may be tried by the Specialist Chancery judge or by a circuit judge who has a Chancery background or by Recorders with a Chancery background (depending on what influence the local specialist judge has over listing). They may also be tried by a specialist Chancery DJ if released by the Specialist CJ.

75. Cases in the Chancery List that involve a claim for less than £25,000, can be tried in less than five hours and involve fewer than two expert witnesses per party are already eligible for the fast track. The Report recognises that many Chancery cases are not about money. Jackson LJ suggests (p.286 paragraph 3.6) that small easement and boundary disputes would be appropriate: one could add claims to shares in domestic properties where there is only a small equity, small partnership claims and those landlord and tenant claims which are issued in the Chancery List rather than in the general County Court. Small probate claims cannot be allocated to the fast track.

76. As to the impact of adopting the proposal, encouraging the allocation of small Chancery List cases to the fast track is unlikely to achieve much in the way of imposing costs constraints. Straightforward eligible cases are already so allocated. There are few straightforward cases in the categories of case at which the Report additionally aims. "Low value" does not mean "easy". Many low value but complex claims allocated to the multi-track now go to mediation: though we would again observe that this process was much hampered when HMCS withdrew funding for all local initiatives and promoted the National Mediation Helpline.

77. Full implementation of Jackson LJ's recommendations would require (a) a change of emphasis in the eligibility criteria and (b) the preparation of matrices of fixed costs for types of Chancery litigation.

78. As to (a), in the preparation of this response the view was originally taken that a redefinition of the eligibility criteria in CPR 26.6(4) was required to make specific reference to non-monetary claims. Debate with consultees has led to a revision in that view. The wording of CPR26.8(1) is probably wide enough for the present purpose: what is required is an amendment to the PD (reinforced by a revision to the Chancery Guide) to say that non-monetary claims are eligible for the fast track and that "the financial value" of the claim is not confined to the amount of any monetary claim but extends to the financial value of any non-monetary relief claimed e.g. the value of a share in a property consequent upon the determination of beneficial interests or the effect on property values if the claimant's case is correct or the defendant's case is correct.

79. As to (b) this is probably an unachievable aspiration to which effort should not be directed unless the consequences of more vigorous case management generally prove disappointing. The methodology which enabled Jackson LJ to prepare fixed cost matrices for road traffic, employers' liability and public liability cases (pp 156-163: in short, an academic analysis of what is in fact spent in volume litigation) cannot be applied to boundary and easement cases, or to any of the other possible categories. In the first instance we should concentrate on a re-emphasis within the eligibility criteria. The immediate consequence of that will be to impose the general fast track fixed costs regime to a (slightly) increased number of cases.

80. Encouraging the allocation of Chancery List cases to the fast track must not, however, be seen solely in terms of the imposition of costs constraints.

81. One consequence is that it affects the trial tribunal. Allocation to the fast track is undertaken by the DJ (generally without a hearing). A district judge has jurisdiction to hear any claim which has been allocated to the fast track except for those identified in CPR PD 2B para. 11.1(a). This excludes various landlord and tenant claims, but would not (without amendment) exclude many claims in the Chancery List which are of comparable complexity and importance. Moreover, listing of trials before District Judges is purely an administrative matter (the Specialist Chancery judge has no real say): and whether a district judge is in any sense "a Chancery specialist" is a purely local matter. Without supervision, matters which have been issued in the County Court Chancery List may therefore be routinely tried by non-specialist DJs or deputy DJs if simply allocated to the fast track. This could be a high

price to pay for the imposition of cost constraints. (Indeed it may make the imposition of cost constraints futile if it simply produces a flood of appeals to the Specialist CJ). This was the imperative behind the Hart/Lloyd Guidelines – "beneficial interest" cases being tried by non-specialist DJs and decided without reference to legal principle). Jackson LJ in fact notes (p.288 para 4.12) that neighbour disputes which proceed to trial should be case managed by judges with conveyancing experience. But there are few DJs who could pass that test.

82. A further consequence of allocating the case to the fast track is to alter the destination of any appeal. If the fast track trial is conducted by a DJ it is to the SCJ. If the fast track trial is conducted by a Recorder it is to the HCJ (generally the Supervising Judge). If not allocated to the fast track appeal from a final decision is to the CA.

83. Our recommended solution is to provide in the PD (a) that the allocation decision must be made by a full Chancery specialist DJ and (b) that no fast track case outside the jurisdiction of a Chancery Master shall be tried by a DJ unless so ordered by the Specialist CJ.

84. A more imaginative approach to low value claims with a degree of complexity would be to have a "fixed costs list" in the High Court where trials would be conducted by Chancery Masters or Specialist DJs. But this would impose a demand on already stretched resources.

85. We have considered the educational implications. Implementation of this recommendation falls on the shoulders of the Specialist CJs. It would be useful to have a half day session for all Specialist CJs with the Chancellor and

the Supervising Judges to discuss local arrangements and quality control strategies. (This proposal has been canvassed with them and was well received.)

7(c) BEDDOE APPLICATIONS

86. The recommendation is that the rules or practice directions should provide that, save in exceptional cases, all *Beddoe* applications will be dealt with on paper: see p.287 paragraph 4.9.

87. The present practice is as follows. Since *Beddoe* applications are issued under Part 8, they come before the Master as box work at an early stage. In accordance with 64 PD(B) 6.1 both trustees and defendants are expected to state whether, and if so why, there should be a hearing, and the application is dealt with without a hearing if that "is possible".

88. This paragraph of the PD is described in the Final Report as giving "only a mild steer towards dealing with *Beddoe* applications on paper". Doubt has been expressed on behalf of the Masters whether the proposed "firming up" by reference to the indefinite concept of exceptional cases will achieve much in practice. We are not persuaded that the criterion 'exceptional' is the appropriate label or concept for the identification of cases where the just and economical disposal of *Beddoe* applications is best carried out orally rather than in writing. There are many non-exceptional *Beddoe* applications where an oral hearing is both fairest, quickest and cheapest in the long run.

89. The present reality as we understand it is that the Masters do not regard it as possible to deal with *Beddoe* applications on paper if they are significantly

contentious. Exceptionally, if there is a particularly difficult issue to be decided, and/or if the proposed or pending litigation is of very substantial value or importance, the Master may refer the application to a judge.

