

# **Should the Civil Courts be Unified?**

**A Report by Sir Henry Brooke**

**Judicial Office  
August 2008**



**From: The Rt Hon Sir Henry Brooke  
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Strand  
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To the Lord Chief Justice

Dear Lord Chief Justice

As you will remember, nine months ago the judiciary was seriously divided over the proposals for civil and family court unification. Put simply, many senior judges (including the Chancellor) opposed the proposals, whereas the Council of Circuit Judges and the Association of District Judges expressed themselves to be virtually unanimous in their support. You first approached me about this matter before Christmas, and over the Christmas holiday I took the opportunity of reading the very large volume of correspondence and submissions from the judiciary which this controversial issue had generated.

In early February you invited me to conduct an inquiry into the arguments for and against civil court unification. You asked me to devote one day a week to the task, and to submit a report to you before the end of July. I thought it best to conduct a large number of one-to-one interviews, and to visit all the major centres where civil business is conducted outside London, as well as the Central London Trial Centre and the Royal Court of Justice. I received wonderful help from everyone I saw. I was lucky enough to meet (or remeet) many dedicated judges and court managers during the course of my inquiry. I have included at Annex K a list of the people I interviewed, to all of whom I am very grateful.

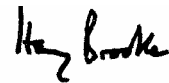
This is a long report because I did not have the time to write a short report. It is also a long report because I believed that we have been sleep-walking into a crisis, so far as civil justice is concerned, and I thought that the people who will be charged with the job of putting our civil justice system on its feet again should have a chance of seeing the whole picture in the round, so that they can understand why we have arrived at the position we are now in. If anyone doubts whether there is a crisis, I invite them to read Annex A of this report.

As you will see, I have concluded that plans for civil court unification should not be proceeded with. On the other hand, I make a large number of suggestions about ways in which the arrangements for civil justice could be improved. Although I set them out fully in Part VI, I am also setting them out for convenience as a postscript to this letter.

There are four matters I need to stress. The first is that I believe that no real progress can be made unless your successor and the Lord Chancellor and the Board of HM Courts Service are willing and able to agree on a five-year strategy for taking our civil justice arrangements out of the doldrums and making them something we can all feel proud of again. The second is that the introduction of modern IT systems (including electronic filing and document management systems) will be essential if any such strategy is to have any prospect of success. The third is that the arrangements for handling contentious civil business in London fall woefully short of what this country, and Londoners in particular, should be entitled to expect. The fourth is that I am very hesitant about including any statistics at all in this report because I have found so many mistakes. If anyone wonders why, I would invite them to read Annex J.

I am particularly grateful to John Sorabji, the Legal Secretary to the Master of the Rolls, for his monograph on the constitutional status of the judiciary which I have included as an Appendix to my report.

Finally I would like to express my thanks to Andy Caton and Jackie Sears in the Master of the Rolls's office, and to Kate Griffiths in your office, for providing me cheerfully with administrative support whenever I asked for it. The direct net cost of this inquiry, in fees and disbursements, will have been less than £14,000.



31 July 2008

This is a summary of my conclusions and recommendations:

I conclude in my report that worthwhile changes can be made to the civil justice system without embarking on the unification of the High Court and the County Courts for the reasons I set out towards the end of Part V.

I was invited to recommend future durable structures for the judiciary in the exercise of its civil jurisdiction. These recommendations are to be found in Part VI. I see nothing in them which conflicts in any way with the parallel arrangements now in place (or those planned) for the use of the judiciary within the criminal and family jurisdictions.

My central recommendations are these:

- (1) The Lord Chancellor and the Lord Chief Justice and HM Courts Service Board should agree upon a five-year strategy for reviving the civil justice system, to be implemented collaboratively by the judiciary, the Ministry of Justice and HM Courts Service.
- (2) The strategy should include procedural reform, changes needed within the judiciary, adequate financing of the system on a long-term sustainable basis, the development and installation of the SUPS and EFD systems and an adequate heavy-duty listing system, and the relocation of the Central London Trial Centre.
- (3) A critical path should be agreed for the delivery of this strategy, with agreed annual reports to report progress.

I would hope that agreement could be reached on the necessary ingredients of this strategy within six months.

I now summarise my more detailed recommendations:

1. Remove the jurisdictional limit of the County Court in Chancery and contentious probate matters (or raise the present limit of £30,000 by a large amount) following consultation and ensure that proper ticketing and supervisory arrangements exist for circuit judges and district judges exercising Chancery jurisdiction in the County Court.
2. Re-fix the financial value above which claims may be filed at the High Court following consultation, whether at £25,000 or £50,000.
3. Require all personal injury actions to commence in the County Court (except for clinical negligence and mesothelioma and other asbestos-related disease cases).

4. Retain defamation, public law matters and certain human rights cases within the exclusive jurisdiction of the High Court, and review other instances of the High Court's exclusive jurisdiction.
5. Make it possible to exercise a remedy similar to fi fa in the County Court, as an alternative to using the bailiff
6. Revise the criteria for retention of cases within the High Court or for transferring them up to the High Court, using the revised version of Mr Justice Jackson's Committee's criteria suggested in Section 5.2.2.
7. Create a new top tier of the County Courts in which heavy cases which do not have to be heard by a High Court Judge may be directed for trial by High Court Judges, retired High Court Judges, Senior Circuit Judges, Circuit Judges and Recorders without the need for deputy High Court Judges. Consider whether the County Courts should become a single national court, and whether it should be renamed the Civil Court
8. Retain the exclusive jurisdiction of the County Courts where it exists, but abolish the need for the Lord Chancellor's concurrence to a High Court Judge sitting in the County Court.
9. Give Designated Civil Judges authority to make an emergency decision on an appeal from Circuit Judge in the absence of a High Court Judge (unless the appeal comes from a decision of the Designated Civil Judge himself). Review the provisions for appeals in insolvency matters.
10. Reduce the number of Queen's Bench District Registries and Designated Civil Judges and broaden the authority of the Designated Civil Judges who should be based at the large centres.
11. Enable Senior Circuit Judges (with civil jurisdiction) and suitably ticketed Circuit Judges to grant pre-judgment freezing orders in the County Court.
12. Enlarge the powers of Registrars and District Judges so that they may make low level injunctions and similar orders in insolvency cases.
13. Bestow insolvency jurisdiction on the Central London County Court.
14. Make legislative provision whereby a decision of a judge who turns out not to have had jurisdiction to hear a case is prevented from being a nullity if the mistake was made in good faith.
15. Bring the contempt jurisdiction of the County Courts into line with that of the High Court.
16. If a case outside London should be heard by a High Court Judge, for which arrangements cannot be made on one of the High Court Judges' routine visits (if any), place it in the relevant list in London so that a High Court Judge can go out and hear the case if it does not settle.
17. Phase out s.9 (4) Deputy High Court Judges (unless required in an emergency), and replace them by Recorders (civil only if necessary). In any event ensure that they are ticketed to hear County Court cases. Fee-paid judges hearing cases in the top tier of the County Court should all be paid at the same daily rate.
18. Gradually reduce the number of Designated Civil Judges, give all those who remain Senior Circuit Judge status and give Circuit Judges who exercise civil jurisdiction in smaller centres pastoral responsibility for the Circuit Judges and District Judges in their area, with a suitable financial allowance (but no special status)

19. Move the Central London Trial Centre close to the Royal Courts of Justice, and place the QB General List, the relevant Chancery Lists, the London TCC lists and the County Court Trial Centre's lists under single diary managers.
20. Review the requirement for Chancery Senior Circuit Judges and increase their number as part of the strategy for phasing out s.9 (4) deputies.
21. Review the requirement for specialist District Judges at large centres, and recruit for these posts on the same recruitment basis as High Court Masters.
22. Provide for annual conferences for both Senior Circuit Judges and for Masters and specialist District Judges, and review their needs for bespoke judicial training and the provision of libraries.
23. HM Courts Service should review their filing arrangements so that mistakes may be less frequently made by inexperienced staff and managers (and judges). Colour coding court files could improve the position, and more easily intelligible case numbering on court files should supplement colour coding. The arrangements in Cardiff whereby a judge marks and signs the outside of a file with a felt-tip pen to indicate how the case should be managed thereafter are worth introducing elsewhere.
24. HM Courts Service should introduce easier coding arrangements when cases are transferred from the High Court to the County Court or *vice versa*, so that dependable statistics can be kept in future.

My terms of reference follow on the next page.

## **Should the Civil Courts be Unified?**

### **A Report by Sir Henry Brooke**

#### **The Terms of Reference for my Inquiry**

In January 2008 the Judicial Executive Board invited me to conduct a six-month inquiry into the question of civil court unification. I have been given the following terms of reference:

1. To consider the present arrangements for the judiciary in relation to the civil jurisdiction of the courts of England and Wales
2. To consider current criticisms of these arrangements, both from a judicial and an administrative perspective.
3. To consider the likely impact on these arrangements if the ideas contained in the *Judicial Resources Review* and the *Justice Outside London report* are implemented.
4. To consider the implications of making further changes that would introduce a single civil court.
5. To recommend future durable structures for the use of the judiciary in the exercise of its civil jurisdiction.

These recommendations should take into account:

- (1) The effect of the recent constitutional reforms;
- (2) Current and anticipated future constraints on the availability of High Court Judges;
- (3) Contemporary concerns that a change to a Single Civil and Family Court model might irreparably damage the standing of High Court Judges and adversely affect future recruitment to the High Court Bench;
- (4) The arrangements currently in place for the appointment and use of senior circuit judges for civil work, and the arguments for and against increasing their number;
- (5) The parallel arrangements now in place and those currently planned for the use of the judiciary within the criminal and family jurisdictions;
- (6) The public interest in achieving arrangements through which judges are deployed to hear cases that match their skills and experience within a jurisdictional and administrative framework that is easy to understand and operate.

Attached to my Terms of Reference was a list of questions I was invited to address during the course of my inquiry.

#### **A. The present arrangements**

1. What percentage of “High Court” actions are tried by Deputy High Court Judges?

2. Who determines which cases are tried by High Court Judges?
3. What criteria are used when deciding on the cases which should be tried by High Court Judges?
4. Are the current arrangements for allocating cases to High Court Judges satisfactory, and if not, why not?
5. What problems are caused by jurisdictional constraints?
6. To what extent does trial by deputies cause (a) confusion (b) disillusion/ disappointment to (a) the litigant and (b) his advisers?
7. What are the practical differences between the handling of cases in the High Court and the County Court?
8. How valuable is the practice of starting litigation in a Division (as opposed to a specialist court or list)?

**B. The effect of the Judicial Resources Review and the Justice Outside London report**

9. What will be the practical effect of implementing the recommendations in these two reports?

**C. The case for introducing a Single Civil Court**

10. What in more detail than just generalisations will be the continuing problems with the system once those reforms have been introduced?
11. Could those problems be remedied or alleviated without introducing a Single Civil Court? If so how?
12. Could those problems be remedied or alleviated by the introduction of a Single Civil Court? In particular:
  - (i) How would a Single Civil Court work in the vital area of case allocation?
  - (ii) Would a Single Civil Court require additional resources? If so, could one rely upon these additional resources being provided?
  - (iii) Is a Single Civil Court system practicable and would it achieve the desired remedies?
13. Standing back, how great is the risk that a Single Civil Court system would end up reproducing the present system in a different guise without achieving worthwhile improvements?

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## GLOSSARY

AIT	Asylum & Immigration Tribunal
CJ	Circuit Judge
CJC	Civil Justice Centre
CMC	Case Management Conference
CPR	Civil Procedure Rules
CPRC	Civil Procedure Rules Committee
DCA	Department of Constitutional Affairs
DCJ	Designated Civil Judge
DDJ	Deputy District Judge
DFJ	Designated Family Judge
DHCJ	Deputy High Court Judge
DJ	District Judge
DR	District Registry
EFDM	Electronic Filing & Document Project
HC	High Court
HCJ	High Court Judge
HMCS	Her Majesty's Courts Service
JEB	Judicial Executive Board
JSB	Judicial Studies Board
MCOL	Money Claims Online
PCOL	Possession Claims Online
PD	Practice Direction
PTR	Pre-Trial Review
QB	Queen's Bench
RCJ	Royal Courts of Justice
SCJ	Senior Circuit Judge
SIAC	Special Immigration Appeals Commission
SUPS	Service Upgrade Project
TCC	Technology & Construction Court

s.9 deputy	Person appointed to sit as a deputy judge of the High Court pursuant to s.9 of the Supreme Court Act 1981
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## Part I Scene-setting

### 1.1 *The Historical Background*

1. This report is concerned with matters close to the apex of our civil justice system. Legal historians will recall that there used to be a small number of free-standing superior courts based in London and a number of local courts outside London whose origins went far back in history.<sup>1</sup> In 1846 Parliament broke new ground by creating 470 County Courts as “poor man’s courts”.<sup>2</sup> These were mainly concerned with the recovery of small civil debts. There were so many of them that everyone lived fairly close to their local County Court.
2. In the run-up to the reform of the judicial system brought about by the Judicature Acts 1873 and 1875, serious thought was given to the amalgamation of the higher courts and the County Courts.<sup>3</sup> That model was not adopted, however, and what emerged on 1<sup>st</sup> October 1875 was the consolidation of eight superior London-based courts<sup>4</sup> into a single Supreme Court of Judicature, which was to consist of two permanent divisions, Her Majesty’s High Court of Justice and Her Majesty’s Court of Appeal.<sup>5</sup> The new High Court was itself composed of five divisions (soon to be reduced to three<sup>6</sup>) standing above the County Courts which retained their original limited financial jurisdiction. Arrangements were then evolved whereby the High Court or, later, the Court of Appeal, assumed an appellate jurisdiction over decisions made by judges in the County Courts. The High Court has also retained to this day in an embryonic form a prerogative

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<sup>1</sup> County courts, hundred courts and borough courts dealt with claims up to the value of 40 shillings, a limit imposed by the Statute of Gloucester 1278. Courts of request were local courts which grew up to serve the needs of particular localities. They had jurisdiction over local inhabitants up to a value of five pounds.

<sup>2</sup> The Fifth Report of the Common Law Commissioners was critical of the arrangements for provincial justice, and in particular the lack of courts that possessed jurisdiction between forty shillings and £20 in many areas. The Small Debts Act 1845 increased the jurisdiction of the inferior courts to £20, but only if they had a resident judge. The County Courts (England) Act 1846 abolished the courts of request, and assumed responsibility for cases concerned with small debts. They also had jurisdiction over claims in contract and tort of a value not exceeding £20.

<sup>3</sup> In 1869 the Royal Commission on the Judicature recommended that the superior courts should be amalgamated into a single Supreme Court, comprising a High Court of Justice and a Court of Appeal. In 1872 the second report of the Judicature Commissioners recommended, by a majority, that the County Courts should also become a constituent part of the new High Court, but this recommendation was not adopted.

<sup>4</sup> The High Court of Chancery of England, the Court of Queen’s Bench, the Court of Common Pleas at Westminster, the Court of Exchequer, the High Court of Admiralty, the Court of Probate, the Court for Divorce and Matrimonial Causes, and the London Court of Bankruptcy. The new High Court also inherited the jurisdiction of the Court of Common Pleas at Lancaster, the Court of Pleas at Durham, and the courts created by Commissions of Oyer and Terminer and of Gaol Delivery or any of such Commissions.

<sup>5</sup> By the Appellate Jurisdiction Act 1876 Parliament created a right of further appeal from the Court of Appeal to the House of Lords, thereby reinstating the supreme authority of the House of Lords in judicial matters...