90. By contrast for example with applications for permission to appeal (which are commonly dealt with first time round at least on paper) there is no provision in the rules or PD for a skeleton argument to be lodged prior to the first consideration of a *Beddoe* application on paper. This significantly inhibits the determination of *Beddoe* applications on paper in cases where there is any significant dispute.

91. Furthermore, there is a risk that if non-exceptional *Beddoe* applications are all determined on paper despite the wish of any of the parties to have an oral hearing, there are likely to be a proliferation of appeals.

92. In our view:

i) There is some scope for increasing the proportion of *Beddoe* applications dealt with on paper.

ii) This will require a revision of 64 BPD, not limited to paragraph 6.

iii) It will be necessary for the Practice Direction to require parties to submit written argument on any contentious *Beddoe* application at an early stage, either as part of their evidence or separately. Since 64 BPD paragraph 7.7 contemplates prior consultation with beneficiaries, it may be sufficiently apparent that an application is contentious for written argument to be provided by the trustees when the application is

first made, and by beneficiaries when acknowledging service, along with any relevant evidence.

iv) Some non-exhaustive explanation in the PD (or in a revised Chancery Guide) of what are and what are not appropriate cases for an oral hearing will be necessary. The fact that a *Beddoe* application is contentious will not of itself make it an appropriate case.

93. It is necessary to bear in mind that a *Beddoe* application forms an important part of the court's armoury in limiting the incidence of the costs of litigation upon trusts and estates. Cases where there appears to be a real risk that trustees may incur disproportionate costs (or liability for others parties' costs which is disproportionate to the value of the estate) in litigation may have to be identified as justifying an oral *Beddoe* hearing, so as to enable the court to get to grips with the case and apply active costs management to the trustees' participation in it. But if the existence of that risk is to be discernible, it will be necessary for the PD to require trustees making *Beddoe* applications always to provide to the court, up front, a statement of the size and nature of the trust fund, a detailed costs budget to the court as part of their evidence, and (if known) an indication of the size of their exposure to liability for other parties' costs. Of course this is frequently done already, but in cases where this is omitted there is an increased risk of costs exhausting the estate beyond the court's ability in practice to do anything about it.

94. We do not envisage any need for specific judicial education. Rather, a change of culture may be required, so as to accommodate for the first time the determination on paper of applications between parties where there is a

significant dispute. The increased box work may significantly reduce the Masters' availability for hearings, but this should be counteracted by those *Beddoe* applications dealt with on paper falling out of the hearings list.

95. Finally, we think it likely to be a very rare case in which a contested *Beddoe* application considered sufficiently contentious or important to be referred to the judge will nonetheless remain suitable to be dealt with on paper.

7(d) CAPPING THE COSTS RECOVERABLE FROM A TRUST FUND OR ESTATE

96. The recommendation is that the amounts of costs which may be recovered from a trust fund or an estate ought to be set as a proportionate level at an early stage of the litigation: see page 287 paragraph 4.5.

97. The justification for this recommendation (in particular in paragraph 4.4 on pages 286-7) suggests that Jackson LJ was probably thinking mainly of litigation about trusts and estates between persons being, or claiming to be, beneficiaries therein, or between beneficiaries and trustees, rather than litigation between trustees and third party strangers to the estate (such as alleged creditors, or neighbours of property owned by trustees). The third party in that type of litigation, although it affects an estate, is not (as the Final Report assumes) necessarily the loser merely because the estate is exhausted in costs. The fact that his opponent is a trustee (who may or may not also have a beneficial interest in the estate) is not an obvious reason for treating the trustee (and therefore the estate) more sympathetically than the third party. Furthermore, the costs order made in favour of a successful third party litigant against trustees is usually a personal order against the trustees, for which they

have unlimited personal liability. The effect of that order upon the estate depends upon the trustee's right of indemnity from the estate.

98. Even within the confines of proceedings between beneficiaries, and between beneficiaries and trustees, we consider that there are insuperable difficulties in limiting the costs recoverable by trustees from the estate by the imposition of a costs cap in the main proceedings, rather than by costs management in the separate *Beddoe* proceedings. A trustee is, in principle, entitled to an indemnity from the estate in respect of costs incurred by him in the reasonable conduct of legal proceedings, and it cannot be right to circumscribe the trustee's indemnity by the imposition of a costs cap designed to limit the effect upon the estate of the costs of the main proceedings generally. Provided only that the trustee has conducted the litigation within the confines of a relevant *Beddoe* order, he is entitled to a full indemnity from the estate, the removal or attenuation of which would probably require primary legislation. We would not in any event favour any attenuation of that right, which is founded on the principle that a trustee is not, in the absence of misconduct, expected to put his hand in his own pocket in the performance of his duties.

99. A trustee is also entitled in principle to a full indemnity in respect of his liability to pay the costs of any other party in the litigation, again subject to his obtaining and complying with *Beddoe* directions. While a *Beddoe* order may prohibit a trustee from himself incurring costs above a stated limit without further reference to the court, it is difficult to envisage how the court with conduct of the *Beddoe* application can regulate with any precision the extent of the trustee's liability for the costs of other parties to the litigation. The only

solution to that problem may lie in the imposition of a cap upon what the other litigant can recover from the trustee.

100. In the context of litigation about estates between beneficiaries, or between beneficiaries and trustees, the tendency in recent times has been for a gradual shift away from the ready award of costs from the estate, to a 'costs follow the event' approach. Nonetheless there are categories of case in which it continues to be customary to award beneficiaries' costs out of the estate. Costs capping may be of assistance in relation to some, but not all, of those. We think it sensible to review them, category by category.

101. A well established (and recently affirmed) example is contested probate litigation, where the need for the court to determine a dispute has been caused by the conduct of the testator: see *Kostic v. Chaplin & ors* [2007] EWHC 2909 (Ch). Although, as that case illustrates, the court will be astute to deprive an unsuccessful litigant of costs from the estate once that litigant has obtained sufficient information about the merits to form his own view, there may nonetheless be scope for costs capping at an earlier stage of such cases. For example, if the issue is as to probate of a second will, where there is an otherwise unchallengeable earlier will on similar terms, the dispute may concern the destination of one modest part of the estate, so that it would be wrong for the rest of the estate (disposed of identically in both wills) to be put at risk by the litigation. More generally there may be scope for costs capping where the estate is modest in proportion to the likely cost of uninhibited litigation about an issue going to probate, such as testamentary capacity or undue influence. In most such cases however, costs will follow the event.