<sup>6</sup> The Common Pleas and Exchequer Divisions were abolished by an Order in Council with effect from 16<sup>th</sup> December 1880. By the Administration of Justice Act 1970 the Probate, Divorce and Admiralty Division was abolished, and most of its functions were transferred to the new Family Division. The Chancery Division assumed responsibility for probate, and the Queen’s Bench Division responsibility for Admiralty matters.

jurisdiction over certain actions by judges in the County Courts against which there is seemingly no direct right of appeal.<sup>7</sup>

3. Section 16 of the Judicature Act 1873, which constituted the new High Court of Justice as a superior court of record, provided that the jurisdiction of all the courts listed in the section were transferred to and vested in the new High Court. The section continued:

“The jurisdiction by this Act transferred to the High Court of Justice shall include (subject to the exceptions hereinafter contained) the jurisdiction which, at the commencement of this Act, was vested in, or capable of being exercised by, all or any one or more of the judges of the said courts, respectively, sitting in court or chambers, or elsewhere, when acting as judges or a judge, in pursuance of any statute, law or custom, and all powers given to any such court, or to any such judge, by any statute; and also all ministerial powers, duties and authorities, incident to any and every part of the jurisdiction so transferred.”<sup>8</sup>

4. As an Appendix to this report I am attaching a monograph written by John Sorabji, the Legal Secretary to the Master of the Rolls, who conducted at my request a study of the constitutional status of the present Supreme Court of Judicature of England and Wales<sup>9</sup> and of the High Court Judiciary.<sup>10</sup>
5. For many years the High Court and the County Courts co-existed harmoniously, not side by side, but the one above the other. They were regulated by different Acts of Parliament and by different procedural rules. The Lord Chancellor traditionally had a direct responsibility for what went on in the County Courts and he was also the Head of the Chancery Division (to whom the Vice-Chancellor reported) until 2005. Subject to this, the Vice-Chancellor and the other Heads of Division regulated what happened in the High Court, for which they issued Practice Directions, Practice Statements or Practice Notes from time to time. The upper limits of the County Courts’ jurisdiction were occasionally enlarged. Until about 30 years ago an action proceeding in the High Court was usually heard by a High Court judge. Outside London District Registrars performed the role of High Court Masters in those cities that housed a District Registry of the High Court. The visiting High Court judge would conduct heavy civil trials, first in the *nisi prius* list when the Assizes came to town and then, since 1971, on his periodic visits to the Crown Court for a mixed diet of heavy criminal and civil work.<sup>11</sup>

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<sup>7</sup> See *R (Sivasubramaniam) v Wandsworth County Court* [2002] EWCA Civ 1738; [2003] 1 WLR 475. I discussed the extreme narrowness of any possible ground of challenge when giving the judgment of the Court of Appeal in *Gregory v Turner* [2003] EWCA Civ 183 at [39] – [43]; [2003] 1 WLR 183.

<sup>8</sup> Section 44 of the Supreme Court Act 1981 has preserved all these powers, duties and authorities to the present day. In *R v Visitors to Lincolns Inn ex p Calder* [1994] QB 1 a Divisional Court (of which I was a member) and the Court of Appeal arrived at different interpretations of this section.

<sup>9</sup> Not to be confused with the new Supreme Court which will replace the Appellate Committee of the House of Lords pursuant to the Constitutional Reform Act 2005 when the Middlesex Guildhall in Parliament Square is ready for use in a refurbished state.

<sup>10</sup> And see further Section 1.4 below.

<sup>11</sup> In 1969 the Beeching Commission sought to reopen the issue of unification, but reluctantly concluded that it did not have the resources with which to work up proposals to establish a single civil court or to keep two courts and have a single point of entry. The Courts Act 1970 abolished a few longstanding civil courts which had survived the reforms of the previous century.

6. These arrangements could not survive the pressures created by the growing volume and growing length of the trials that warranted the attention of a High Court judge. Although the number of High Court judges steadily increased, the size and scale of their workload increased still further. Successive Lord Chancellors made increasing use of a provision of the Supreme Court Act which allowed them to appoint judges to hear cases in the High Court on a temporary basis. By the mid-1980s these “Section 9 judges”<sup>12</sup> were conducting High Court trials on a massive scale.<sup>13</sup> More drastic surgery was needed.

## 1.2 The Civil Justice Review

7. This came in the form of the recommendations of the Civil Justice Review Body in 1988, which were substantially implemented by the High Court and County Courts Jurisdiction Order in 1991. This order gave the County Courts concurrent jurisdiction with the High Court in a huge swathe of common law business. The authors of these reforms envisaged that actions would be transferred from the High Court to the County Courts (and *vice versa*) in accordance with their weight and complexity. As a matter of principle, trials relating to a claim for less than £25,000 should be heard in the County Court, and trials relating to claims for more than £40,000 should be heard in the High Court, and there should be middle ground in which both courts should have concurrent jurisdiction.<sup>14</sup> They also recommended that judges in the County Courts should be able to grant all the civil remedies available to judges in the High Court except the newly created *Mareva* and *Anton Piller* injunctions.<sup>15</sup> In a County Court action these orders could be sought by a simple application to the High Court for the purpose of seeking the order, or by arrangements made under s. 5 of the County Courts Act whereby a High Court judge could sit in the County Court for this purpose.
8. Although Sir Jack Jacob QC, a former Senior Master, suggested in his 1987 Hamlyn Lectures that the time had come to amalgamate the High Court and the County Courts, the Civil Justice Review Body decided not to go down that route<sup>16</sup> for practical reasons.<sup>17</sup> After referring to the argument that a unified civil court would enable judge power to be allocated to cases on an ideally flexible basis, they said it was also arguable that this case concentrated too heavily on the overall efficiency of the system, at the

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<sup>12</sup> Either existing judges or Recorders or retired judges permitted to sit in the High Court under s.9(1) of the Supreme Court Act 1981 or fee-paid lawyers, usually QCs, authorised by *ibid*, s.9(4). See, generally, Section 1.7 below.

<sup>13</sup> In 1985 the trial jurisdiction of a County Court Registrar was limited to £1,000, and the trial jurisdiction of a County Court judge had an upper limit of £5,000. Out of 1,130 High Court QB trials in the general lists in 1986, 580 resulted in awards of under £10,000, and a further 200 in awards between £10,000 and £20,000. 30% of the trials of personal injury actions in the High Court in 1985 led to awards less than £5,000.

<sup>14</sup> They envisaged these indicative figures being increased from time to time by Practice Direction.

<sup>15</sup> In the event jurisdiction to make *Mareva* orders outside the High Court was limited to Mercantile judges and to the other exceptional cases set out in regulation 3(3) of the County Court Remedies Regulations 1991, and jurisdiction to make *Anton Piller* orders was restricted to the High Court.

<sup>16</sup> One of the papers prepared for a major seminar convened by the Law Commission in 1984, just before the Review Body was appointed, invited participants, among other things, to consider the possible unification of the High Court and the County Courts.

<sup>17</sup> The rival arguments are set out on p 20 of the Review Body’s Report. In para 84 of the report (on p 16) it is clear that opinion then, as now, was sharply polarised. The majority of respondents, including the Chancery Masters, supported complete amalgamation. The Council of Circuit Judges supported the maintenance of two courts, with most types of starting in the County Court. The judges of the High Court and the Court of Appeal, the Queen’s Bench Masters and the Bar opposed both proposals.

expense of what might be called “specialist efficiency.” They said that specialist efficiency required that specialist cases should be dealt with from commencement in the High Court rather than a general pool.<sup>18</sup> At all events they concluded by expressing the opinion that the major changes they recommended could all be achieved within a two-court system, and that very wide basic agreement on the adoption of these changes could be reached among the judiciary at all levels, the Bar, the solicitors and consumer interests.<sup>19</sup>

9. They said that to explore the question of unification would entail a long and detailed financial assessment which could take an extended period to complete, without any assurance of eventual agreement. It would also require major legislation and an extended implementation period. They noted, but did not have to adjudicate on, the constitutional objections that public respect for the High Court judiciary might be diminished by unification, recruitment to the High Court Bench might be prejudiced, and the independence of the High Court judges might be undermined in the perception of Government and the public.<sup>20</sup>
10. For these and other reasons the Review Body decided to retain the High Court as the home of the specialist jurisdictions. These, in essence meant the Chancery Division (including its specialist courts or lists), the Commercial Court, the Crown Office List (for public law cases), the hybrid animal described as Official Referees’ Business, and the General List of the Queen’s Bench Division as the residuary home of complex civil litigation (including civil jury trials) that was not assigned anywhere else.<sup>21</sup>

### **1.3 Lord Woolf and Access to Justice**

11. Lord Woolf embarked on his own two-year study of the civil justice system (under the brand name “Access to Justice”) less than three years after the great increase in the jurisdiction of the County Courts effected by the 1991 Order. Whereas the Civil Justice Review Body had been much involved with issues of jurisdiction, Lord Woolf largely addressed issues of procedure. He recommended the unification and simplification of the procedural rules. Instead of having one set of Supreme Court Rules and a separate set of County Court Rules there would be a single new set of Civil Procedure Rules. These would be expressed in language that would be easy to understand. Parliament would delegate to the Civil Procedure Rules Committee the power to make any necessary adjustment to the Rules without the need to wait for primary legislation, and a much clearer distinction would be made between the rules (which dictated what one might or might not do), and the practice directions (which explained the practice followed in different corners of the new procedural system which was to be a race-track rather than a maze). To give the reforms any chance of having a lasting effect, there would be a new Civil Justice Council, with a very senior judge as Head of Civil Justice.

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<sup>18</sup> Report of the Review Body on Civil Justice (1988) HMSO, para 105.

<sup>19</sup> *Ibid*, paras 109-111.

<sup>20</sup> *Ibid*, paras 112-115.

<sup>21</sup> On p 23 of their Report the Review Body said that the High Court should handle and try public law cases; other specialist cases; and general list cases of importance, complexity and substance. The expression “Cases of substance” meant cases where the amount in issue exceeded £25,000, and there should be a flexible financial band between £25,000 and £50,000 within which cases might be tried in the County Court or in the High Court.



12. Although he recommended the introduction of a single set of rules in the High Court and the County Courts, Lord Woolf did not recommend the unification of the courts themselves. He could see that this would be an additional step in reducing the complexity of the system, since it would produce a single vertically integrated court. He believed, however, that very much the same result could be achieved if the movement towards aligning the jurisdiction of the County Courts and the High Court was continued, and the powers of circuit judges were to be extended.<sup>22</sup>
13. Lord Woolf accepted that for constitutional reasons it was essential that the separate status of the High Court judge was maintained and not undermined in any way. Although it was not impossible to preserve distinct judicial tiers in a single court (as in the Crown Court) it would become more difficult, in his opinion, if the High Court itself were merged in a single court. The further alignment of the jurisdiction should, however, continue both as to subject matter<sup>23</sup> and as to powers. He believed that the restrictions on circuit judges granting *Mareva* and *Anton Piller* orders should be removed.<sup>24</sup>

#### **1.4 The status and standing of the High Court judge**

14. Both the Civil Justice Review Body and Lord Woolf referred to concerns about the constitutional status of the High Court judge if a scheme of unification were pursued. John Sorabji's monograph<sup>25</sup> shows how in 1875 the new Supreme Court of Judicature inherited the constitutional powers and authority vested in the old superior courts. The judges of those courts did not merely apply the law, like modern day tax inspectors. They certainly applied the principles of law and equity which they had inherited (when empowered to do so) but they shaped and developed them to suit the social and other conditions of their day, and to take into account modern thinking, both here and overseas. In that sense, and in that sense only, they were and are law-makers in their own right.
15. One of the courts whose powers and authority the new Supreme Court of Judicature inherited was the Court of Queen's Bench. This court exercised prerogative power by the writ of *certiorari* to bring up and quash decisions affecting the rights of others if they were contrary to law or offended the principles of natural justice. It also had power by the writ of *mandamus* to compel a court or other public authority to perform its legal duty, and a correlative power, which it exercised through the writ of prohibition, to direct that an inferior court or public authority did not perform an act which was contrary to law. The only type of decision over which its writ did not run was a decision of another superior court.<sup>26</sup>

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<sup>22</sup> *Access to Justice*, Interim Report (1995), pp 73-74.

<sup>23</sup> Defamation, he said, was an obvious exception.

<sup>24</sup> *Access to Justice*, Interim Report (1995), p 74. These important injunctive remedies, crafted by judges 30 years ago, are now called Freezing Orders and Search Orders. Lord Woolf's recommendation was not accepted.

<sup>25</sup> See the Appendix to this report...

<sup>26</sup> See the speech of Lord Diplock in *In re a Company* [1981] AC 374, in which he said: "The High Court is not a court of limited jurisdiction and its constitutional role includes the interpretation of written laws... Judicial review is available as a remedy for mistakes of law made by inferior courts and tribunals only."

16. For a hundred years after the Judicature Acts, these prerogative powers were exercised at first instance by a Divisional Court of the Queen's Bench Division.<sup>27</sup> The jurisdiction of that court was incommenced, however, by procedural barnacles, such as the obligation to identify an error of law on the face of the record before *certiorari* would lie. It was also unable to grant some of the remedies that were available in private law actions, such as an injunction, a declaratory judgment or an award of damages.
17. The reforms that breathed life into our system of administrative law just over 30 years ago were procedural, not substantive. The development of substantive principles of public law has always been left to the judges.<sup>28</sup>
18. Other powers vested in the old superior courts were derived from their inherent jurisdiction. Lord Diplock has referred to this jurisdiction as conferring power to do acts which a court needs must have power to do in order to maintain its character as a court of justice.<sup>29</sup> This inherent jurisdiction is not past child-bearing. In my time as a judge courts in which I sat called it in aid to provide an exceptional remedy at both High Court and Court of Appeal level, whether to avoid real injustice in exceptional circumstances by setting aside an earlier judgment<sup>30</sup> or to protect the court's own processes by injunction when there was no other proportionate means of preventing a litigant from continuously abusing his right of access to the court.<sup>31</sup>
19. Although this constitutional power and authority is now vested in both the High Court and the Court of Appeal, the High Court is inevitably the first port of call for the citizen who is seeking a public law remedy he cannot obtain elsewhere. This is why those who are so worried about the implications of court unification identify the status and standing of the High Court – and by association, the judges who comprise it – as being at significant risk.
20. In the current debate opponents of unification have said, correctly that the present status of the High Court, and of the judges who compose it, forms an important part of the

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<sup>27</sup> As a symbol of the constitutional importance of this court the Lord Chief Justice very often presided.

<sup>28</sup> See, for instance, the development of the public law principles of substantive legitimate expectation, following a period in which judges had tried unsuccessfully to fit private law principles of estoppel into a public law context. The decision of the Court of Appeal in *R v North and East Devon Health Authority ex p Coughlan* [2001] QB 213 shows this process at work. In its report on *Judicial Review and Statutory Appeals* (1994) Law Com No 226, the Law Commission said at para 1.3: "In our programme we chose not to look at the substantive grounds for judicial review, which we believe should continue to be the subject of judicial development. The recommendations in this report are designed to ensure that continuing development of the grounds for judicial review is facilitated by an effective procedural framework."

<sup>29</sup> See *Bremer Vulcan v South India Shipping* [1981] AC 909 at p.977H. In the earlier case of *Connelly v DPP* [1964] AC 1254 Lord Morris of Borth-y-Gest said at p 1301: "There can be no doubt that a court which is endowed with particular jurisdiction has powers which are necessary to enable it to act effectively within such jurisdiction. I would regard them as powers which are inherent in its jurisdiction. A court must enjoy such powers in order to enforce its rules of practice and to suppress any abuses of its process and to defeat any attempted thwarting of its process."

<sup>30</sup> *Taylor v Lawrence* [2002] EWCA Civ 90; [2003] QB 528; *Seray-Wurie v Hackney LBC* [2002] EWCA Civ 909; [2003] 1 WLR 257.

<sup>31</sup> *Bhamjee v Forsdick* [2003] EWCA Civ 1113; [2004] 1 WLR 88.

checks and balances in our unwritten constitution.<sup>32</sup> The constitutional status of the courts that make up the Supreme Court of Judicature is unique. There are some who say that their importance is increasing. Only the High Court has unlimited jurisdiction in all civil matters at first instance, and as recently as 1998 it was only to the High Court that Parliament entrusted the power to make declarations of incompatibility under the Human Rights Act, and the power to award damages in the event that a judicial act violated someone's Convention rights.

21. It has never been any part of the current debate that there should be any change in the security of tenure afforded to the senior judiciary by the Act of Settlement 1701, as now re-enacted in s11(3) of the Supreme Court Act 1981.
22. On the other hand, this country has always been fortunate in being able to attract to the High Court Bench practising lawyers who are pre-eminent in their field, and the quality of English law has greatly profited from their willingness to serve as judges. Opponents of unification are troubled that it might lead to a greater unwillingness to accept the financial sacrifices which many of these lawyers make when they accept senior judicial appointment. The argument has been put like this:

“Anything which tends to alter the present distinct status of the High Court Judge from being a category apart towards being merely the most senior of a series of judicial grades threatens its recruitment not only because separate status matters in itself, but also because the perception of applicants will be that present differentials in pay and conditions<sup>33</sup> will be more easily eroded, once the separate and distinct status has gone.”

23. Other participants in the debate believed quite strongly that these concerns were overstated, and that the constitutional status and standing of the High Court Bench could be preserved intact in any new statutory scheme.