102. Another type of estate litigation in relation to which costs are commonly ordered to be paid out of the estate is will construction (or, for that matter, the construction of an *inter vivos* settlement), in particular where the executors or trustees seek the court's assistance, and join beneficiaries (or potential beneficiaries) individually or in a representative capacity. In our experience there is little scope for the beneficial use of cost capping in relation to such litigation because, generally, it is these days conducted with brevity and therefore with economy. Furthermore, where a beneficiary is joined in a representative capacity, rather than because of his wish to advance his own interests, it will usually be unfair that he should do so otherwise than on the basis of a full indemnity for his costs. He may refuse to participate on any other terms. The early imposition of a costs cap in such a case may simply lead to the representative defendant discontinuing his participation half way through, or to an application to raise the cap which the court would find it very difficult to resist.

103. Applications under the Inheritance Act in relation to small or modest sized estates have traditionally given rise to risks of dissipation of the estate, in particular because of costs unnecessarily incurred by the personal representatives. As between the remaining parties, costs are more likely to follow the event. Nonetheless, Inheritance Act litigation is inherently susceptible to generating expenditure out of all proportion to the value of the estate.

104. We think that the scope for useful costs capping in relation to Inheritance Act cases is limited, for two reasons. First, the tendency of personal

representatives to incur unnecessary and disproportionate costs can better be controlled by a rigid insistence on the principle that the PR's role in such litigation is purely neutral and informative, rather than adversarial. Secondly, the overwhelming majority of Inheritance Act cases settle, frequently at mediation, precisely because the costs consequences of pursuing them to trial are sensibly perceived by all the participants to be a powerful incentive to settle. In such circumstances, an early costs capping hearing, which may itself be expensive and contentious, may do little to improve matters.

Implementation

105. We therefore think that there is scope for the introduction of costs capping in relation to litigation about estates, provided that it is applied sparingly, in a targeted way, and only where the circumstances suggest that it is likely to be efficacious, rather than across the board. There is of course already provision for costs capping generally, in CPR 44.18-20. It is hedged about by significant restrictions (see 44.18(5)) and we know of only one occasion where it has led to an application (which failed) for a costs capping order in litigation about estates.

106. We consider that, at least on a trial basis, it might be worth injecting a specific provision in the rules designed to require the court to consider costs capping in litigation about estates, along the following lines. Any beneficiary or person claiming to be a beneficiary in an estate (including the subject matter of an *inter vivos* settlement) who intends to seek an order that his costs be paid out of the estate otherwise than by means of an order against the executor or trustee on a 'costs follow the event' basis, should be required to make that

intention plain at the outset, giving reasons, (either in the claim form or when acknowledging service or in any relevant allocation questionnaire), and be required to provide at the same time a costs budget in sufficient detail to enable the court to form a view about the likely impact upon the estate of any such order. The beneficiary should be required to serve that information upon the personal representatives or trustees, as the case may be. The personal representatives or trustees should then be obliged to lodge with the court (and serve upon the relevant beneficiary) a succinct statement of the value and composition of the estate and, in particular, to distinguish between that part of the estate which is the subject matter of the litigation, and any part unaffected by it, together if thought fit with any application for a costs capping order, supported by written reasons.

107. On its first consideration of the case thereafter, the court should, even where the fiduciary makes no application to that effect, consider whether a costs capping order would be appropriate and, if thought fit, either make such an order without more ado (in a plain case) or give directions enabling the question whether such an order should be made to be determined, either on paper or at a hearing, as the court thinks fit. If the court thinks that it would be likely to save costs, it should have power to make, in effect, an order *nisi*, with liberty to the claiming beneficiary or the fiduciaries to apply to have it reviewed after full argument, orally or in writing.

108. We think it important that, in addition to having power to impose an overall cap upon the incidence of beneficiaries' costs upon the estate, the court should more frequently exercise its power to apportion the burden of a beneficiary's

costs to a particular part of the estate, so as to protect that part (if any) of the estate which is not the subject matter of the dispute from being dissipated in connection with it. This is of particular importance where, for example, the dispute relates to the subject matter of a specific gift, but the terms of the will would leave the costs to fall upon the residue.

109. For the reasons which we have given, we do not recommend that costs capping be applied to the costs of relevant fiduciaries, because of the inappropriate inroad which that would create into their right of indemnity, and because those costs are in our view better controlled by a requirement for appropriate costs management within *Beddoe* applications.

110. Nor, for the reasons also given, do we think that costs capping should apply to persons who are third parties *vis-à-vis* the estate, rather than beneficiaries, or to the costs of persons joined in a primarily representative capacity. There may however be scope for capping the costs of beneficiaries joined primarily to protect their own interests, where it is merely convenient for them also to be given a representative status (for example on behalf of their own children and remoter issue).

7 (e) FIXED COSTS/BENCHMARKED COSTS REGIME IN INSOLVENCY CASES

111. The Report recommends (p.290 para. 5.6) that there should be established a benchmarked costs regime for routine winding up and bankruptcy petitions. Appendix 8 to the Report (p.546ff) contains sample statements of costs which include recommended fee levels for London and for outside London cases. These were assessed by a working group (p.289 note 65). The system is lop-

sided in that it applies only to petitioners (whether the petition is granted or dismissed). It is optional (in that the petitioner can insist upon assessment).

112. What is needed to implement the recommendation is an amendment to CPR Part 45. The amendment will need to be tied in with other circumstances in which Jackson LJ proposes benchmarked or fixed costs.

113. A provision is needed that where a court is invited to make a summary assessment of costs and (a) a fixed costs regime or benchmarked costs regime is available for such costs and (b) the amount sought is in the appropriate figure or range, then the summary assessment shall be in that sum. (This means there is no argument.)