## **1.5 A renewed interest in civil court unification**

24. The question of unification re-emerged in 2004. By now there were increasingly heavy demands on the time of the High Court judiciary, brought about in part by the implementation of the Human Rights Act 1998 and other new legislation that called for specialist judicial expertise. The number of High Court Judges (“HCJs”) had continued to grow, but it could not go on growing indefinitely. Senior Circuit Judges (“SCJs”) were

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<sup>32</sup> This concept was variously expressed by senior judges who participated in the debate last autumn: (i) “The position of the High Court judge is of constitutional importance, anchored in the constitution by convention”; (ii) “A mixture of history, the common law and equity, statute and constitutional convention have given High Court judges powers of immense constitutional significance”; (iii) “The High Court judge is the bedrock of the judicial system of England and Wales, constitutionally and practically. It is separate and distinct from any other court or bench of judges”. A fourth judge referred to “the constitutional position of the High Court judge as the embodiment of the judiciary as a free standing pillar of the constitution, independent from legislature or executive.”

<sup>33</sup> The longer vacations available to the High Court judiciary, which many extremely high-earning lawyers see as one of the attractions of the office, were mentioned in this context.

conducting judicial work previously reserved for HCJs on an ever-increasing scale. Constitutional reforms were transferring to the judiciary increasing authority over the way in which the judges were deployed.

25. The Judicial Resources Review report in 2005 recommended that new criteria should be established and implemented as a means of controlling the way in which the services of the senior judiciary were used. In 2004 the then Master of the Rolls, as Head of Civil Justice, had suggested that the time might have come to unite the High Court and the County Courts. There followed two discrete public consultations, one called “A Unified Civil Court?” and the other called “Focussing Judicial Resources Appropriately”. In both consultations the desirability of further reform received majority support, but there was also powerful minority opposition, particularly to the unification proposals. Judges and practitioners with Chancery expertise were very strongly opposed to unification.
26. The difficulties inherent in any early implementation of what was thought to be theoretically desirable became most evident when thought was given to the way in which these reforms might be implemented in London. The logic of the reforms meant that a large volume of heavy civil work would be started at what is now County Court level, but by common agreement the London County Courts, and in particular the Central London Civil Justice Centre, were simply not fit for this purpose. With annual staff turnover ranging from 30% to 60% in some important courts the idea of the London County Courts being able to assume responsibility for accommodating a higher volume of heavy civil business was risible. It was against this background that the former Lord Chancellor wrote to the Lord Chief Justice towards the end of 2006 to the effect that he considered that unification was a good idea in principle and that it was worth exploring further. The Judicial Executive Board in December 2006 responded by saying that it, too, supported unification in principle (the Chancellor dissenting), and that it, too, was willing to take the investigation of the merits of civil and family court unification a further step forward.
27. In 2007 a judicial working party chaired by Lord Justice Dyson failed to reach agreement on the way forward towards unification.<sup>34</sup> It was common ground that unification would proceed, if at all, by the abolition of the County Courts and the preservation of the High Court as the vehicle through which civil and family court business would be conducted in future.
28. The majority of the working party favoured unification in principle but could not agree on the form that it should take. Judge Collins CBE and District Judge Walker CBE favoured a unification model that created a logical new framework by which all judges, at every level (including magistrates who sat in the Family Proceedings Courts), would be full members (or judges) of the enlarged High Court. This proposal failed to assuage the very real concerns of the senior judicial members of the working party. They, in turn, could not agree among themselves whether there could be any acceptable model. The concerns of two of the five senior judges on the working party<sup>35</sup> were twofold, one

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<sup>34</sup> Its terms of reference included an obligation to ensure that the statutory structure they proposed did not diminish the special status of a High Court judge.

<sup>35</sup> Mr Justice Briggs and Mr Justice Charles.

constitutional and one practical. The practical concern was that in any model which contained a “gatekeeping” role for the lower judiciary, they would naturally tend to retain complex and interesting work for themselves even if there existed a higher level of judge who, in general terms at least, could do the work more effectively. Their constitutional concern was that all the models they considered ran the serious risk of weakening irreparably the constitutional status of the HCJ, and the arguments in favour of unification were simply not strong enough to make the risk worth taking.

29. The working party was therefore unable to speak with one voice. It was also so immersed in this high level debate about the future of the High Court judiciary that it could not pay much attention to the detailed workings of a unification scheme which were to be left, in any event, to secondary legislation. The model supported by Lord Justice Dyson, Lord Justice Moore-Bick and Mr Justice Jackson created a structure whereby although the County Court would be abolished by the merger of its jurisdiction into the High Court, the new High Court would continue to consist only of HCJs and the other senior judges named in s.4 (1) of the Supreme Court Act 1981.<sup>36</sup> All other judges<sup>37</sup> would be judges of the High Court and, subject to statutory restrictions, might exercise the jurisdiction of the High Court, although the High Court would not “consist” of them.
30. The other unification model, favoured by Judge Collins and District Judge Walker, involved the repeal of the provision that the High Court consisted only of the HCJs. The new statute should simply provide that the jurisdiction of the High Court should be exercisable by the Justices of the High Court and, subject to statutory restrictions, by the other judges.
31. Following a dialogue with the working party in the second half of July 2007, the JEB decided to take the debate forward by proposing a model of its own (the Chancellor again dissenting). Under this model, HCJs would continue to exist but there would no longer be a High Court in any way recognisable as such by observers of the old regime. Instead, all the unified civil – and family - courts would be called the High Court, as would the Crown Court, and within this enlarged court HCJs, Circuit Judges (“CJs”), District Judges (“DJs”) and part-time judges would be assigned judicial work at different levels of value and complexity, depending on their seniority in the judicial hierarchy and on their expertise in different fields. HCJs would retain their jurisdiction but would exercise it in the Crown Court, the new Civil Court and the new Family Court.
32. When the Lord Chief Justice explained these ideas to the High Court judiciary at their plenary meeting at the start of the Michaelmas term, there were so many dissenting voices that it was decided to defer the debate to a Saturday in November when the issues could be talked through properly. The Lord Chief Justice, when agreeing that this meeting should take place, also gave an undertaking that the JEB would not continue to promote a unification proposal if it did not receive the support of the majority of the High Court Bench.

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<sup>36</sup> The Heads of Division, the Vice-President of the Queen’s Bench Division and the Senior Presiding Judge.

<sup>37</sup> That is to say, CJs, Masters, DJs, Registrars and Recorders.

33. The meeting fixed for Saturday 3<sup>rd</sup> November 2007 did not in fact take place. Many judges said that they would be unable to attend, and more importantly a flood of email messages exchanged during October between members of the senior judiciary made it tolerably clear that such a meeting would be likely to engender much more heat than light. The views that were being expressed in advance of the meeting suggested that a majority of the senior judiciary were opposed to the plan.
34. The proposals then under discussion envisaged that there would be no amendment to the statutory provisions relating to appointment, security of tenure and precedence or to those relating to the extraordinary functions of HCJs.<sup>38</sup> It was also envisaged that the new statute should expressly state that (i) the role of HCJs was to deal with the most complex and important cases; (ii) only HCJs might exercise the statutory jurisdiction under s.4 of the Human Rights Act 1998 and such other jurisdiction as might be prescribed; (iii) the Business Allocation Rules would be able to limit the jurisdiction that might be exercised by the other judges; (iv) decisions made by HCJs would be binding on the other judges, but not on other HCJs; and (v) the HCJs would have a senior role in assisting the Lord Chief Justice to supervise the management of the court system.<sup>39</sup>
35. By the time that the 3<sup>rd</sup> November meeting was cancelled, the judiciary had become very polarised. The HCJs of the Chancery Division (led by the Chancellor) and the Family Division (apart from the President, who had supported the JEB's stance) declared themselves opposed to unification.<sup>40</sup> The Council of Circuit Judges and the Association of District Judges, on the other hand, said that their members were almost unanimously in favour. SCJs who exercised civil jurisdiction were, on the whole, against what was proposed, as were the judges of the Commercial Court (who made it clear that they were not opposed to unification *per se*). The remainder of those who had participated in the October debate ranged themselves on various sides of the argument, some of those who supported unification in principle opting for the working party's preferred model rather than the JEB model.
36. The cancellation of the 3<sup>rd</sup> November meeting did not, however, kill the proposal altogether. The lower judiciary, who supported unification, very understandably did not take to a decision-making process in which they had only been marginally involved, and the civil servants in what was now the Civil Law and Justice Division of the Ministry of Justice continued to develop unification plans in accordance with the former Lord Chancellor's instructions. They had now begun a dialogue with Parliamentary Counsel, who were instructed to prepare a Bill for presentation to Parliament in the 2008-9 session.

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<sup>38</sup> Supreme Court Act 1981, ss.10-13 and 44.

<sup>39</sup> It was also envisaged that the status of the HCJs would be further enhanced by secondary legislation which prescribed routes of appeal substantially in the same terms as were currently in force (i.e. appeals from one level of judge to another).

<sup>40</sup> The Chancery Masters and the Bankruptcy Registrars also opposed unification, and many judges in the Queen's Bench Division and the Court of Appeal were opposed to aspects of the proposals currently before them...

37. It was against this confused background that the JEB (the Chancellor again dissenting) invited me to conduct an inquiry into the arguments for and against the unification of the civil courts, with a remit to deliver a report by the end of July 2008. By this time the idea of a Parliamentary Bill for the 2008-9 session had been shelved, but the way was very much open for a Bill in the 2009-10 session. I was invited to devote one day a week to the inquiry over a six-month period. It was agreed, in the light of the unhappy experiences of the previous working party, that I would conduct the inquiry on my own, although I was encouraged to consult widely. I prepared the first draft of my terms of reference myself, and these were eventually formulated in the terms set out at the beginning of this report.

## **1.6 Relevant developments since 1988**

38. I need to pause here to mention a number of important developments since the Civil Justice Review Body pegged out the boundaries between the High Court and the County Courts in 1988.

### **1.6.1 Non-specialist common law litigation**

39. Outside London the pressure of heavy criminal business made it increasingly difficult for the HCJs sent on circuit to set aside time to hear civil cases. In recent years Queen's Bench judges have been sent to some of the circuits with a specific remit to hear civil cases and civil appeals. Their lists are usually arranged back to back with the lists of three or four other local judges who are qualified to hear heavy civil work, so that even with a high rate of pre-trial settlements proper use can now be made of these visits.<sup>41</sup>
40. In the light of this trend, and in acknowledgment of the importance of expanding the specialist jurisdictions outside London, the creation of the post of Senior Circuit Judge ("SCJ"), with a salary grading between that of HCJ and CJ, has emerged as a very important feature of the arrangements for civil justice outside the Royal Courts of Justice ("RCJ").<sup>42</sup>
41. This was a development about which the Council of Circuit Judges has always been concerned, for fear that it would lead to the emergence of a two-tier Circuit Bench. Successive reviews by the Senior Salaries Review Body, however, have led to a steady increase in the number of SCJs, and the extension of these appointments to judges holding heavy responsibilities in the field of civil and family justice and to those who hold heavyweight specialist judicial posts. At the time of my inquiry a review was being

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<sup>41</sup> These arrangements appeared to be working reasonably well in large towns like Leeds, Manchester, Liverpool and Birmingham. I found that they were problematic in Cardiff, Nottingham and Newcastle, where there is not the same volume of back-to-back business available, and since most high value personal injury and clinical negligence cases involve a number of expert witnesses, it is impractical to list many of them within the same small listing window, even if the experts were themselves available during those short periods.

<sup>42</sup> The post was first created for judges exercising criminal jurisdiction, first for the resident judge at the Inner London Crown Court, and then (in 1985) for the resident judges at the Snaresbrook and Southwark Crown Courts. In 1997 the status was accorded to all the judges of the Central Criminal Court not on the grounds of management responsibilities but on the grounds of "whole job weight".

conducted in an effort to establish consistent criteria by which the suitability of these appointments for different posts could be fairly assessed in the future.<sup>43</sup>

42. In recent years considerable difficulty has been experienced in attracting judges of the requisite skill to apply for appointment to some of the specialist SCJ posts. The higher salary and status, and the assurance that the appointees will be conducting high quality civil work, have mitigated some of these difficulties.<sup>44</sup>
43. Designated Civil Judges (“DCJs”) now have a general responsibility for the administration of civil justice in their area. There are now 26 DCJs, only a few of whom have SCJ status.<sup>45</sup> Some devote all their time to civil justice, while others have a mixed workload of criminal, family and civil cases.
44. Another recent development has been the creation of Civil Justice Centres, which are replacing the separate buildings for County Court and High Court hearings in major provincial centres. Such centres now exist in Manchester, Liverpool, Birmingham and Cardiff, and also (in all but name) in Leeds, and a further Civil Justice Centre is soon to be built in Bristol.
45. In London, the Central London Civil Justice Centre forms part of the London County Court network. It contains a trial centre with 12 courtrooms where judges hear multi-track cases (listed for two days or more, and sometimes for less than that) which are started there or are sent to the Centre from County Courts all over London and beyond. The Centre has a split site. The DJs and the bulk of the court’s administrative staff occupy a different building in Park Crescent. It has encountered formidable difficulties in recent years with the quality and quantity (and rapid turnover) of its administrative staff.
46. Over the years a number of the smaller County Courts have ceased to exist. There are now about 220 County Courts remaining. The number of judges has steadily increased, although in recent years there has been a policy decision not to increase the number of HCJs.<sup>46</sup> An increasing number of HCJs have been appointed to specialist posts which either did not exist or were not considered to warrant HCJ status in 1988.<sup>47</sup>

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<sup>43</sup> By July 2006 the status of SCJ was held by 70 judges: 21 resident judges at Crown Court centres, seven DCJs, one Designated Family Judge (“DFJ”), the RCJ-based TCC judges, the judges at the Central Criminal Court, judges exercising specialist civil jurisdiction and a few Presidents of Tribunals.

<sup>44</sup> At the time of my Inquiry there were seven such posts at Manchester, six at Birmingham, four at Leeds, three at Cardiff, three at Bristol, and seven in London. The DCJ at Liverpool also held SCJ status.

<sup>45</sup> The DCJs in post with SCJ status for the entire period of my inquiry were based at Leeds, Manchester and Liverpool. New DCJs with senior circuit judge status were appointed at Birmingham and Cardiff in July 2008. In the same month a vacancy arose at Bristol, where the future status of the DCJ is not yet assured. The new DCJ for the London courts does not at present have SCJ status, his predecessor having been accorded that status by reason of his appointment as judge in charge of the Central London Trial centre, a post he still holds.

<sup>46</sup> At the time of my inquiry there were five Heads of Division, 37 judges in the Court of Appeal, 110 High Court Judges (73 QB, 18 Chancery and 19 Family), and 28 High Court Masters and Registrars (in addition to the Costs Judges and the District Judges of the Principal Registry of the Family Division).. There were 652 Circuit Judges (the majority of whom exercised criminal or family jurisdiction) and 421 District Judges (who sat



## 1.6.2 Developments in Chancery practice outside London

47. Outside London Sir Richard Scott was the first High Court judge to be appointed Vice-Chancellor of the County Palatine of Lancaster.<sup>48</sup> In this role he was responsible to the Vice-Chancellor for Chancery business in the north. He would hear Chancery matters on the Northern and North-Eastern circuits for half of every legal term. In due course, following the recommendations of a committee chaired by Lord Justice Morritt,<sup>49</sup> a Chancery supervising judge was appointed to perform a similar role on the Midland, Western and Welsh circuits.
48. There are also eight Chancery SCJs outside London who supplement their efforts. As a result there is now a strong Chancery presence in Birmingham, Bristol, Cardiff, Leeds, Liverpool and Manchester where none (except on the Northern Circuit) existed in 1988. In London there has in recent years been a Chancery List at the Central London Civil Justice Centre, where there are now two Chancery SCJs, supported by other judges who hear Chancery business.

## 1.6.3 The creation of the Mercantile Courts

49. There have also been developments in the mercantile field. The Commercial Court judges very rarely travelled outside London, and when business courts, with High Court status, became established in provincial centres, they became known as Mercantile Courts. There are now seven Mercantile judges outside London, based in Birmingham, Bristol, Cardiff, Leeds and Manchester,<sup>50</sup> and one in London, based at the Commercial Court at the RCJ. They, too, are all Senior Circuit Judges.

## 1.6.4 The emergence of the Technology and Construction Court (TCC)

50. What was formerly known as Official Referees' Business is now the Technology and Construction Court. Some years ago a High Court judge was appointed to lead this court, which was something of a hybrid, since Official Referees were qualified on appointment to hear both High Court and County Court business. The Official Referees then in post

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interchangeably in the High Court and the County Court in centres where there were High Court District Registries.

<sup>47</sup> By way of example. High Court Judges now sit in the European Court of Human Rights and the International Criminal Court. High Court judges are Presidents of the Employment Appeal Tribunal (to which a second High Court judge is regularly assigned), the Asylum and Immigration Tribunal, the Special Immigration Appeals Commission and the Competition Appeal Tribunal. A High Court Judge has always been seconded to act as Chairman of the Law Commission. The recent constitutional reforms have led to an increasing number of senior judges undertaking heavy judicial management responsibilities on a scale unheard of in 1988.

<sup>48</sup> Historically there had always been a strong Chancery presence in the North-West. Every other Thursday in the legal term there was a "Lancashire Day" in the Chancery Division in London when Chancery business emanating from Lancashire was heard. The Vice-Chancellor of the County Palatine was a circuit judge, supported by deputies, before Sir Richard Scott's appointment.

<sup>49</sup> Lord Justice Morritt recommended that another Chancery judge should be in each area for the other half of the legal terms, but this recommendation was not accepted.

<sup>50</sup> Now that one of the Mercantile judges at Birmingham is working 50% of the time, it is envisaged that the resulting 0.5 vacancy will be filled by a TCC specialist. At Leeds there is a Chancery/Mercantile judge. These apart, there are two Mercantile judges at Manchester, and one at the other centres I have mentioned.

all became judges of the new court, and were accorded the status of senior circuit judge. That status has also been accorded to two TCC judges at Manchester and one at Birmingham.<sup>51</sup>

51. The court was then strengthened, first by the identification of a number of High Court judges who could be called upon to assist with TCC business if the need arose, and more recently by the decision to appoint specialist TCC practitioners as High Court judges who would spend half their time on TCC business. In that role they would supplement the efforts of the High Court judge in charge of the court, who now sits there on a full time basis for a three-year term of office. In July 2008 five High Court judges were assigned to this list.

### 1.6.5 The jurisdiction of High Court Masters and District Judges

52. The way in which the jurisdiction of High Court Masters and DJs<sup>52</sup> has developed over the last 20 years has been one of the success stories in the field of civil justice during that period.

53. Since 1999 CPR 2.4 has provided that:

“Where these Rules provide for the court to perform any act then, except where an enactment, rule or practice direction provides otherwise, that act may be performed –

- (a) in relation to proceedings in the High Court by any judge, Master or district judge of that Court;<sup>53</sup>
- (b) in relation to proceedings in a county court, by any judge or district judge.”

54. The cases in which a Master or DJ does not have jurisdiction are for the most part set out in a Practice Direction.<sup>54</sup>

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<sup>51</sup> With the advent of part-time judicial working for the Circuit Bench, one of the Mercantile judges at Birmingham now works 50% of the time, and I was told that another 50% judge is being sought for the resulting vacancy who will mainly do TCC business. One of the specialist SCJs at Leeds has moved to 90% working.

<sup>52</sup> Outside London DJs may perform duties as DJs in District Registries of the High Court, and also as district judges in the County Court. In this Section I am not concerned with the insolvency and companies business conducted by the Bankruptcy Registrars in London, or with matters concerned with the Patents Court or the Patents County Court (for which see Sections 2.1.1 and 2.1.2 below).

<sup>53</sup> The Senior Master has observed to me that whereas the jurisdiction of a DJ in the High Court is confined to the District Registry in which he sits (see Supreme Court Act 1981 s.100) the Masters possess a jurisdiction that is not confined to the RCJ. He therefore from time to time exercises powers granted to the High Court pursuant to CPR 30.2(4) to direct that cases are transferred to the RCJ for specialist case-management. Very recently he made orders for transfer into the RCJ about 150 cases that had been issued in District Registries and County Courts in different parts of the country for the purpose of staying them pending his decision on an application for a Group Litigation Order in three months' time.

<sup>54</sup> Practice Direction B to CPR Part 2 – Allocation of Cases to Levels of Judiciary. Special provision is made in *ibid*, para 5.1 for Masters and DJs to exercise jurisdiction in specifically identified Chancery proceedings with the consent of the Chancellor.

55. In the High Court a Master or DJ has no power to make a search order, a freezing order,<sup>55</sup> or an order authorising a person to enter land to recover, inspect or sample property. He may only make an injunction in terms agreed by the parties; or in connection with or ancillary to a charging order; or in connection with or ancillary to an order appointing a receiver by way of equitable execution; and he may make an order restraining a person from receiving a sum due from the Crown.<sup>56</sup> The Practice Direction also identifies restrictions on their powers to make orders or grant interim remedies.<sup>57</sup> They may make limited civil restraint orders.<sup>58</sup>
56. Masters and DJs may, subject to any Practice Direction, try a case which is being treated as being allocated to the multi-track because it is proceeding under CPR Part 8. They may try a case allocated to the multi-track under CPR Part 26 only with the consent of the parties,<sup>59</sup> and they have unlimited jurisdiction when assessing the damages or sum due to a party under a judgment.<sup>60</sup> Neither they nor a s.9 deputy may try a case in a claim made in respect of a judicial act under the Human Rights Act 1998, nor a claim for a declaration of incompatibility in accordance with s.4 of that Act.<sup>61</sup>
57. In the County Court, however, a DJ has much wider powers to grant an injunction. In addition to the cases in which a Master or a DJ has power to grant an injunction in the High Court, a DJ may grant an injunction in the County Court in civil proceedings where the application is made in proceedings which he has jurisdiction to hear; where the application relates to a money claim not yet allocated to track but within the limits of the small claim or fast tracks; on an application for an anti-social behaviour injunction under ss.153A, 153B or 153D of the Housing Act 1996; on an application for an order under s.3 of the Protection from Harassment Act 1997; or on an application made under s.1B or s.1D of the Crime and Disorder Act 1998.<sup>62</sup>
58. DJs also have a summary power to commit a person to prison for a civil contempt for disregarding court orders under s.23 of the Attachment of Earnings Act 1971; for an assault on an officer of the County Court in the execution of his duty under s.14 of the County Courts Act 1984; for the various contempts of court identified in s.118 of that Act; and a power to remand in custody under the provisions relating to anti-social behaviour contained in ss.153A-157 of the Housing Act 1996.

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<sup>55</sup> Or an order ancillary to a freezing order.

<sup>56</sup> Practice Direction B to CPR Part 2, paras 2.2-2.3. They may make an order varying or discharging an injunction or undertaking given to the court if all parties to the proceedings have consented to the variation or discharge. *Ibid*, para 2.4.

<sup>57</sup> If they relate to the liberty of the subject; or to criminal proceedings or matters except procedural applications to the High Court (including case stated) under any enactment; or to appeals from Masters or DJs; or in appeals against costs assessments under CPR Parts 43-48 except on an appeal under CPR 47.20 against the decision of an authorised court officer); or in applications under s.42 of the Supreme Court Act 1981 by a vexatious litigants for permission to start or continue proceedings; or on applications under s.139 of the Mental Health Act 1983 for permission to bring proceedings against a person. (Practice Direction B to CPR Part 2, para 3.1).

<sup>58</sup> See Practice Direction 3C to CPR Part 3, para 2.1.

<sup>59</sup> Practice Direction B to CPR Part 2, para 4.1. Restrictions on the trial jurisdiction of Masters and DJs do not prevent them from hearing applications for summary judgment or, if the parties consent, for the determination of a preliminary issue (*ibid*).

<sup>60</sup> *Ibid*, para 4.2.

<sup>61</sup> *Ibid*, para 7A.

<sup>62</sup> Practice Direction B to CPR Part 2, paras 8.1 and 8.1A.

59. So far as powers of trial are concerned, a DJ in the County Court has jurisdiction to hear any claim which has been allocated to the small claims track or fast track<sup>63</sup> except claims under certain statutory provisions set out in the Practice Direction to CPR Part 2. He also has jurisdiction to hear proceedings for the recovery of land and certain proceedings under the Housing Acts that are identified in the Practice Direction. He has unlimited jurisdiction to assess damages or other sum due to a party under a judgment; and jurisdiction to hear any other proceedings with the permission of the DCJ in respect of any particular case.<sup>64</sup>
60. The Practice Direction gives a DCJ power to control the proper distribution of business between CJs and DJs, where both levels of judge have jurisdiction in respect of any proceedings. A DCJ may also make arrangements, both in the High Court and in the County Court, for proceedings to be assigned to individual DJs either generally or in particular cases.<sup>65</sup>
61. During the course of my inquiry, I heard that these powers were being increasingly used by DCJs in favour of DJs whom they regarded as competent to do heavier work, including smaller multi-track trials.<sup>66</sup>
62. Among the issues I encountered during the course of my inquiry was the question whether there should be a few DJs at major centres outside London who should be specially recruited – and trained – to conduct heavy civil litigation. Specialist senior circuit judges often expressed a wish to me that there should be a specialist DJ to whom they could confidently delegate work in their specialist field.<sup>67</sup> In centres as large as Birmingham and Manchester practical arrangements have been made on the ground to meet this need, but the need also exists in smaller centres like Leeds, Bristol and Cardiff, even if the specialist DJ might also have to handle a significant volume of non-specialist, lower value, business.<sup>68</sup>
63. The history of the SCJ post revealed great anxieties within the Council of Circuit Judges about the creation of a two-tier circuit bench, and the Association of District Judges has similar anxieties. On the other hand, it has to be recognised that the volume of heavy civil litigation being conducted at the civil justice centres outside London has increased very significantly in recent years, and that it needs specialist handling at both DJ and CJ level.

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<sup>63</sup> Or a claim which is treated as being allocated to the multi-track under CPR 8.9(c) and the table at Section B of the Practice Direction to Part 8.

<sup>64</sup> Practice Direction B to CPR Part 2, para 11.1.

<sup>65</sup> Practice Direction B to CPR Part 2, paras 13-14.

<sup>66</sup> For example, Mr Justice MacDuff told me that this was the practice at Birmingham, and Mr Justice David Steel described how the practice also occurred on the Western Circuit.

<sup>67</sup> If specialist DJs could be identified, the relevant specialist judge could assign suitable work to them without always having to obtain the assent of the DCJ under paras 13-14 of the Practice Direction.

<sup>68</sup> The Senior Master told me how much he would welcome it if a cadre of Masters and DJs who handle heavy procedural work could be created. He believed that if regular annual meetings and bespoke JSB training would be of great mutual advantage. See also Section 2.1.2 below.

### 1.6.6 IT support for court business

64. The Woolf reforms brought with them an era of active case management, for which the judiciary were promised proper IT support. Many more documents would have to be filed at court, particularly in the earlier stages of litigation, if the judges were to gain and then retain control of cases as soon as litigation started. Proper IT support for the courts had been one of the concerns of the Civil Justice Review Body 20 years ago, and it is no secret that Sir Richard Scott, then Head of Civil Justice, made it clear in 1998 that in his view the civil justice reforms should not go forward unless and until such support was forthcoming.
65. Awareness of this need (and the obligation to fulfil this promise) led the Court Service to create a Modernisation Programme Board (on which I served between 2000 and 2004) with the remit of installing a national IT network (now known as the LINK network) in every criminal and civil court which was judged to have a viable long term future. Court staff and judges were not only to have the use of Microsoft Office software (suitable for headquarters work) but also specialist electronic filing, document management and diary and listing software of a type already in common use in comparable jurisdictions overseas.
66. It was an important part of the overall modernisation strategy that claims would be issued away from the courthouses (unless an immediate application for emergency relief was required) so that judges and their support staff at the courthouses could concentrate on dealing only with the defended cases which would come to them electronically as soon as a defendant had intimated resistance to a claim. Courthouses on expensive inner city sites would no longer be the repositories of growing mountains of paper files.
67. All went well with these plans for civil and family court modernisation in the 2000-2003 financial cycle. In July 2002, however, the Treasury refused to give them any additional backing, and 25% of the money already destined for this purpose was diverted to other ends during one of the Department's financial crises.<sup>69</sup> As a result all the plans for specialist case management software had to be instantly abandoned, an inferior specification had to be chosen for those LINK civil and family courts which the Department could still afford to equip, and even the plans to create a common, integrated database for all the civil and family courts have still not been implemented nearly six years later, long after their original scheduled finishing date.

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<sup>69</sup> I described this history four years ago in a lecture entitled "Court modernisation and the crisis facing our civil courts", given as the Seventh Annual Lecture for the Society of Advanced Legal Studies on 24<sup>th</sup> November 2004. See *Amicus Curiae*, the Journal of the Society for Advanced Legal Studies, Issue 56, pp 2-9. The lecture is also available among the speeches made by judges in 2004 on the Judiciary's website at [www.judiciary.gov.uk](http://www.judiciary.gov.uk).

### 1.6.7 The financial underpinning of the civil courts

68. Within our unwritten constitution Lord Diplock identified the principles which obliged a civilised state to provide courts for the resolution of disputes in these terms:<sup>70</sup>

“Every civilised system of government requires that the state should make available to all its citizens a means for the just and peaceful settlement of disputes between them as to their respective legal rights. The means provided are courts of justice to which every citizen has a constitutional right of access.”

69. For many years the Lord Chancellor’s Department resourced the civil and family courts under agreed arrangements whereby the taxpayer paid for the provision of the judges and the court buildings while the rest of the cost of providing civil justice was met out of court fees.<sup>71</sup> In a letter dated 26<sup>th</sup> January 1965 Lord Gardiner, the newly appointed Lord Chancellor, set out what he understood to be the governing principles in these terms in a letter to the Chief Secretary to the Treasury:

“(i) Justice in this country is something in which all the Queen’s subjects have an interest, whether it be criminal or civil.

(ii) The courts are for the benefit of all, whether the individual resorts to them or not;

(iii) In the case of the civil courts the citizen benefits from the interpretation of the law by the Judges and from the resolution of disputes, whether between the State and the individual or between individuals.”<sup>72</sup>

70. In 1983, however, there was the first breach of this very longstanding agreement. The Government announced expenditure plans for 1983-4 and beyond which would “take account of the agreed policy to recover full costs less judicial costs through court fees.”<sup>73</sup>

71. In 1992 things changed again. The Treasury now decided to equate the provision of civil and family justice with the provision of every other Government service supplied to

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<sup>70</sup> See *Bremer Vulcan v South India Shipping* [1981] AC 909 at p.977C-H.

<sup>71</sup> Or, in the case of the Royal Courts of Justice, out of the unused surplus from non-contentious probate fees. The history is set out in Sir John Thomas’s Sir Elwyn Jones Memorial Lecture “The Maintenance of Local Justice”, given at Bangor University on 8<sup>th</sup> October 2004.

<sup>72</sup> Lord Gardiner went on to remind the Chief Secretary that Magna Carta, whose 750<sup>th</sup> anniversary they were about to celebrate, provided that we will not sell justice to the people, and that while being willing to agree to minor concessions to meet Treasury needs he thought that in this respect the principle of Magna Carta ought to be maintained. Sir John goes on to record that no change in these principles occurred in Lord Gardiner’s Chancellorship (1964-1970).

<sup>73</sup> This change, whereby the cost of court buildings was to be met out of court fees in future appears to have been effected because it was believed that the total number of County Court proceedings was expected to rise from 1.83m in 1983 to 2.25m by 1986-7. It is not clear to me whether those who agreed upon this change of policy considered whether there was any reasonable likelihood of the income from court fees being able to cover, in one way or other, the full cost of the very heavy future investment that was likely to be needed in the court estate, both in buildings and in IT provision, over the next 20 years.

paying customers. It insisted that its entire cost (including, now, the cost of the judges) must be met from court fees, subject only to any remissions or exemptions or subsidies that might be agreed with Treasury ministers from time to time.<sup>74</sup>

72. From 1992 onwards, however, successive Lord Chancellors did not raise court fees both to meet the inevitable shortfall and to provide proper funding for all the investment programmes required by the courts. It was not until July 2002 that the Treasury insisted very vigorously that the Court Service must balance its books out of fee income (subject to any permitted subsidies, etc).

73. By section 17 of the Constitutional Reform Act 2005 an incoming Lord Chancellor is now required to swear a special oath which contains an obligation in relation to the provision of resources for the courts:

“In the office of Lord High Chancellor of Great Britain I will ... discharge my duty to ensure the provision of resources for the efficient and effective support of the courts for which I am responsible. So help me God”.

74. The Lord Chancellor’s new statutory duty to have regard to the need for the judiciary to have the support necessary to enable them to exercise their functions is set out in section 3(6) (b) of the same Act.