114. A further provision is needed that in proceedings in respect of which there is a fixed costs regime or a benchmarked costs regime and the court orders that the costs shall be assessed on the standard basis then the party having the benefit of that order may at its option seek to recover costs in the appropriate figure or within the appropriate range. If the party to whom that option is available does not exercise it then if that party proceeds to an assessment but fails to recover a sum more than 20% in excess of the fixed or benchmarked costs than that party shall pay the costs of and occasioned by the assessment proceedings.

115. Finally, CPR Part 45 would need to identify the proceedings to which a fixed costs or benchmarked costs regime applies by reference to a PD, and the PD to specify bankruptcy petitions and winding up petitions as proceedings in respect of which a benchmarked costs regime applies, identifying the initial statements of costs (probably in an additional schedule) and providing for the annual revision of those initial figures by the proposed Costs Council.

116. As noted, this procedure was devised by and the appropriate figures fixed by a small working group. This working group will have to be put on a permanent and formal basis, and tied in with the Costs Council: see the Report at p.59 para.1.3 .

7 (f) COSTS MANAGEMENT IN INSOLVENCY PROCEEDINGS

117. The Report considered (p. 290 para 5.7) whether the court should exercise prospective control (a) over costs between the parties in insolvency proceedings or (b) the costs and remuneration of office holders.

118. As to (a) the recommendations of a small working party are set out on page 291 paragraph 5.9. In essence it is proposed that at the first effective hearing or any subsequent hearing the court may direct the parties to file and exchange budgets of the estimated costs in an appropriate form; and in addition (in the case of an office holder) evidence that the creditors' committee or the general body of creditors or the principal creditors have been provided with the budget and any estimate of the non-recoverable remuneration of the office holder expected to be incurred in connection with the proceedings. At any stage in the proceedings the court may on application or of its own motion cap the costs of any party. At the end of the proceedings the court will have regard to the budget estimates of the receiving party in assessing costs.

119. There is some unease at the introduction of a special regime for insolvency litigation (rather than leaving such cases to be subject to whatever general costs management regime is developed for cases generally). Before the specific recommendations are implemented that option ought to be considered. To effect implementation of the proposal the Report suggests (page 292

paragraph 5.10) that the matter be considered by the Insolvency Rules Committee. This does not appear appropriate, since it has no rulemaking power. Its function is to respond to proposals advanced by the Insolvency Service. But rules do not seem to be required. The recommendations could be implemented by case management directions given at the first hearing of the Ordinary or Originating Application in individual cases under CPR 3.1(2)(m): IR 7.51(1). But some caution must be exercised lest (a) the litigation costs disclosure requirement becomes a weapon in the hands of malfeasant directors or shadow directors which enables them to obstruct office-holders in their endeavours to recover money for creditors and (b) proceedings brought by office-holders and proceedings brought by the company are treated differently without justification.

120. What would be of value is a seminar to consider costs management in insolvency cases utilising one of our JSB protected days with the object of producing a template to order the thoughts and provide a basis for an order to be made by those who have to consider these issues. This will be HCJs (giving case management directions after an application for interim relief), registrars (who will routinely take the first appointment on a petition or originating application) and SCJs (who generally call in such petitions or originating applications for management, or find them appearing in their weekly applications lists: and who can train their specialist Chancery DJs locally).

121. One matter that will require thought is the interrelationship between these proposals and those relating to CFAs (a substantial proportion of originating

applications appear to be funded in this way) and new contingency fee and third party funding arrangements.

122. It should be noted that a costs capping order will operate only as between the parties to the litigation. It will limit the amount that an office-holder can recover on behalf of creditors by way of costs from an unsuccessful defendant who has wronged the company and its creditors (thereby increasing the cost of the litigation for creditors). It will not affect the amount that an office-holder (successful or unsuccessful in litigation) can deduct in respect of legal costs from the insolvency estate.. That would require something quite other than amendments to rules about costs.

123. As to (b) Jackson LJ wisely left matters well alone (page 292 paragraph 5.11). The fundamental problem is that the creditor control envisaged in the Insolvency Act 1986 is routinely circumvented by office-holders obtaining permission to charge on a time-cost basis from supine creditors at the first meeting. The remedy here might lie in requiring office-holders to identify for creditors (as part of the routine reporting requirement) costs incurred and remuneration charged in connection with litigation.

7(g) THE *AGASSI* PROBLEM

124. The recommendation is that, rather than reverse *Agassi v. Robinson* [2005] EWCA Civ 1507, a suitable body of tax experts should become an approved regulator for the purposes of section 20 of the Legal Services Act 2007.

125. This is of limited impact in the Chancery Division, because tax cases have now been transferred to the Tribunal system, from where an appeal lies to the

Court of Appeal. In the First Tier Tax Chamber there is no costs-shifting, save in cases categorised as complex. Nonetheless, there is more scope for costs-shifting both in the Upper Tribunal and in the Court of Appeal, so that the present inability to recover costs of specialist tax advisers retained instead of solicitors in a tax case remains of continuing concern.

126. Although we regard this as primarily a matter for the Tribunal system, we nonetheless support the recommendation in principle. We do not expect the task of choosing one or more professional bodies to conduct the necessary regulation of its members to be an easy one, not least because there are at present competent tax experts, qualified to instruct counsel directly, within various professional associations, not limited to the Chartered Institute of Taxation. Nonetheless this is not something with which we would expect to be closely involved.

127. We would point out that the *Agassi* problem is not by any means limited to tax cases. For example, office holders not infrequently make use of litigation support services within their own accountancy firm, only to find that the scope for recovering expenditure on that work by an order for costs is gravely limited: see for example *SISU Fund Limited v. Tucker* [2005] EWHC 2170 (Ch). That was an example of a case in which, not least due to the time constraints affecting the parties, the office holders found it cheaper and more efficient to use the services of accountants to do much of the very expensive work on disclosure, than to instruct solicitors. The result was that the sensible costs saving thereby achieved was largely negated by their inability to recover the costs in question from their unsuccessful opponents.

9(a) REPEAL OR DIS-APPLICATION OF THE PRE-ACTION CONDUCT PRACTICE DIRECTION ("PDPAC")

128. The recommendation is, in relation to the Chancery Division, that the PDPAC be either disapplied or repealed. The objective is that, whatever parts (if any) of the PDPAC may survive in relation to work of other divisions, it should have no further application at all to the Chancery Division. It is further recommended that no alternative protocol or pre-action practice direction should be imposed in relation to Chancery litigation, although the profession is encouraged to continue with its existing use, where appropriate, of informal specialist protocols already in existence, such as the contentious probate protocol prepared by the Association of Contentious Trust and Probate Specialists.