75. In 2006 HM Courts Service published disaggregated figures for the first time which revealed that civil justice was showing a profit of over £30 million. Although this profit was diverted elsewhere during the year of account, the Courts Service’s published fee policies now evidence a determination that this should not be allowed to happen again.<sup>75</sup> In 2006-7, despite this substantial operating profit on civil business, HM Courts Service imposed further financial cuts on the civil courts whose effects were very apparent in the courts I visited during the course of my inquiry.<sup>76</sup>

76. In 2006-7, strenuous efforts were made to spend the anticipated underspend on fee income during the year of account, but notwithstanding these efforts the surplus on civil justice was still over £14 million.

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<sup>74</sup> The principles for charging for a service were set out in a Fees and Charges Guide first published by the Treasury in 1992. It contained this mantra: “The purpose of charging for services is to ensure that resources are efficiently allocated. Charges should normally be set to recover the full cost of the service.” This alteration to a funding policy of critical importance for the efficient administration of justice was not debated or approved by Parliament at the time, and the senior judiciary has never accepted that it was reasonable to hobble the administration of justice in this way. In all comparable common law countries the cost of resourcing the civil courts is shared between the taxpayer and the litigant in much the same way as happened in this jurisdiction prior to 1983.

<sup>75</sup> They remain willing, however, because of Treasury edicts, to divert part of the income derived from litigants engaged in private law disputes to subsidise the operation of the Administrative Court and other parts of the civil courts system that are engaged with public law litigation between the citizen and the state.

<sup>76</sup> See Annex A below for a description given by many DCJs in 2007 of the serious problems now created by the lack of adequate staff resources in the courts within their areas.

77. I have been told that as a consequence of an extremely large increase in the court fees charged to litigants for public law family work the Council of a London Borough is to challenge the lawfulness of the Treasury's "full cost recovery" policy. For the purposes of this report I have to assume that this policy will remain in place. The cost of the IT investment so badly needed to underpin the operation of the civil courts must be met out of the fees charged to litigants.<sup>77</sup>

## **1.7 Section 9 Judges**

78. Section 9 of the Supreme Court Act 1981 is entitled "Assistance for transaction of judicial business of Supreme Court." In this part of the report I am concerned with what are known as s.9 (1) judges and s.9 (4) judges. They are sometimes known as Deputy High Court Judges ("DHCJs").<sup>78</sup>
79. Section 9(1) includes a table. In its left hand column are listed six types of judge (or former judge) ranging from a judge of the Court of Appeal to a CJ and a Recorder. The right hand column lists a range of courts in which these judges are competent to act on request. Thus the table shows that a judge of the Court of Appeal is competent to act in the High Court and the Crown Court, if requested to do so, whereas a Recorder is only competent to act, on request, in the High Court. The scheme of the sub-section is that any of the judges in the left hand column may act, at the request of the appropriate authority, as a judge of the court set out against his name in the right hand column, until they reach the age of 75.
80. In essence "the appropriate authority" means the Lord Chief Justice or a very senior judge whom he has nominated to perform his duties under this provision.<sup>79</sup> The Lord Chancellor must be involved, in one way or another, in dealing with these requests,<sup>80</sup> and if a CJ or Recorder is to be asked to sit as a HCJ, the Judicial Appointments Commission must concur in the nomination.
81. Section 9(4) is different. This provides, for the purposes of this report, that if it appears to the Lord Chief Justice, after consulting the Lord Chancellor, that "it is expedient as a temporary measure to make an appointment under this subsection to facilitate the disposal of business in the High Court, he may appoint a person qualified for appointment as a High Court Judge to be a deputy of the High Court during such periods or on such occasions as the Lord Chief Justice, after consulting the Lord Chancellor,

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<sup>77</sup> A small sum is provided by the taxpayer each year to meet the fees that would otherwise have been charged to indigent litigants. Since 2005-6 the Treasury has agreed that about £25 million a year of resource spending on IT may be offset directly against increased fees, although the strict application of its Guide would have required this investment to be funded within the Department's Expenditure limit and recovered through fee income subsequently.

<sup>78</sup> Retired judges of the High Court and the Court of Appeal may also sit as DHCJs.

<sup>79</sup> The Heads of Division, in respect of requests to act as HCJs in their Division.

<sup>80</sup> He must be consulted when the request relates to a serving judge or recorder, and he must concur if the request relates to a retired judge: see Supreme Court Act 1981, s.9 (2A)-(2C).



thinks fit”.<sup>81</sup> Since these are temporary measures, the concurrence of the Judicial Appointments Commission is not required.

82. Among the recent constitutional changes, responsibility for initiating these provisions passed from the Lord Chancellor to the Lord Chief Justice on 3<sup>rd</sup> April 2006 pursuant to paragraph 31 of the Concordat, which provides:

“The Lord Chief Justice will be responsible, after consulting the Secretary of State, for the authorisation of individual members of the judiciary to sit in particular levels of court other than their usual level (within the statutory framework). In respect of the deployment of Circuit Judges and Recorders to sit in the High Court, the Lord Chief Justice will select from a list he is to maintain of those considered suitable, which will be agreed with the Judicial Appointments Commission.”

83. In 1988 the Civil Justice Review Body was very critical of the excessive use of s.9 deputies.<sup>82</sup> It said

“Several respondents considered that excessive use was made of persons who are not High Court judges to dispose of High Court cases. It was thought that the volume and nature of these sittings went well beyond the justification which had been offered by the General Issues paper, namely the need to give experience to potential recruits to the Bench, to provide for temporary upsurges in business and shortages in judicial numbers, and to have a flexible demarcation line between work which is appropriate to the High Court and the Circuit Benches. It must indeed be considered excessive that 30% of High Court sittings were by persons who are not High Court judges.

The proposals in this report for shifting work out of the High Court should enable High Court cases to be heard by High Court judges. Leaving aside the specialist jurisdiction which takes the form of official referees’ business, a case to be heard by a Circuit judge or a part-time deputy appointed from the practising profession should be heard in the County Court.”

84. It accordingly recommended that deputy judges should only be appointed to give them experience to cover peaks of work or temporary shortages of judge power, and that Circuit judges and deputies should hear their cases in the County Court.

85. These aspirations were not fulfilled in practice. A table on page 266 of Lord Woolf’s Interim Report (1995) shows that in a 12-month period ending on 31<sup>st</sup> March 1995 over 34% of Queen’s Bench (“QB”) cases and just under 19% of Chancery cases were heard by s.9 deputies. Lord Woolf touched on this issue quite briefly:

“Until very recently, with isolated exceptions to accommodate the most complex cases, a High Court judge could not be made available to try any case of substance likely to last more than three weeks. At times, 10 days was the limit. Those cases had to be tried by a deputy High Court judge.

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<sup>81</sup> Supreme Court Act 1981 s.9 (4). During the period or on the occasions for which a person is appointed as a deputy judge under s.9 (4) he may act as a HCJ (*ibid*).

<sup>82</sup> Report of the Civil Justice Review Body (1988), paras 192-193. A table at p 19 of the Report shows that in 1986 60% of the 1,870 cases in the QB General List were tried by HCJs, 25% by CJs and 15% by DHCJs.

This has led repeatedly to more difficult cases being dealt with by deputies or Circuit judges while less difficult cases were tried by High Court judges.

The situation is quite different in the Chancery Division. With the exception of the two Chancery judges who supervise Chancery work on circuit, the Chancery judges are normally available on a continuous basis to hear cases in London. As a result, deputy days were between 15% and 20% of all sitting days. At times the pressure of business in the Chancery Division is not as great as that in the Queen's Bench Division and waiting times in the Chancery Division may be less than in the Queen's Bench Division. Despite this, there is inevitably some reluctance to release judges to another Division."

86. In order to reduce the volume of litigation in the High Court, Lord Woolf recommended that a claim should not be started in London unless it was appropriate to be tried in London and unless the claimant certified that his claim, where it could be valued, was worth over £50,000 and that it was a multi-track claim which ought to be dealt with by a HCJ.<sup>83</sup>
87. In 1991 the Civil Justice Review Body's recommendation to the effect that all personal injuries claims should be started in the County Court was watered down by introducing a limit of £50,000 below which such proceedings had to be started in the County Court.
88. Lord Woolf's recommendations were similarly watered down. When the new rules came into effect, no change was made to the existing personal injuries limit of £50,000, but a new provision was introduced whereby an action might only be commenced in the High Court if the financial value of the claim was £15,000.<sup>84</sup> At the same time no change was made to the equity jurisdiction of the County Court, which remained pegged at its 1981 figure of £30,000. Nor was any requirement introduced whereby a claimant had to certify that his claim was a multi-track claim which ought to be dealt with by a HCJ.
89. Outside the RCJ large numbers of High Court trials were conducted by s.9 deputies. At the RCJ, on the other hand, detailed studies conducted for the Judicial Resources Review in 2004-5 showed that the proportion of High Court cases heard by deputies there had not altered much. A four-week study of the QB General List in November 2004 revealed that 26% of the sitting days were attributable to s.9 deputies. A comparable five-week survey conducted in the Chancery Division a few weeks later showed that s.9 deputies were hearing 16% of the cases.
90. I have studied the statistics which show the number of days sat by each type of judge at the RCJ in recent years, and they reveal the following picture:<sup>85</sup>

*Sitting Days at RCJ by High Court Judges and Deputies*

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<sup>83</sup> High Court and County Courts Jurisdiction Order 1991, Article 5(1).

<sup>84</sup> High Court and County Courts Jurisdiction Order 1991, Article 4A.

<sup>85</sup> See Annexes B1-B4 for details showing the judges who sat in each sector of the RCJ between January 2006 and May 2008. Annex B1 (b) shows how only defamation specialists are used as deputies for defamation cases.

2006	HcJs	Retired HcJs	s.9(1) CJs	s.9(1) Recorders	s.9(4) Deputies	Total Deputies	Total days sat	Deputies % of total
2007								
QB General	1688	28	355	127		510	2198	23.2
Chancery	2613	88	172	265	130	655	3268	20
Commercial etc	1507	6	123	43.5		172.5	1679.5	10.2
Administrative	2613	77	65	108		250	2863	8.7
2008 (Jan-May)								
QB General	761	14	145	70		219	980	22.3
Chancery	1194	17	52	211	140	425	1619	26
Commercial etc	546	-	39	8		47	593	7.9
Administrative	1194	51	54	54		159	1353	11.8

*Proportion of Deputies used*

	2007	2008
QB General	23.2%	22.3%
Chancery	20%	26%
Commercial etc	10.2%	7.9%
Administrative	8.7%	11.8%

91. Comparable statistics show the following picture outside London:<sup>86</sup>

*Proportion of Deputies used*

	2007-8
Midlands	92.2%
Northern	?
North Eastern	86.7%
Western	88%
Wales	86%

To fill out this statistical picture, I was given the following anecdotal information on my visits to major centres outside London:

**Birmingham**

About 95% of the High Court QB cases will be released to s.9 deputies. This is straightforward QB work [some of it is relatively low value personal injury work].

The Chancery Listing Officer said that it is hard to get hold of an s.9 judge with a Chancery ticket. It is easier to obtain civil Recorders with Chancery expertise.<sup>87</sup> Mr Justice Norris told me that 2% of Chancery High Court trials were conducted by a HCJ. Long cases are always conducted by the local s.9 judge.

<sup>86</sup> See Annexes C1-C5 for details of sitting days on five of the circuits. On the South-Eastern circuit, there were very few sitting days by s.9 deputies, because such defended High Court work as is commenced on the circuit is sent to the RCJ to handle. Mr Justice Bean told me that he had only received six applications to release a QB case to a s.9 judge since the beginning of the year.

<sup>87</sup> See Annex C1 for details.

## Manchester

Mr Justice Patten deals with less than 10% of the Chancery High Court work undertaken at Manchester and Liverpool. All the other trials in the Chancery Division are undertaken by the two Chancery specialist judges, with the other specialist judges available to help, if needed. 90% of the High Court Chancery work on the Northern Circuit is tried by these judges.<sup>88</sup>

## Leeds

There are 3 two-week periods each year when a High Court QB judge is in Leeds to hear civil business, and s.9 judges sit back to back. For Chancery/Mercantile trials 2-3 trials are listed for each judge each day, with only one marked as a first fixture. There will be at least two and sometimes three judges sitting each day,<sup>89</sup> and the High Court Chancery Judge sits back to back with two other judges during his visits...

In addition to the DCJ, the specialist judges, other mainstream CJs and the five DJs, there are a number of s.9 (1) Recorders who assist with the work.<sup>90</sup>

## Bristol

90% of the s.9 work consists of personal injury and clinical negligence claims.<sup>91</sup> Of the eight cases for which the services of a High Court judge were requested, four settled, two were moved to London for trial, and two are listed for trial next autumn. In the same period 211 High Court cases were listed for trial at Bristol by s.9 judges, of which 187 settled, and only 24 (11.4%) were tried.<sup>92</sup>

## Cardiff

HH Graham Jones told me that it is an entirely random matter whether heavy personal injury cases are conducted in the High Court or in the County Court. Since he came back from retirement he has done 50 days of High Court work and 53 days of County Court work.<sup>93</sup> A HCJ now comes to Cardiff for civil work for two weeks three times a year, sitting back to back with the DCJ or another s.9 judge. He and the listing officers try to provide a suitable High Court list for the HCJ, but it is not easy, particularly as so many cases settle.<sup>94</sup>

92. Against this background, Judge Holman (the DCJ at Manchester), Judge Grenfell (the DCJ at Leeds), Judge Bursell QC (the DCJ at Bristol), and His Honour Graham Jones (the acting DCJ at Cardiff) all strongly favoured the unification of the High Court and the County Courts because in their area of judicial business they found the continuing distinction between the two levels of court to be illogical and confusing. There was a

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<sup>88</sup> See Annex C2 for details.

<sup>89</sup> Sittings in Newcastle are less frequent, and only one specialist judge goes there at any one time for one or two weeks each month. Unless the Vice-Chancellor is also in Newcastle at the time, he will not be backed up by another judge.

<sup>90</sup> See Annex C3 for details.

<sup>91</sup> See Annex C4 for details. On my visit to Bristol I was shown the list kept by the QB Listing Officer. 10% of the claims on the pages I saw were classified misrepresentation, fraud, professional negligence, breach of contract etc.

<sup>92</sup> Of these, 13 were tried in 2006, 9 in 2007 and only two in the first three months of 2008, thereby reflecting the greater modern tendency to settle cases that was reflected in other evidence I received.

<sup>93</sup> These County Court days may also include appointments concerned with High Court case management.

<sup>94</sup> See Annex C5 for details.

vacancy in the post of DCJ at Birmingham when I paid my visit.<sup>95</sup> The previous incumbent, now Mr Justice MacDuff, told me that he, too, had in the past favoured unification, but he was now opposed to it, because he felt that the problems he had encountered as DCJ did not warrant such a radical change.

93. The statistical evidence in Annex B2 shows the heavy use of QCs as DHCJs in the Chancery Division. 33 QC Recorders sat a total of 769 days between January 2006 and May 2008, and their efforts were supplemented by 25 QCs who did not have Recorder status. It is also noticeable that although 15 SCJs sat for 434 days as deputies in London during this period, no use at all was made by the Division of CJs who did not have SCJ status.
94. The QB General List, on the other hand, used only 23 QCs, all of whom were Recorders, who sat for 224 days during this period. 17 CJs sat a total of 318 days between them. Of the 480 days sat by SCJs, one of them, HHJ Seymour QC, sat for 362.
95. These lists also show that the use of QCs as deputies in the Commercial Court is extremely restricted. Mr Justice Andrew Smith told me that as a general rule they will send down to the Mercantile Court any case valued at less than £1 million which has no special characteristics, a policy which preserves the quality of the Commercial Court brand.
96. On the other hand a large number of commercial and common law QCs sit as deputies in the Chancery Division.<sup>96</sup> This points to the conclusion that when deciding whether a middle-ranking commercial dispute should be litigated in the Commercial Court or the Chancery Division litigants' advisers are attracted by the quality and quantity of the judges, whether HCJs or SCJs or QCs sitting as deputies, that they are likely to encounter in the Chancery Division.<sup>97</sup>
97. Despite the pressure on its lists, the Administrative Court used s.9 deputies very sparingly over the same period, consistently with the policy that HCJs should sit as a general rule to hear public law business. 10 QCs, all of them Recorders, sat for 256 days between January 2006 and May 2008, and four SCJs and two CJs only sat on a further 58 days. The number of deputies will increase this year while the Administrative Court tries to get its swollen lists under some kind of control.

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<sup>95</sup> I met Judge McKenna during my visit, and he was appointed to be the new DCJ at Birmingham in July.

<sup>96</sup> For example, in the 29 month period between January 2006 and May 2008 records show that David Donaldson QC sat in the Chancery Division for 59 days, Nicholas Strauss QC for 51 days, Bernard Livesey QC for 43 days, Peter Leaver QC for 39 days, Robert Englehart QC for 38 days, John Jarvis QC for 35 days, John Powell QC for 33 days, and Susan Prevezer QC for 30 days. A "sitting day" includes days spent in chambers pre-reading or writing judgments. See Annex B2 for the full list.

<sup>97</sup> Mrs Justice Gloster told me that when she was at the Bar she appeared in the Chancery Division and the Commercial Court in heavy commercial litigation almost interchangeably.

## **1.8 The surviving differences between the High Court and the County Courts**

98. The High Court is a national court, exercising its jurisdiction throughout England and Wales. Section 9 of the Supreme Court Act 1981 prescribes who may sit in the High Court in addition to the Heads of Division and the puisne judges of the court.<sup>98</sup>
99. Each County Court is separate and distinct from every other County Court. While circuit judges and district judges (and their deputies) ordinarily exercise the jurisdiction of the County Court, any judge (from deputy district judges (“DDJs”) to Lords Justices of Appeal) may sit in the County Court if authorised to do so by the Lord Chief Justice following consultation with the Lord Chancellor.<sup>99</sup> The Lord Chancellor is empowered to make orders conferring jurisdiction and allocating proceedings as between the High Court and the County Court.<sup>100</sup> The Patents County Court is a County Court created by statute to exercise a particular specialist jurisdiction. The process of making a single set of Civil Procedure Rules, common to both courts, is nearing completion.
100. The County Court has a general power to make any order which could be made by the High Court if the proceedings were in the High Court, subject to prescribed exceptions.<sup>101</sup> The County Court may also adopt the general principles of practice in the High Court in any case not expressly provided for.<sup>102</sup> Subject to any prescribed exceptions, the County Court has unlimited jurisdiction to hear and determine any action founded in contract or tort<sup>103</sup>, and any action for the recovery of sums recoverable under any enactment.<sup>104</sup> By the consent of the parties it may exercise jurisdiction in any QB action so long as the court’s Admiralty jurisdiction is not engaged.<sup>105</sup> It also has jurisdiction to deal with actions for the recovery of land.<sup>106</sup>
101. Once an action has been started in a County Court, any application in the action must be made to that court.<sup>107</sup> A County Court claim will be automatically transferred to the defendant’s home court.<sup>108</sup> A claim for possession must be started in the district in which the land is situated.<sup>109</sup> A DCJ may not make a general civil restraint order restricting a litigant’s activities in the High Court.<sup>110</sup>

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<sup>98</sup> For the practical effect of s.9, see Section 1.7 above

<sup>99</sup> See County Courts Act 1984 ss.1, 5 and 6.

<sup>100</sup> See, for example, the High Court and County Courts Jurisdiction Order 1991 and the County Court Remedies Regulations 1991.

<sup>101</sup> County Courts Act 1984 s.34.

<sup>102</sup> County Courts Act 1984, s.76.

<sup>103</sup> County Courts Act 1984, s.15.

<sup>104</sup> County Courts Act 1984, s.16.

<sup>105</sup> County Courts Act 1984, s.18.

<sup>106</sup> County Courts Act 1984, s.22.

<sup>107</sup> CPR 23.2.

<sup>108</sup> CPR 26.2.

<sup>109</sup> CPR 55.3.

<sup>110</sup> CPR Part 3, PD – Civil Restraint Orders, para 4.2(1) (c). It is unlikely that a DCJ has power to make an order that has effect beyond the County Court districts for which he is responsible.

102. The County Court has no jurisdiction in relation to judicial review<sup>111</sup> or *habeas corpus*.<sup>112</sup> It has no power to make mandatory orders or quashing orders or orders of prohibition.<sup>113</sup> A number of statutory provisions give the High Court jurisdiction to hear appeals from statutory bodies.<sup>114</sup> A County Court has no appellate jurisdiction in respect of the Crown Court.<sup>115</sup> Nor does it have jurisdiction to hear cases stated by magistrates under section 111 of the Magistrates' Courts Act 1980.<sup>116</sup> It has no power to make a declaration of incompatibility with a Convention right.<sup>117</sup>
103. A County Court has no jurisdiction to hear an action for libel or slander,<sup>118</sup> or an action in which the title to any toll, fair, market or franchise is in question.<sup>119</sup>
104. Subject to certain exceptions, a County Court cannot make freezing orders or search orders.<sup>120</sup>
105. The equitable jurisdiction of the County Court is limited in general terms to proceedings where the amount at stake is less than £30,000,<sup>121</sup> although in many cases the parties may consent to the County Court having jurisdiction.<sup>122</sup> While its jurisdiction in bankruptcy in the insolvency districts designated by the Lord Chancellor is concurrent with that of the High Court,<sup>123</sup> its winding up jurisdiction is restricted to companies with a paid up share capital of less than £120,000.<sup>124</sup> A County Court's contentious probate jurisdiction is restricted to cases where there has been an application through the probate registry for the grant or revocation of probate or administration, and the estate in question has a net value of under £30,000.<sup>125</sup>
106. A County Court has jurisdiction under s.10 of the Local Land Charges Act 1975 and s.10 (4) of the Rentcharges Act 1977 only where the sum concerned or amount claimed

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<sup>111</sup> Courts and Legal Services Act 1990, s.1 (10).

<sup>112</sup> Schedule 1 to the CPR, RSC Order 54.

<sup>113</sup> County Courts Act 1984, s.38 (3) and, now, CPR 54.1(2).

<sup>114</sup> A comprehensive list, accurate at that time, was published by the Law Commission in Annex 2 to Consultation Paper No 126 (Administrative Law: Judicial Review and Statutory Appeals) which was published in 1993. Appeals and applications under ss.19 and 20 of the Local Government Finance Act 1982 can be commenced only in the High Court: High Court and County Courts Jurisdiction Order, para 6.

<sup>115</sup> Supreme Court Act 1981, s.28.

<sup>116</sup> For the powers of the High Court, see Supreme Court Act 1981, s.28A.

<sup>117</sup> Human Rights Act 1998, s.4. Any claim for damages in respect of a judicial act must be commenced in the High Court (CPR Part 7, PD, para 2.10(2)).

<sup>118</sup> County Courts Act 1984, s.15 (2) (a).

<sup>119</sup> County Courts Act 1984, s.15 (2) (b).

<sup>120</sup> County Court Remedies Regulations 1991, para 3. Nor can a County Court grant injunctions or declarations of the kind formerly obtainable under the obsolete writ of *quo warranto* (for the powers of the High Court in this respect, see Supreme Court Act 1981, s.30.)

<sup>121</sup> County Courts Act 1984, s.23.

<sup>122</sup> *Ibid*, s.24.

<sup>123</sup> Insolvency Act 1986, s.373.

<sup>124</sup> Insolvency Act 1986, s.117 (2). Applications under the Companies Act 1985 may only be made to a County Court if a County Court would have jurisdiction to wind up the company in question (*Practice Direction: Applications under the Companies Act 1985*).

<sup>125</sup> County Courts Act 1984, s.32.

does not exceed £30,000.<sup>126</sup> Similarly it has jurisdiction under certain provisions of the Law of Property Act 1925 and the Land Charges Act 1972 only where the amount at stake is less than £30,000.<sup>127</sup>

107. Enforcement of a County Court order by way of execution of goods shall take place in the High Court if the sum involved is greater than £5,000.<sup>128</sup>
108. Finally, a County Court's powers to punish for contempt are more restricted than the High Court's.<sup>129</sup> A County Court has power to commit for contempt in the face of the court,<sup>130</sup> and for breach of a court order.<sup>131</sup> Any other form of contempt is punishable by committal only in the Queen's Bench Division of the High Court.<sup>132</sup>

### **1.9 The exclusive jurisdiction of the County Court**

109. An action for damages for personal injuries may be brought in the High Court only if its value exceeds £50,000, and other money claims may only be brought there if their value exceeds £15,000.
110. Applications under s.1 of the Access to Neighbouring Land Act 1992 may only be commenced in the County Court, and there are a number of other statutes, such as the Race Relations Act 1976, that contain similar restrictions.<sup>133</sup>
111. Enforcement of a County Court order by way of execution of goods shall take place in a County Court if the sum involved is less than £600<sup>134</sup>, and enforcement of a County Court order arising out of a regulated consumer credit agreement takes place in the County Court.<sup>135</sup> Except where the County Court does not have jurisdiction, possession claims should normally be brought in the County Court, and only exceptional

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<sup>126</sup> High Court and County Courts Jurisdiction Order para 2(2).

<sup>127</sup> *Ibid*, para 2(3)-(6).

<sup>128</sup> *Ibid*, para 8(1) (a).

<sup>129</sup> The High Court has power to punish any contempt by up to two years imprisonment. That power is available in the County Court only for breach of an injunction or undertaking. In the County Court the maximum sentence for assaulting an officer of the court in the execution of his duty is three months (County Courts Act 1984 s.114) and for insulting (which includes threatening) a judge, juror or witness or for misbehaving in court is one month. (*ibid*, s.118).

<sup>130</sup> County Courts Act 1984, s.118.

<sup>131</sup> CPR Schedule 2, CCR Order 29.

<sup>132</sup> *In Re G (A Child) (Contempt: Committal)* [2003] EWCA Civ 489 the Court of Appeal regretted that this statement of the law was correct.

<sup>133</sup> There was formerly a convenient list of them in CPR Schedule 2, CCR Order 29, but this rule has been tidied up almost to extinction in the continuing process of CPR consolidation.

<sup>134</sup> High Court and County Courts Jurisdiction Order para 8(1) (b).

<sup>135</sup> High Court and County Courts Jurisdiction Order para 8(1A). Enforcement of certain traffic penalties is to take place only in the Northampton County Court (*ibid*, para 8A).



circumstances justify starting a claim in the High Court.<sup>136</sup> Only a County Court has jurisdiction to hear a mortgage possession action outside Greater London.<sup>137</sup>

112. The issue of a judgment summons is a procedure available only in a County Court,<sup>138</sup> and County Court administration orders are available only from a County Court.<sup>139</sup>

### **1.10 Transfers between the High Court and the County Court and vice versa**

113. Section 40(2) of the County Courts Act 1984 gives the High Court power to transfer any proceedings before it to the County Court. Guidance as to the way this power should be exercised is set out in CPR 30.2<sup>140</sup> and in para 2 of the Practice Direction to CPR Part 29.<sup>141</sup> This power allows the High Court to confer jurisdiction on the County Court in cases where the County Court would not otherwise have had jurisdiction.<sup>142</sup>
114. Section 41 of the County Courts Act gives the High Court power to direct that County Court proceedings be transferred to the High Court, and Section 42 gives the County Court power to direct transfer to the High Court. The Queen's Bench Guide describes the practice in these terms:

6.9.1 Part 30 and the Part 30 Practice Direction deal with transfer of proceedings, within the High Court, from the High Court to the County Court and between County Courts. The jurisdiction of the High Court to transfer proceedings to the County Courts is contained in s.40 of the County Courts Act 1984 as substituted by s.2(1) of the Courts and Legal Services Act 1990. Under that section the court has jurisdiction in certain circumstances to strike out claims that should have been started in a County Court.

6.9.2 Rule 30.2 sets out the provisions for the transfer of proceedings between:

County courts,

The Royal Courts of Justice and a district registry of the High Court, and

District registries.

Rule 30.3 sets out the criteria to which the court will have regard when making an order for transfer. (See paragraph 6.4 above about automatic transfer.)

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<sup>136</sup> Practice Direction to CPR Part 55, para 1. Circumstances which may, in an appropriate case, justify starting a claim in the High Court are if (1) there are complicated issues of fact; (2) there are points of law of general importance; (3) the claim is against trespassers and there is a substantial risk of public disturbance or of serious harm to persons or property which properly require immediate determination. *Ibid*, para .3

<sup>137</sup> County Courts Act 1984 s.21 (3). But compare CPR 55.3(2), which suggests that in limited circumstances possession actions may be started in the High Court.

<sup>138</sup> County Courts Act 1984, s.110, and CPR Schedule 2, CCR Order 28.

<sup>139</sup> County Courts Act 1984, ss.112-7, and CPR Schedule 2, CCR Order 39.

<sup>140</sup> See Annex F below for the text of CPR 30.2.

<sup>141</sup> See Annex E below for the text of para 2 of this Practice Direction.

<sup>142</sup> See the recent judgment of David Richards J to this effect in *National Westminster Bank Ltd v King* [2008] EWHC 280 (Ch); 2008] 2 WLR 1279

6.9.3 The High Court may order proceedings in any Division of the High Court to be transferred to another Division or to or from a specialist list. An application for the transfer of proceedings to or from a specialist list must be made to a Judge dealing with claims in that list.

6.9.4A claim with an estimated value of less than £50,000 may generally be transferred to a County Court, if the County Court has jurisdiction, unless it is to proceed in the High Court under an enactment or in a specialist list.

6.9.5 An order for transfer takes effect from the date it is made. When an order for transfer is sealed the court officer will immediately transfer the matter to the receiving court. At the same time, the court officer will also notify all parties of the transfer. An order for transfer to the High Court at the Royal Courts of Justice should state: "Transfer to the Central Office, Queen's Bench Division, [or as appropriate] at the Royal Courts of Justice."

6.9.6 Paragraph 5 of the Part 30 Practice Direction sets out the procedure for appealing an order for transfer. Where an order for transfer is made in the absence of notice given to a party, that party may apply to the court that made the order to have it set aside.

6.9.7 Where money has been paid into court before an order for transfer is made, the court may direct transfer of the money to the control of the receiving court.

115. There is also a helpful summary in paras 13.5 to 13.11 of the Chancery Guide:

13.5 Any Chancery case which does not require to be heard by a High Court judge, and falls within the jurisdiction of the County Courts, may be transferred to a County Court. Where a case has been so transferred, the papers must be marked "Chancery Business" so as to ensure, so far as possible, suitable listing.

13.6 The jurisdiction of County Courts is set out in the High Court and County Court Jurisdiction Order 1991 as amended, and in enactments amended by that Order.

13.7 The jurisdiction of the High Court to transfer cases to a County Court is contained in the County Courts Act 1984, section 40, as substituted by the Courts and Legal Services Act 1990, section 2(1). Under that section, the court has jurisdiction in certain circumstances to strike out actions which ought to have been begun in a County Court.

13.8 A claim with an estimated value of less than £50,000 will generally be transferred to a County Court, if the County Court has jurisdiction, unless it is either within a specialist list or is within the criteria in rule 30.3(2).

13.9 If the case is one of a specifically Chancery nature a transfer from the High Court will ordinarily be to the Central London County Court (Chancery List) ("the CLCC") where cases are heard by specialist Chancery Circuit judges or recorders and a continuous Chancery List is maintained, unless the parties prefer a transfer to a local County Court.

13.10 Even where the estimated value of the claim is more than £50,000 transfer to the CLCC may still be ordered if the criteria in rule 30.3(2) point in that direction, in particular having regard to the criteria in

rule 30.3(2) (d), namely the complexity of the facts, legal issues, remedies or procedures involved.

13.11 If a claim is transferred to a County Court at the allocation stage no other directions will usually be given and all case management will be left to the County Court.

116. The Chief Chancery Master told me that if an action starts in the Chancery Division which should be transferred to the County Court, simple transfer directions will be given on paper if there is no hearing. If there is a hearing, the Master will give directions at the same time as he makes the order for transfer down. The Chancellor has exhorted the Chancery Masters to be very tough about transferring cases to the County Court which do not warrant a High Court judge. Occasionally a case slips through the net when at the Master stage it *is* fit for the High Court but subsequently before trial (after it has left the Master's control) something happens within the case (eg the parties reduce the issues to simple ones) which makes it less fit. He says that there is little that can be done about that, and it is very rare indeed.
117. Cases are usually transferred to the Chancery List at the Central London Civil Justice centre, although a case may be transferred to a local County Court, if it is convenient for it to be tried locally (eg if a view is needed).
118. I describe in Section 2.1.2 below how the Queen's Bench Masters use these powers much more sparingly.