129. In our view this is an altogether sensible proposal. It is supported by those practising in the Chancery Division, and is therefore uncontentious. It will be simple to implement, has no implications for case management, and requires no further education.

10 DISCLOSURE

130. The first recommendation is that solicitors, barristers and judges be given appropriate training on how to manage and conduct e-disclosure effectively. We agree wholeheartedly with this proposal. Our experience is that in complex high value commercial cases solicitors are well ahead of judges in terms of technical understanding. Happily, disputes as to the conduct of e-disclosure are relatively unusual but, if the court is to be able to discharge its responsibilities under the forthcoming Practice Direction Governing

Disclosure of Electronically Stored Information, it is essential that most of us are much better informed about the technical aspects than we are currently are.

131. We have some doubt whether the JSB basic course would be sufficient for our purposes, and we await with interest an outline of the more advanced half day course referred to in paragraph 2.10 on page 367 of the Final Report.

132. The second recommendation is that a new CPR rule 35.1A should be introduced to adopt the "menu option" in relation to (a) large commercial and similar claims; (b) any case where the costs of standard disclosure are likely to be disproportionate. Again, we agree with and support this recommendation.

133. We have however one reservation with the basis upon which it is suggested that the menu option should be extended beyond large commercial and similar claims, by reference to any case where the costs of standard disclosure are likely to be disproportionate. This is, it seems to us, a perfectly expressed objective, but a poor tool by way of definition. The proposed draft new rule 31.5A (text at paragraph 3.11 on page 370 of the Final Report) provides in sub-rule (2) a workable definition of a "substantial case" (i.e. a large commercial or similar claim) by reference to a precise formula which, if it applies, then triggers the taking by the parties of appropriate procedural steps designed to identify, either by agreement or by court order, the appropriate form of disclosure within the menu set out in sub-rule (6), together with any necessary ancillary directions under sub-rule (7). Sub-rule (2)(e) allows the court to 'mark' a case as substantial for other reasons, including but not limited to the likely nature or extent of disclosure. In the Chancery Division there are likely to be many cases, not about money, which will obviously be

substantial without triggering the £1 million threshold. Competition cases are a good example, and may be a candidate for the automatic application of the menu option.

134. The question whether the costs of standard disclosure are likely to be disproportionate in any particular (non-substantial) case is subjective, and may be answered differently by the opposing parties, either because of their limited perception or for tactical reasons. Without further extending the questionnaires to be filled in before the first CMC, it will be difficult for the court to form any view whether that criterion is satisfied in relation to any particular case. Furthermore, the resolution of disputes about whether that criterion is satisfied in relation to any particular case would itself be likely to give rise to the incurring of disproportionate costs, in particular in cases where directions would otherwise be given on paper for all stages until trial, and a trial window identified, without the need for a CMC. This is now the norm in Chancery cases which fall below the 'substantial case' threshold, as defined.

135. We have no doubt that there will be many cases in which, although the £1 million substantial case threshold is not reached and are not substantial for other reasons, the costs of standard disclosure will be likely to be disproportionate. There is in principle no reason why that likelihood could not arise even in cases at the lower end of the multi-track. Nonetheless, in cases which do not trigger the substantial case threshold, we think it likely that any protracted correspondence or hearings about the question whether the costs of standard disclosure are likely to be disproportionate will itself generate disproportionate costs. We therefore suggest a cautious approach to the

implementation of the extension of the menu option outside substantial cases (as defined).

136. One alternative would be to insert two new boxes at the beginning of the Allocation Questionnaire, headed (1) Value of the proceedings and (2) The party's costs budget for disclosure. This would enable the court quickly to compare the two at an early stage, thereby providing the necessary early warning. The problem with this approach is that parties frequently underestimate the cost of disclosure, at the early stages of a claim.

137. The other alternative would be to make provision for the parties to agree, at the Allocation stage, that the disproportionate costs criterion is met in relation to a particular non-substantial case, and thereby to trigger the menu option, and to provide a power in the court, exercisable at any time before standard disclosure is given, to trigger the menu option where, on case management (by perusal of the file or at a hearing) it appears to the court that this criterion is met.

138. In such a case, where the parties agree that the criterion is met, then the procedural steps presently proposed in sub-rules (3) to (5) should be followed by the parties. Where the court considers at a later stage that the criterion is met, then it may be necessary to go straight to the stage contemplated by sub-rule (6) without any prior procedural steps being taken, leading either to an immediate choice of an option from the menu, or to a choice being made after the parties have had time to consider the menu and make their own proposals.

139. Finally, we agree with the recommendation in paragraph 3.13 on page 372 of the Final report that full scale *Peruvian Guano* disclosure be included among

the menu options, for the exceptional cases where it remains appropriate. It is currently included under sub-paragraph (6)(e) of the proposed new rule.

11 WITNESS STATEMENTS AND EXPERT EVIDENCE

140. In relation to witness statements generally, it is recommended that, within the case management powers already available to the court, controls should be placed in appropriate cases on the content or length of witness statements and, more generally, that costs sanctions should be imposed for unduly long witness statements.

141. We agree first that the existing powers of the court are sufficient to enable these recommendations to be implemented, and secondly that they should be applied only on a case by appropriate case basis, rather than routinely.

142. It remains to be seen whether the proposals as to disclosure to the court of costs budgets (see below) will provide a reliable early warning system enabling the court to know when it is appropriate to apply controls on the content or length of witness statements so as to avoid the risk of the incurring of disproportionate costs. As matters stand at the moment, the presence of that risk is usually invisible to the court until it is too late.

143. In the meantime, all that we envisage as being necessary for the implementation of the recommendation of after-the-event costs sanctions in the Chancery Division is an appropriate culture change among the judges, and a warning to the profession in the Chancery Guide that these powers will be exercised more frequently than in the past.

144. As for expert evidence, the recommendations are:

i) that Part 35 and its Practice Direction should be amended so as to require that a party seeking permission to adduce expert evidence furnish an estimate of the costs of that evidence to the court; and

ii) that the Australian procedure known as "concurrent evidence" or "hot tubbing" should be piloted in cases where all parties consent, with consequential amendment to CPR Part 35 if the pilot is successful.