## **Part II. The present arrangements for the judiciary in relation to the civil jurisdiction of the courts of England and Wales**

119. The first of my terms of reference invites me to consider the present arrangements for the judiciary in relation to the civil jurisdiction of the courts of England and Wales. There was no accurate up to date source to which I could turn for anything resembling the full picture, and much of my inquiry was devoted to establishing just what is now happening. Only when I had succeeded in achieving this would it be possible to make meaningful suggestions about how things might happen better in future.<sup>143</sup> In the first two sections of this part of my report I will describe what happens in London, and in Section 2.3 I will describe what happens in the High Court outside London. It is first necessary, however, to set what follows in a wider perspective.
120. Multi-track claims that lie on the border between the High Court and the County Courts represent a minuscule proportion of the total volume of claims handled by HMCS every year. They represent the apex of a very large pyramid. When a claim is defended it is allocated to track. undefended claims that result in default judgments or a very speedy

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<sup>143</sup> The last of my terms of reference invites me to recommend durable structures for the use of the judiciary in the exercise of its civil jurisdiction in future.

withdrawal or settlement of the claim do not constitute judicial business and are largely an irrelevance in the context of my report. Provisional figures for multi-track claims allocated to track in the County Courts and in District Registries of the High Court in 2007 are set out below.<sup>144</sup>

County Courts	26,712
District Registries	1,281

121. These figures should be compared with the provisional figures for the total number of claims issued in the County Courts in 2007:

Money claims	1,555,486	993,483
Non-money claims	392,531	593
Insolvency petitions <sup>145</sup>	66,984	
Totals	2,015,001	994,081

122. In 2007, 1,410,581 money claims were issued for specific amounts. Where the value of the claim can be ascertained, the breakdown is as follows:

Up to £500	40.7%
£500-£5,000	43.8%
£5,000-£15,000	10.9%
£15,000-£50,000	3.9%
Over £50,000	0.5%

123. 341,856 defences were received in the County Courts, and 176,210 claims were allocated to track: the rest were withdrawn or settled before allocation. Allocations were:

Small Claims	97,832
Fast track	51,666
Multi-Track	26,712
Total	176,210

124. More and more claims are being issued (and handled throughout) at back office data centres away from the courthouses. This number will grow steeply over the next five years when proper IT systems are installed<sup>146</sup> and the teething troubles of MCOL (and PCOL, even though a possession claim must lead to a judicial hearing) have been ironed out. The provisional figures for 2007 are:

	Claims issued	Default judgments
County Court Bulk Centre	730,478	617,467
Money Claim Online	161,567	49,506
Totals	892,045	656,973

<sup>144</sup> More detail is to be found in the table at Annex D. All the figures I set out in this section are provisional figures, and because they depend on the reliability of those who key in the data, I am not wholly confident that the underlying data is accurate in all cases.

<sup>145</sup> This figure includes petitions issued in the District Registries of the High Court.

<sup>146</sup> See Section 4.6 for a description of likely future IT developments and the meaning of these acronyms.

125. The only reason why the conduct of civil business in the courts shows an overall profit is because so many claims are processed inexpensively in this way (or through default judgments obtained at the courthouses), with fees charged for issue and enforcement that are well above the cost of providing the service.
126. Any meaningful strategy for the future of civil justice must therefore make it as easy as possible for judges and staff at the courthouses to handle high volume low value business, while maintaining and enhancing the quality of judicial and administrative service at the top of the pyramid, where High Court business is conducted.<sup>147</sup>
127. Professor Ian Scott, of Birmingham University, has set out<sup>148</sup> the challenge that confronted me in this inquiry in these terms:

“Whether we are talking about criminal trial courts or civil trial courts it is helpful to begin with the concept of the "case pyramid". Imagine a pyramid with two axes, one representing the height of the pyramid (the "y" axis), and the other the width of the bases (the "x" axis). The y axis measures (for want of a better word) "seriousness" (serious - trivial); and the x axis measures volume (high volume - low volume). The pyramid represents the social phenomenon that trivial cases arise in much higher volume than serious cases.

How should the court system respond to this phenomenon? What judicial organisation would be best fitted to deal with it? How is the case pyramid to be mapped on to judicial organisation? It seems obvious that a multiple response, distinguishing (at least) serious (low volume) cases and trivial (high volume) cases, is required. ("Trivial" is not the best word but it is convenient; by using it I do not mean to suggest that some cases are unworthy of judicial attention.).

The most serious cases (which arise in low volume) should get a response that is the best that a court system could be expected to provide; the best judges, the best procedures, etc. This "best" response is the paradigm and is bound to be expensive to provide and expensive to operate; therefore we would expect it to be a rationed resource with restricted access. For convenience, we could call this "best" response "formal justice".

The trivial cases (which arise in high, sometimes very high, volume) do not deserve the best response, because a lesser

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<sup>147</sup> The reason why so many very experienced DCJs support unification is not because they want to cling onto difficult and interesting work themselves, but because in their view the distinction between the two courts (at centres where the same staff, the same DJs and the same CJs handle High Court work and County Court work interchangeably) obstructs the efficient administration of court business.

<sup>148</sup> “*Trial Court Integration in England.*” This updated version of an earlier paper is now published as Chapter 12 in *Canada’s Trial Courts; Two Tiers or One?* (ed Peter H. Russell) University of Toronto Press 2007.

response is quite capable of being a satisfactory response and, in any event, the expense involved in providing and operating the best response cannot be justified in trivial cases. The less than best response is distinguished by features that are in derogation of the paradigm. For convenience, we could call this "less than best" response "summary justice".

The logic of the multiple response leads to the phenomenon of "horizontal forum fragmentation", a force that operates against the unification of courts."

128. Although, as he pointed out, our County Court processes (in the multi-track and the fast track, at any rate) have become much less summary than they used to be, this is a good starting point for my description of what is happening at the apex of the pyramid today.

## **2.1 The Queen's Bench Division and the common law courts**

### **2.1.1 Heavy non-specialist multi-track common law work in London: RCJ**

129. Lord Justice May, the Vice-President of the Queen's Bench Division, who is in charge of the deployment of the Queen's Bench judges, is a strong supporter of unification. He told me that under the present arrangements a £5 million clinical negligence case in Manchester might start in the County Court,<sup>149</sup> whereas a £75,000 running down action in London might start in the Central Office at the RCJ.<sup>150</sup> Although in theory each might be transferred upwards or downwards, in practice no such transfer took place in a large number of these cases.
130. As a result, he said, a solicitor in Peckham might start a comparatively low value running down action in the Central London Civil Justice Centre, and a solicitor in EC1 might start an equivalent action in the RCJ, where it would be retained. Although HCJs and Masters theoretically possessed appropriate control over transfer in a dual point of entry system, in practice they did not exercise it often enough in London. Conversely, a DCJ might retain a case which really ought to be tried by a HCJ. He felt that a dual system of entry bred a situation in which cases were not necessarily in the right place before the right judge. This is the reason why he was so passionately in favour of a single point of entry system, which would require the judiciary (at a sufficiently high level) to select which case went where.
131. He considered that the QB General List in London had a large enough amount of effective HCJ work to run 5-6 cases for HCJs at any one time.

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<sup>149</sup> Judge Holman, the DCJ at Manchester, told me that in practice solicitors in Manchester issue claims for damages for personal injury (including clinical negligence claims) in the High Court if the claim exceeds £750,000.

<sup>150</sup> See the Table in Annex D below which shows a representative sample of 300 cases handled by Queen's Bench Masters in 2007-8.

132. A senior High Court manager<sup>151</sup> told me that in normal circumstances the QB General List has a daily complement of eight judges.<sup>152</sup> In May 2008 eight HCJs were assigned to the list. They may be assigned, however, for very short periods at one time.<sup>153</sup> Because they are moved so often to different duties, QB judges cannot as a general rule case-manage cases or conduct PTRs. They see the papers for the first time when the case is assigned to them to try. I was told that some solicitors issue their claims in the Chancery Division or the Commercial Court because they feel they can rely on the quality and experience of the judges available in contrast to all the variables in the QB General List.
133. It is to this list that Lord Justice May will turn when he needs to post a QB judge to other duties in an emergency.
134. The settlement rate used to be 70-80%.<sup>154</sup> It is now higher. Virtually everything settles now, including clinical negligence cases. In 2007 trials occurred when a contentious issue about periodical payments orders had to be litigated, but this issue had disappeared as an area of dispute by May 2008. 15-20 cases may be listed to start on a particular Monday. Two weeks beforehand, there may be ten left. There may in the end be five trial starts, but one or two of them will settle on the day.
135. The continued incidence of late settlements makes this list very difficult to manage effectively. There may be 16 clinical negligence cases worth £500,000 in the list, but most of them settle. On the other hand, insurers may choose to fight a £100,000 claim. A HCJ may be listed to hear a £1-1.5 million case, but when it settles, there have to be “fillers” available.<sup>155</sup> The heavy incidence of late settlements makes it difficult to justify the assignment to the list of more judges who are clinical negligence specialists.<sup>156</sup>
136. I found that there is undoubtedly a strong feeling among some solicitors that if they choose to start their proceedings in the High Court in London, their choice should be respected. Mr Justice Eady said that HM Courts Service listing staff was very conscious of customer demand, and that they tried to please the customer. Keith Fairweather said that people liked coming to the High Court. Tim Green told me that if country solicitors

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<sup>151</sup> Keith Fairweather is Head of Court Support and Deputy Director of the High Court at RCJ.

<sup>152</sup> A typical complement would be five High Court judges, Judge Seymour QC (a senior circuit judge formerly appointed to the TCC), a s.9 (1) circuit judge and a s.9 (4) deputy. Mr Justice Eady, the judge in charge of this list, estimated that 25% of QB actions were being tried by deputies in March 2008: up to Christmas 2007 the figure was 30-35%. Some of the judges assigned to the list for short periods may be criminal justice specialists. Although they may have had little or no experience of heavy civil litigation, some of them turn out to be proficient in handling civil cases.

<sup>153</sup> Tim Green, who has been in charge of QB Listing for 12 years, told me that judges want a reading day at the start and judgment-writing time before they go off to other duties at the end, and it is difficult to make practical use of a judge who is assigned to this list for only one or two weeks.

<sup>154</sup> Evidence of Tim Green.

<sup>155</sup> These are smaller cases that can be brought quickly into the list to occupy a judge whose large case has settled very shortly before trial (or on the morning of the trial).

<sup>156</sup> Lord Justice May, as the judge in charge of QB deployment, may be asked for help in an emergency. He may be able to make, say, a Commercial Court judge available to hear a heavy QB action which does not settle.

issue their claim at the RCJ, they expect a HCJ.<sup>157</sup> The QB List at the RCJ, he said, is a very parochial place, and one should not be dismissive of people's choices. People will resist being sent where they do not want to be sent. People want to go where they have always gone in the past.

137. In addition to claims started and retained in the RCJ, the QB General List sometimes accepts cases from the County Courts in Central London or Southend or Cambridge, for instance, if the claim is worth over £50,000.<sup>158</sup> Cases are also accepted from Winchester on this basis.
138. The Senior Master said that in London the existence of the High Court did make a difference, and that it was treated as the prescribed court for the conduct of their litigation by City and West End firms. I describe in Section 2.1.2 below how very few actions are transferred out of the QB General List to the County Courts.

## 2.1.2 The Queen's Bench Masters

139. The Senior Master<sup>159</sup> leads a team of nine QB Masters. He explained to me that although the salaries are the same, High Court Masters are appointed through a different competition and recruitment processes to DJs. They need to have an understanding of heavy civil litigation.<sup>160</sup>
140. The advent of the Woolf reforms brought about a revolution in the quality and quantity of work handled by the High Court Masters in the Central Office at the RCJ. Although proceedings in which both the County Courts and the High Court have jurisdiction may now be started at either level, personal injury claims may only be started in the High Court if the financial value of the claim is £50,000 or more. All other claims (including clinical negligence claims) may be started in the High Court so long as their financial value exceeds £15,000.
141. The Masters recently started preparing very brief summaries of the cases they were handling. I have seen 303 of these summaries, and the Table in Annex D sets out the story they tell. It can be summarised briefly as follows:

	Number of cases	£50-£100 £000s	£101-300 £000s	£301-£1m £000s	Over £1m	Unknown
Personal Injury Claims	179	27	91	26	26	9

<sup>157</sup> He said that with claims in the £70,000 - £80,000 range it is difficult to assess whether they should have a HCJ. Some solicitors get very angry when he tells them that their case will be heard by a s.9 (1) circuit judge or a s.9 (4) deputy.

<sup>158</sup> For example, if a local circuit judge is suddenly taken ill.

<sup>159</sup> Master Whitaker succeeded Master Turner as Senior Master in 2007.

<sup>160</sup> When I interviewed the Senior Master with Master Fontaine (who used to be a solicitor in two large City firms) they told me that they thought it would be good if one or two of the procedural judges at some of the major civil justice centres outside London were recruited from the same background. They believed that there should be two levels of interlocutory judge: one for routine litigation and one for the heavy work.



Debt & Contract claims	68	23	29	8	4	4
Tort & HRA claims	49	18	11	5	3	12
Miscellaneous	7	2			1	4
Total	303	70	131	39	34	29

142. The new limits introduced in 1999 decimated QB work at the RCJ,<sup>161</sup> and have enabled the QB Masters to develop specialist skills. The conduct of clinical negligence litigation has been one of these, ever since Master Foster established a specialist list 12 years ago.<sup>162</sup> There are also standing arrangements whereby since 2002 most of the mesothelioma and lung cancer and other asbestos-related claims have been coming to the QB Masters from all over England: the present Senior Master has been responsible for the success of this list. Claimants' solicitors appreciate the specialism and efficiency of a dedicated list. Most of these cases settle, and if they do not settle, it is convenient for them to be tried at the RCJ.<sup>163</sup> Nearly half of the sample I inspected were composed of mesothelioma and asbestos-related disease claims (78) or clinical negligence actions (45).
143. The Masters also deal with a significant number of foreign process matters, and certain complex jurisdictional disputes, where specialist knowledge is required, and where such applications would otherwise have to be dealt with by a High Court judge.
144. The Senior Master told me that the QB Masters still use the simple form of marking cases that was first introduced over 35 years ago. These markings are derived from the *Practice Direction (Assessment of Cases: Substance)* [1972] 1 WLR 3. This Practice Direction was issued by the Senior Master on 10th December 1971 in relation to cases proceeding in the QB Division. It provided that the order for directions then in use should include a provisional assessment of the substance, difficulty or public importance of the case.
145. An assessment in Category A (which means that the case must be tried by a High Court Judge) denoted a case of great substance or great difficulty or of public importance. An assessment in Category B (which means that the case should be tried by a High Court Judge if available) denoted a case of substance or difficulty, while an assessment in Category C denoted "other cases". These markings are then used by the QB Listing

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<sup>161</sup> Keith Fairweather told me he remembered the days, less than 20 years ago, when 100,000 writs were issued in the Central Office every year, and the cost of a writ was £70. In contrast, 4,246 claims were issued in the Central Office in 2006, and the fee payable when proceedings are started now ranges between £360 (for claims between £15,000 and £50,000) and £1,530 (for claims in excess of £300,000 or unlimited in value).

<sup>162</sup> This list is now run by Master Ungley and Master Yoxall.

<sup>163</sup> A new Practice Direction to CPR Part 3 relating to the conduct of Mesothelioma Claims came into effect on 1<sup>st</sup> April 2008. Under para 7 of this Practice Direction Living Mesothelioma Claims are to be determined or tried not more than 16 weeks following service of the Claim Form. The hearing date may be later in respect of Fatal Mesothelioma Claims.

Officers when assigning cases to the different judges who are sitting in the QB (General) List at the relevant time.<sup>164</sup>

146. The Senior Master told me that the 1991 Allocation Order did not work because people held on to their work in a way that was not intended. In contrast to the Chancery Masters, QB Masters transfer very few actions down to the County Court,<sup>165</sup> and I understand that very few actions are transferred up from the County Court to the High Court.
147. Recently a £6-7 million claim was started at the Central London Civil Justice Centre, although it was transferred to the High Court because there was a dispute over forum. The Senior Master believes that it is unsatisfactory to have two levels of court in London with concurrent jurisdiction for high value claims, with differing case-management arrangements.<sup>166</sup> He said that the situation is an anomaly, and the 95% settlement rate at both the RCJ and the Central London CJC<sup>167</sup> shows that the interlocutory process is the predominant process in civil litigation. The Masters, he said, case-manage cases towards settlement.
148. In the Senior Master's view, it is a misuse of circuit judge time for them to do interlocutory work. He believes there should be a cadre of interlocutory judges who specialise exclusively in this work. People like the High Court Masters ought to be case-managing the heavy work. Good case-management is what makes cases settle.
149. I was told that because there was such a long delay in appointing the new Senior Master, the litigation that arose from the Buncefield fire was transferred for case-management purposes to the Commercial Court, and arrangements have now been made for trial by a Commercial Court judge.<sup>168</sup>

### **2.1.3 Heavy non-specialist multi-track common law work in London: the Central London Civil Justice Centre**

150. The Central London Civil Justice Centre is located in two separate buildings in Park Crescent, on the southern edge of Regent's Park. It consists in essence of a conventional

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<sup>164</sup> Master Leslie told me that he rarely placed a case in category A, but that there used to be a practice (now in abeyance) whereby the QB Masters were required to write a short note for the staff and Judge in charge of the QB (General) List by way of justifying a Category A recommendation.