145. We agree with the first of those recommendations. If the proposals as to costs management are adopted, it is likely that the costs of deploying expert evidence will form part of a general process of costs budgeting designed to give the court sufficient information to exercise its case management powers in a manner calculated to minimise the burden of costs.

146. In our experience however, there is a tendency among litigation solicitors to seek permission to adduce expert evidence before ascertaining, by discussion with their opponents, whether the propositions which it would require expert evidence to prove are in fact contentious. This is frequently the case where expert evidence of foreign law is sought to be adduced. It seems to us likely therefore that there will be cases in which the costs budgeting proposed for the calling of expert evidence may be unrealistic, if there has been no prior effort to ascertain which propositions to be proved by an expert are really in dispute. Without that information, the provision to the court of an expert costs budget may be of limited use in practical case management.

147. As for the second recommendation, we have no experience of our own with which to evaluate the utility of concurrent evidence or "hot tubbing", but certain types of Chancery litigation, in particular unfair prejudice applications

by shareholders of quasi-partnership companies, commonly give rise to complex share valuation issues. It may therefore be worthwhile considering whether the proposed pilot should be tested, by consent, in examples of that type of litigation.

12 – CASE MANAGEMENT

148. In the introduction to Chapter 39 of the Final Report, headed Case Management, it is stated that it is focused principally upon multi-track cases proceeding in (a) the County Courts and District Registers around the country; and (b) the general Queen's Bench Division in London. Nonetheless, the recommendations at the end of that Chapter (section 8 page 399) are couched in general terms which appear, at least in principle, to be applicable to the Chancery Division of the High Court, both inside and outside London, even though the impact of those recommendations upon work in the Chancery Division is not specifically addressed in chapter 39. Bearing in mind the general tendency to avoid balkanisation, in particular in the drafting of the CPR and Practice Directions, our response to the chapter on case management is based upon an assumption that all or part of the recommendations may be considered for application in the Chancery Division.

149. We start with a brief description of how case management is at present organised within the Chancery Division, both in and outside London. In the RCJ, cases are in effect managed under a docketing system in the sense that, once allocated to a particular Master, they continue to be managed by that Master (if possible) until the case management is taken over by the judge, either at the PTR or at the trial. Some intellectual property cases (but not

patent cases which are judge managed) are managed by a specialist Master, currently Master Bragge. Apart from those cases, there is no distribution of cases between the Masters on the basis of specialisation.

150. Exceptionally, large and complex cases may, upon application to the Chancellor, be allocated for case management to a particular judge who, if available, will usually also be the trial judge. Patent cases are, generally, judge managed throughout.

151. Save for patent cases, for which particular judges are ticketed, cases are not allocated to High Court Chancery judges [or deputies] on the basis of their particular expertise. On the contrary, to the extent that the exigencies of the list permit, cases are allocated in such a way as to preserve for every judge as broad a range of experience and expertise as possible. This is done because, when handling litigation over a large number of different sub-specialisations within the general Chancery heading, it would be inefficient and causative of unnecessary delay to narrow down the number of judges available to deal with any particular type of case to a subset of what is already a small division.

152. We are not aware of any widespread dissatisfaction among users of the Chancery Division with the experience and expertise of the judges appointed to hear their cases. By contrast, we have encountered over many years frequent expressions of dissatisfaction when listing pressures require cases to be allocated to deputies rather than High Court judges, and a general desire on the part of Chancery court users that lists and waiting times for trial should be kept as short as possible. We are in particular not aware of any widespread view that the policy which we have described above has led to increased costs.

153. In straightforward cases, case management at the RCJ is done on paper as far as possible, so as to avoid the delay and cost of a CMC. Generally, directions are given on paper for all stages to trial, and a trial window chosen, upon receipt of the Allocation Questionnaires.

154. Outside London, Chancery Division business is managed according to local arrangements. But the clear pattern is of much more active case management by Specialist CJs.

155. DJs are not appointed according to specialisms (in the way that Masters and Registrars are). All DJs exercise a general jurisdiction. In some DRs (Manchester, Leeds, Birmingham) there are specialist Chancery DJs who will either have had Chancery experience in practice or (increasingly) will have developed an interest since appointment, have been trained up by the Specialist CJ and will have begun attending the Specialist Judges' Seminar run by the JSB (and an annual half day refresher seminar for Chancery DJs) . They will be locally recognised as "the Chancery DJs": they may work exclusively or partly on Chancery work. There is no formal qualification or "ticketing" system such as exists in the Family Division. In other DRs there will be no specialist Chancery DJ : the work is simply allotted locally (though one DJ may volunteer to do most of it). (Indeed, with the emerging judicial career structure some DJs are reluctant to be seen as specialist Chancery DJs for fear that it will harm their advancement to CJ status and so insist upon retaining a broad range of work.)

156. The consequence is that although outside London DJs case manage the routine Chancery cases the SCJs tend to do more active case management than HCJs

do at the RCJ. Often they will give case management directions (including provision for relisting CMCs before the SCJ) at a hearing for interim relief: or the parties themselves, recognising that the case requires specialist input, will list the CMC before the Specialist CJ rather than take their place in a crowded DJ list. Often DJs will refer cases for directions. In most Chancery District Registries under locally developed arrangements which vary from registry to registry (a) in every significant case a Specialist CJ will review the case (at a hearing or on paper) so that a judge with experience of conducting trials will see its shape; and (b) every case in the County Court Chancery List will be seen by the Specialist CJ to consider its release to the General List, trial by a recorder or trial by a specialist Chancery DJ. These are not formal occasions: real active case management takes place. Directions are given about trial (category of judge), isolation of issues. and identification of issues that may be argued, the evidence that may be adduced and so forth and earlier case management orders will be reconsidered. In short, outside London there is much more active case management by trial judges.

157. Turning to the specific recommendations (at page 399), the first is that measures should be taken to promote the assignment of cases to designated judges with relevant expertise. For the reasons already given, we consider that, save to the extent that intellectual property and patent cases are already dealt with in that way, this recommendation should not be applied to the work of the Chancery Division in the RCJ. It would run directly counter to the established policy in that regard, and we are not aware of any widespread view among Chancery court users that it should be changed. Outside London the

only workable specialisation is "Chancery". There are not enough judges for anything more detailed.

158. The second recommendation is that a menu of standard paragraphs of case management directions for each type of case of common occurrence should be prepared and made available to all district judges, both in hard copy and online. This is already the norm, and standard form directions are included in the Chancery Guide. We are however concerned that the use of standard forms should not lead to a 'tick box' mentality, which is often the antithesis of good case management.

159. We agree with the recommendation that CMCs and PTRs should either (a) be used as occasions for effective case management; or (b) be dispensed with and replaced with by directions on paper. This is already the practice.

160. We also agree with the recommendation that there should be proper time for pre-reading in relation to hearings of that kind. There is a long established practice within the Chancery Division in the RCJ for time to be given for pre-reading in relation to such applications, when a hearing has been listed. Outside London pressure on the lists may mean that reading time is short: but the Specialist CJ will prepare to take an active part in shaping the case and (for example at the PTR) will have previously considered the file in connection with listing decisions. The aspect of this recommendation that may require a change in culture and organisation is the extent of pre-reading (for example of Allocation Questionnaires and other information about a case lodged with the court at an earlier stage) so as to enable the court to form its own view whether, in any particular case, the oral hearing of a CMC or PTR will assist

in effective costs management. It is not infrequently the case that where the agreement of the parties as to case management directions suggests that no oral hearing is necessary, there are aspects of what they have agreed which, with its experience and further training, the court can see risk the incurring of disproportionate costs.

161. We are reluctant to suggest that this process should be applied as a matter or routine. To do so would substantially increase the burden of box work already undertaken by the Masters and judges, with a consequential reduction in their availability for hearings. Furthermore there is force in the view that if legally represented parties to substantial litigation are all content with agreed case management directions, it is not for the court to impose upon itself a substantially increased administrative burden, even though it has and should readily exercise a power to override the parties' agreement as to case management, where the inadequacy of that agreement comes to its attention. Furthermore, the routine examination of agreed directions by the court with a view to directing some different course to be taken than that which has been agreed may of itself discourage the parties from the procedural cooperation with a view to agreement which, of itself, is likely very substantially to save costs overall.

162. We also agree with the recommendation that in multi-track cases the entire timetable for the action, including trial date or trial window, should be drawn up at as early stage is practicable. This is already done in the Chancery Division, as described above. It is routine outside London where pressure on listing means that parties will fix a trial date and estimate the length of hearing

at the earliest stage, and all subsequent case management directions are focused upon keeping to the date and estimate: the penalty for failure being that the case goes off (or goes part-heard) for six months.

163. As for permission for pre-issue applications in respect of breaches of pre-action protocols, we consider that there is little scope for this in the Chancery Division, in particular because there are no pre-action protocols which apply to Chancery work, and because of the recommendation, with which we also agree, that the Practice Direction on Pre-Action Conduct should be done away with. We would certainly not support any pre-action applications in respect of breaches of informal protocols, such as the ACTAPS protocol on contentious probate litigation. So far as we know, this protocol is sensibly used on a voluntary basis by those who intend genuinely to comply with it, so that to permit applications in relation to it would be a recipe for expensive and purposeless satellite litigation.

164. The final recommendation with direct effect on practice at first instance is that there should be less tolerance than hitherto of unjustified delays and breaches of orders, that this should be reflected in an amendment to CPR 3.9, and that the court should monitor the progress of the parties in order to secure compliance with orders and pre-empt the need for sanctions.

165. Our experience is that there has during the short lifetime of the CPR, and indeed prior to its coming into force, been a sea-change in the attitude of Chancery judges and Masters to compliance with time limits for the taking of procedural steps in Chancery litigation. We broadly agree that this change away from a former unquestioning tolerance should continue, whether or not

buttressed by amendment of CPR 3.9. In practice the early setting of trial windows, coupled with the court's reluctance to alter them thereafter, has largely achieved this objective in the Chancery Division.

166. We have more difficulty with the recommendation that the court should monitor the progress of parties in order, of its own motion, to secure compliance with orders. While we acknowledge the widespread view among court users that this would assist in reducing the cost of civil litigation, and that nothing concentrates the mind more wonderfully than an out of the blue telephone call from a judge, there is at present quite simply no hands-on court management of Chancery proceedings in between hearings or paper applications, nor any culture in which either the Masters or judges have developed expertise or experience in that respect. Indeed, the very concept of a one to one communication between a judge and one party, in the absence of the other party, is alien to most judges, save in particular circumstances, for example where judges' clerks chase for the lodging of papers and skeleton arguments in time for the judge's preparation for the hearing of interim applications.

167. While it may be possible, for example in the Commercial Court, which handles a relatively small number of large cases, for such hands-on case management practices to be made routine, we envisage great difficulties in achieving this in the Chancery Division in London, not least because of the large number of cases assigned at any one time to each Master, and the absence of any such docketing of cases to judges, save for those exceptional cases where judicial case management has been directed. Furthermore, the

Chancery Masters and judges are fully stretched as matters stand in processing Chancery litigation to trial within reasonable time limits, and the administrative burden of the establishment of a routine process of hands-on case management would either cause a substantial and probably unacceptable lengthening of the Chancery lists, or the need to appoint more Masters, which we would expect to be unacceptable on financial grounds in the current economic climate.

168. The final two recommendations appear to be directed towards ensuring a more consistent approach by the Court of Appeal towards the interpretation and application of the overriding objective, in terms of case management, and in particular in the application of rule 3.9.

169. It will probably come as no surprise that, with the utmost respect, most of us share the view expressed in the Final Report (see paragraph 7.2 on page 398) that the Court of Appeal should more consistently than in the past support robust but fair case management decisions by first instance judges, by applying a broad margin of appreciation in circumstances where, left to itself, the Court of Appeal might have made a different decision.

170. We would not wish to comment about how this might best be achieved, save to endorse the spirit underlying the final two recommendations on page 399.

13. COSTS MANAGEMENT

171. We here respond to the combined recommendations in chapters 3 and 40 of the Final Report. The recommendation in chapter 3 is that there should be a re-definition of "proportionate costs" by reference to the sums in issue, value

of non-monetary relief, complexity of litigation, conduct and any wider factors, such as reputation or public importance, and that the test of proportionality should be applied on a global basis.

172. We enthusiastically support this broadening and globalisation of the proportionality test. A constant frustration for judges in their un-trained attempts to conduct detailed costs assessments is that they are not, as matters presently stand, permitted to carry out a global review of proportionality, and then apply a broad-brush disallowance of costs on that basis. However untrained and ill-prepared judges may be to review the minutiae of a costs schedule, they are not by any means unqualified to recognise a grossly disproportionate costs bill at the end of an interim application. Accordingly we support any proposals which free the judge from the straitjacket of a rigid item by item approach, while recognising that it will frequently still be necessary to conduct an item by item examination, on the way to forming a view about proportionality on a global basis.

173. The recommendations in Chapter 40 start with training, for solicitors, barristers and judges. Again, we enthusiastically support this recommendation. It is our common experience (albeit with rare exceptions) that counsel are either too inexperienced or too poorly instructed to provide any reasoned critique of their opponents' costs schedules when presented for the purposes of summary assessment. Similarly, we lack the training with which to carry out that assessment ourselves on a reliable basis. While it may be that the level of unpreparedness of counsel in this respect is in part a consequence of having devoted his efforts to winning the case, rather than

preparing to deal with the consequences of losing it, we suspect that it reflects an underlying failure by solicitors to focus on costs budgeting.

174. As for the establishment of a costs management procedure, we note that the Final Report appears at paragraph 7.4 on page 415 to conclude that no case exists for its introduction in the Commercial Court or, by implication, in multi-track cases elsewhere of similar magnitude. Nonetheless that appears to leave room for costs management to be used in smaller cases in the Chancery Division, and we see no particular reason why, with proper training, the judges and Masters should not be able to apply a costs management procedure, as an adjunct to general case management, where either the parties or the judge (including Master) identify an appropriate case for doing so.

175. Nonetheless, as pointed out by the submissions of the Circuit Judges (paragraph 6.2 on page 411) the widespread use of this technique is likely to stretch the resources of the Masters and (perhaps exceptionally) the judges to a degree which will have significant adverse consequences in terms of their capacity to keep down waiting times. The result is that we anticipate that if the supply and demand balance for those resources remains as it is at present, and financial constraints permit no increase in the number of Masters, it will be difficult for Masters to devote a substantial part of their time to costs management, unless (as appears possible) it gives rise to no substantial increase in the length of CMCs or in the burden of box work.

176. The Final Report suggests that there are differing views about the extent to which costs management will increase those burdens. It may be that an apparent increase in the burden will be satisfactorily resolved by appropriate

training, so that, to the trained judicial eye, the aspects of a costs budget which needs to be taken by the scruff of the neck will spring from the page in a way that they would not do at the moment.

177. Finally, for reasons which will already be apparent, we can see no real scope for pre-issue costs management within the work of the Chancery Division, and we note that the recommendations in that regard appear to be targeted upon clinical negligence litigation: see paragraphs 8.2 on page 419 and Chapter 23 generally.

14 – PART 36 OFFERS

178. The recommendations are first, that the effect of *Carver v. BAA plc* [2008] EWCA Civ 412 should be reversed and, secondly, that where a defendant rejects a claimant's offer but fails to do better at trial, the claimant's recovery should be enhanced by 10%. In relation to the second recommendation we note that, at paragraph 3.14 on page 426 of the final Report, it is recommended that this 10% uplift might properly be scaled down in respect of higher value cases, and that the rules should in any event enable the court to award less than a 10% uplift in cases where there are good reasons to take this course.

179. In the Chancery Division, litigation is frequently not about a simple claim for money, to which both these recommendations apply. Accordingly, the proposition in Ward LJ's judgment in *Carver* that "money is not the sole governing criterion" carries real weight with us.

180. While we fully understand the reasons for these recommendations in the general run of civil litigation, we doubt their general value in Chancery

litigation, save perhaps in cases where money is indeed the sole governing criterion. Even there, the ratio of costs to value in Chancery litigation is usually high enough for the parties to have sufficient incentive to take all settlement offers seriously, without the proposed stimulus of a 10% uplift.

181. We are not therefore in opposition to these recommendations so far as general civil litigation is concerned, but would hope to be able to have a broad scope for the exercise of a more flexible discretion in typical Chancery litigation. Furthermore the proposed penalty for rejection would in many cases have no practical application (e.g. how can an injunction receive a 10% enhancement). It will be necessary for the Chancery judges to devise other means of disincentivising the unrealistic rejection of offers, if (which in our field we doubt) the present sanctions in Part 36 are regarded as inadequate. We would add that, because it is not uncommon for the question which party is the defendant and which the claimant to be a matter of happenstance in Chancery litigation, the notion that it is only rejection by defendants rather than by claimants that calls for the development of a further sanction inevitably strikes us as unfairly one-sided, within our particular sphere.

15. OTHER CHANCERY ISSUES

182. The recommendation is that various matters raised for consideration in the Preliminary Report, which produced divided responses during the consultation which followed, should be remitted to a working group set up by the Chancery Bar Association and the Law Society with a view to it making recommendations by the summer of 2010, for inclusion in any implementation programme following the Report.

183. We think that it would be a good idea for further consideration of costs saving measures to be undertaken by a group with the appropriate experience of Chancery litigation, and we have no doubt that valuable experience would be forthcoming from appointees of the Chancery Bar Association and the Law Society. There is also a Chancery Court Users Committee and a Companies and Bankruptcy Court Users Committee, both of which ought to be consulted.

184. Nonetheless, we consider that such a group would benefit from judicial input. We have two main reasons for this. First, the identification of specific improvements in the way in which the Chancery Division does business needs to proceed from the basis of an accurate understanding of the way in which business is presently transacted, both by the Masters and by the judges. Secondly, as is apparent from our response to other proposals, it is almost inevitable that specific proposals will have knock-on consequences in terms of the need to re-allocate judicial time (for example away from hearings in favour of box work), and it seems to us that the practicalities of this would be difficult to grapple with in the absence of judicial participation.

Mr Justice Briggs

Mr Justice Norris

Mr Justice Floyd