<sup>165</sup> Between April 2007 and March 2008 only 49 non-Chancery actions were transferred to the Central London CJC from the RCJ out of the 4,000 cases being handled there.

<sup>166</sup> The Masters case-manage all the non-specialist QB claims at RCJ, whereas CJs case-manage them at the Central London CJC if they are transferred to the trial centre after preliminary directions have been given by a DJ at the referring court. See also Section 2.1.3 below.

<sup>167</sup> For the much lower settlement rate for cases after they have been transferred to the Central London Trial Centre see Section 2.1.3 below. Perhaps this is a consequence of case-management responsibilities being split between the sending court, which dispatches them quickly, and the receiving court which receives the cases in order to try them.

<sup>168</sup> Although this heavy litigation may have had some insurance aspects, the Senior Master believes that it would, if anything, have been more suitable ultimately for a TCC judge, but the insurance companies involved in the case were used to the Commercial Court, and something had to be done to keep the litigation moving.

County Court, staffed by DJs and administrative support staff, in one of the buildings, and a multi-track trial centre in the other. The trial centre has 12 courtrooms for circuit judges. They hear claims commenced in the Central London County Court and the centre also acts as a referral centre for multi-track trials transferred to it from other County Courts in the London area and beyond.<sup>169</sup> The Central London County Court represented an amalgamation of the former Bloomsbury County Court (in Great Portland Street) and the Marylebone County Court<sup>170</sup> (in Marylebone Road), and when the lease of the Westminster County court (in St Martin's Lane) was terminated, it also inherited business from that County Court area.

151. Judge Paul Collins CBE, who is the lead judge there, leads a permanent team of 10 CJs who are civil justice specialists.<sup>171</sup> If a multi-track case is transferred from another court, a DJ in the sending court will have given preliminary directions, and the CJs at the Centre will conduct all the case-management thereafter. The cases that start at the Central London County Court will be case-managed by one of the DJs there until they are ready for a PTR. A trial date can be provided within eight weeks for a one-day trial, and within 12 weeks for all other cases (unless they are particularly complex). Judge Collins told me that their cases usually have a 65-70% settlement rate, but this had gone down to 55% in the weeks leading up to my second visit to the court in July 2008. I describe the work in the Centre's Chancery List in Section 2.2.5.3 below, and the Centre's TCC work in Section 2.1.7 below. Civil jury trials arising out of alleged police misconduct used to be fairly common, but they are now comparatively rare.
152. In his 2006-7 report on the Central London CJC, Judge Collins said that at the start of the year the staff complement there had been reduced from 91 to 80, and the impact of long and short term absences meant that the court typically operated with a staff of about 65. Twenty members of staff left in the year under review (including experienced managers), and 14 more had left or given notice since then.<sup>172</sup> The increasing demands of training new entrants inevitably diverted senior managers away from their principal role of managing the business of the court. Court orders were at one time taking up to 16 working days to process.
153. Judge Mackie CBE, QC spent a year as a Mercantile judge at the Central London CJC before being transferred to perform that role in the High Court with a base at the RCJ. He told me that he enjoyed Central London, but

“[I]f you are moderately poor and start your claim there, the chances are that the file will get lost or disorganised. It is a very inefficient way of doing things. The circuit judges there gradually got demoralised....

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<sup>169</sup> All trials estimated to last for two days or more are transferred to the trial centre, together with some one-day trials. Between April 2007 and March 2008 49 cases were also transferred to the trial centre from the RCJ.

<sup>170</sup> After the sale of the Bloomsbury site, it became known as the Marylebone and Bloomsbury Court.

<sup>171</sup> One of them, Judge Diana Faber, spends half her time at the court. When she is away at the Crown Court hearing criminal cases, she is replaced by another circuit judge on a temporary basis. All the recent replacements practised as QCs doing civil work when they were at the Bar.

<sup>172</sup> For the even worse picture in 2007-8, see Section 4.7.3 below.

The Mercantile judge at RCJ does more Mercantile work than two judges used to do in Central London when I was there because the administrative back-up is so much better here....

Wealthy people use the High Court and get a fine judge and adequate administrative service. Poor people who use the County Court pay much the same fees but, at least in London, have inferior facilities and much worse service. This is an unfair product of a divided system.”

154. In November 2003 a Commercial Court Working Party reported that the main disincentive to using the Central London CJC for Mercantile business was that the administration of the court was poor. By way of example, bundles of documents were lodged by solicitors in good time but did not find their way to the judge; counsel’s skeleton arguments did not reach the judge; and difficulties were caused by a standard 10-day backlog in correspondence.
155. In September 2005 the Chairman and three Committee members of the London Solicitors’ Litigation Association told Judge Mackie that adequate administration was crucial for a court handling business claims. Their members currently avoided the Central London CJC at almost any cost because of the administrative problems which had become so bad as to be openly acknowledged by judges and administration. Administration, not geography, was seen as the reason why users tended not to bring cases in the Mercantile Court at the Central London CJC.
156. When Judge Mackie attended a meeting of 20 members of the City of London Law Society Litigation Sub-Committee the following day, he was told that they had little or no contact with the Central London CJC: nobody present had ever used it (except for one solicitor when he was seeking advocacy rights).
157. When I visited the Central London CJC in February 2008, Judge Collins told me that missing files were a constant nuisance. He had some hopes that more resources might be allocated to his trial centre. At Central London CJC there were no ushers, and one clerk serving a minimum of two judges. The judges had to swear in the witnesses themselves. Judge Dight estimated that he wasted half an hour every day because he was so poorly resourced.
158. Judge Collins said that the resource problems would be the same whether there was a Unified Civil Court or changes brought about within the existing system by the Judicial Resources Review. So long as the resource difficulties continued, court users would not notice any difference.<sup>173</sup>

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<sup>173</sup> When I saw Linda Lennon, the relevant HMCS Area Director in May 2008, she told me that the acting chief executive of HMCS had allocated additional funds to the London Civil Area in October 2007 as a result of the civil fees surplus. Money went in part time sitting days, agency staff and overtime. In order to address some of the staffing issues at the Central London Civil Justice Centre it was decided to allot the Trial Centre its own

## 2.1.4 The Administrative Court

159. Until the recent creation of the Administrative Court the public law jurisdiction of the QB Division was exercised by HCJs sitting in the Crown Office List, supported when necessary by s.9 deputies. In March 2000 the Review of the Crown Office List, chaired by Sir Jeffrey Bowman, made a number of recommendations for the reform of the work of the List, taking as their starting point the as yet unimplemented recommendations of the Law Commission (1994)<sup>174</sup> and Lord Woolf (1996).<sup>175</sup>
160. In addition to their recommendations for procedural reform, they said that the Crown Office List (which should in future be known as “the Administrative Court”) should become a more specialised court, with the nominated judges spending a greater proportion of their time on its work. As immediate steps, those nominated judges who were at present willing to do so should sit in the Crown Office List for at least half a term at a time, and nominated judges in future should be selected not only for their expertise in public and administrative law but also on the basis that they would spend at least half their time on Crown Office List work.
161. The medium term aim should be that over a three year period the sitting periods of all the nominated judges should be increased so that they would spend at least half their time on Crown Office work. A further move towards them spending two thirds of the year in the Crown Office List should be considered in the light of practical experience once the medium term aim had been achieved.
162. In principle Crown Office cases should be able to be heard in major centres around the country, if this was more convenient for the parties. Experiments should continue to see how such hearings could be arranged, and whether new technology might provide alternative means of access to justice.
163. So far as legal and administrative support was concerned, they said that the new court should have clear objectives, and that a lead nominated judge should be appointed with overall responsibility for the speed, efficiency and economy with which the work of the court was conducted. The head of the court should be a lawyer with sound managerial and administrative skills, and the areas in which the jurisdiction of the Master of the Crown Office should be exercised should be clarified by the lead nominated judge and then be set out in the Crown Office Guide whose production they recommended.<sup>176</sup>

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complement of staff, which would be separate from that allocated to the County Court. She said that staff were very positive about the outcome and that the decision was supported by Judge Collins. She said that there has been a major difficulty in recruiting and retaining staff there, as with many London County Courts.

<sup>174</sup> *Administrative Law: Judicial Review and Statutory Appeals* (1994) Law Com No 226.

<sup>175</sup> *Access to Justice: Final Report* (1996), Chapter 18.

<sup>176</sup> Where the parties consented to an order, the Master should be able to quash the impugned decision and, where appropriate, remit the case to the original court or tribunal.

164. The Human Rights Act 1998 had not been implemented at the time of their report, and there was a good deal of uncertainty about the extent to which this legislation would place additional demands on the judges of the court.
165. This Report led to the introduction of CPR Part 54 and the repeal of Order 53 of the Rules of the Supreme Court, which had remained in force in the Schedule to the Civil Procedure Rules pending the completion of the work of the Bowman Review and the implementation of its recommendations.
166. Hitherto the consistent application of Government policy had created statutory appeal routes wherever this was appropriate, and had left recourse to judicial review as a remedy of last resort.<sup>177</sup> In 2004, however, Parliament abolished the Immigration Appeal Tribunal and replaced it with a new one-tier Asylum & Immigration Tribunal (“AIT”), against whose decisions recourse could only be had to the High Court or the Court of Appeal. Under this new statutory scheme, if the AIT dismissed an appeal, there was no right of further appeal. Instead, the appellant could ask that a decision be reconsidered on the basis that it contained an error of law. If the decision was reconsidered, a right of appeal lay only to the Court of Appeal, even if the reconsideration was again conducted by a single immigration judge.
167. To avoid the High Court being completely overwhelmed by work, Parliament introduced transitional arrangements by which dissatisfied appellants might first apply to a senior immigration judge. If reconsideration was refused, they could ask a High Court judge by the so-called “opt-in” procedure to make a final decision on paper whether the case arguably required reconsideration.
168. If, after an appeal had been finally rejected, an appellant then asserted to the Home Office that new circumstances had arisen that justified a fresh look at his case (“a fresh claim”), no appeal was provided against the Home Office’s refusal of this application. The only available remedy was judicial review.
169. As a result of these developments, the Administrative Court was completely overwhelmed with work. Appellants had to decide very quickly whether they wished to opt-in, without having much opportunity to seek legal advice (even if they could afford to pay for it), and once they had ticked a box on a form the papers were sent by the AIT to the RCJ for a nominated judge to deal with quickly on paper. Applications for judicial review in “fresh claims” cases also arrived in their hundreds. The way in which the court’s workload increased is shown in this table:

	2004	2005	2006	2007
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<sup>177</sup> Consistently with this policy, the then Government accepted the recommendation of the Law Commission in 1994 that a new statutory right of appeal to the County Court should be created as a means of challenging the large number of homelessness decisions by local housing authorities which had led to the Crown Office List being overloaded with judicial review applications in the late 1980s and early 1990s for want of any other avenue of challenge.

Total Case-load	7,000	10,985	11,302	11,320
Opt-ins	- <sup>178</sup>	3,396	3,306	3,767
Judicial review in asylum & immigration cases	1,737	3,023	4,017	4,323

170. Most of the judicial review cases in asylum and immigration cases were fresh claims. At the time of my inquiry urgent consideration was being given to ways in which about 8,000 of the cases in the second and third rows of this table might be transferred elsewhere. I will discuss this possibility in Section 4.8 of this report, and I will also discuss in Section 4.5 the impact on the work of the Administrative Court of the Tribunals, Courts and Enforcement Act 2007.
171. By May 2008, however, the Administrative Court had been in a continuing state of crisis for three years. Implementation of important recommendations of the Bowman Report had to be put on hold because of the flood of applications which did not warrant the attention of a HCJ, but for which Parliament had not provided any other home. There are about a dozen HCJs with specialist expertise in this field, but a total of 45 judges had to be nominated to the court, and with the exceptions of Collins J (whose three-year term as lead judge has been extended) and Sullivan J (who sits in the Special Immigration Appeal Commission ("SIAC") for some of his time) other judges did not usually sit in the Administrative Court for more than three weeks at a time.

### 2.1.5 The Commercial and Admiralty Courts

172. These two courts form part of the QB Division. They are customarily referred to together, because the same judges sit in each court, with shared administration and common procedure. At the time of my inquiry Mr Justice Andrew Smith was the judge in charge of the Commercial Court and Mr Justice David Steel the judge in charge of the Admiralty Court.
173. The 2005-6 Report of the Commercial and Admiralty Court provides a useful overview of the business of the two courts. The jurisdiction of the Commercial Court extends to any claim relating to the transactions of trade and commerce (including commercial agreements, import and export, carriage of goods by sea, land and air, banking and financial services, insurance and reinsurance, markets and exchanges, commodities, construction of ships, agency, and arbitration and competition matters).<sup>179</sup>

<sup>178</sup> 1,820 applications for statutory review under s.101 of the Nationality, Immigration and Asylum Act 2002 were received in 2004. The new opt-in procedure was introduced on 1<sup>st</sup> April 2005.

<sup>179</sup> The Commercial List of the Queen's Bench Division had been informally called the Commercial Court since its inception in February 1895. By the Administration of Justice Act 1970 the existence of a statutory Commercial Court and a statutory Admiralty Court was enshrined in primary legislation. See now s. 6(1) of the Supreme Court Act 1981. Competition matters are only dealt with in the Commercial Court if they are associated with matters falling under the Commercial Court's jurisdiction (see CPR 30.8(4)).

174. The Commercial Court's business generally involves disputes where the sums at stake exceed £1 million (and usually much more). Smaller cases are transferred to the Mercantile Court.<sup>180</sup>
175. The Admiralty Court, for its part, has exclusive jurisdiction over certain maritime claims (including the arrest of ships, collisions and salvage). It has co-extensive jurisdiction with the Commercial Court in respect of many claims under bills of lading or charter parties.<sup>181</sup>
176. Disputes in these courts remain predominantly international in flavour. Parties choose the courts to resolve them either because they have specifically provided in their contracts for the application of English law or the jurisdiction of the English Courts, or because they regard the Commercial Court as the most suitable one in which to bring their claims. As a result the number of claims where at least one claimant or one defendant emanates from outside the jurisdiction continues to constitute about 70% of all the claims in the Court.
177. In the year to 31<sup>st</sup> July 2007 eight of the 15 nominated judges of the Commercial Court sat at any one time, and they heard 66 trials and 1,030 applications. The pre-trial settlement rate was said to be 70%.
178. I did not have to devote much time during my inquiry to the affairs of these courts. Nobody suggested that their basic structure should be disturbed or that they should no longer be identified in primary legislation.
179. The only live issue was whether, and in what circumstances, judges of the Commercial Court should travel outside London to hear heavy cases in the cities in which the dispute arose and where the witnesses carry on business.<sup>182</sup> Sir Igor Judge, the President of the QB Division, told me that there was no good reason why a Commercial Court judge should not go to, say, Manchester *ad hoc* to try a heavy commercial/mercantile case which warranted a HCJ.<sup>183</sup> Lord Justice Moore-Bick, a former judge in charge of the Commercial Court,<sup>184</sup> said that high class commercial business ought to be heard in centres like Birmingham.
180. This view was shared by all the judges of the Commercial Court whom I interviewed. Mr Justice Andrew Smith told me that he was seeking to get across the message that Commercial Court judges were indeed willing to travel to hear heavy cases outside London, and the Master of the Rolls, himself a former judge of the Commercial and

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<sup>180</sup> See Section 2.1.6 below.

<sup>181</sup> The Court of Admiralty has had a separate existence since about the 14<sup>th</sup> century.

<sup>182</sup> Mr Justice Aikens told me that it was quite common for the judges of the Commercial Court to conduct cases in Manchester or Liverpool in the inter-war years, when there used to be a strong local commercial Bar in those cities. On the other hand sittings of the Commercial Court outside London in the post war years have been very rare indeed.

<sup>183</sup> He said that if there was no room for him in the Judges' Lodgings, he could stay at a hotel.

<sup>184</sup> He is now Deputy Head of Civil Justice.



Admiralty Courts, made this clear on a recent visit to the new Civil Justice Centre at Manchester. On my visits outside London, nearly all the Mercantile judges I met told me how much such an initiative would be welcomed not only by them but by members of the local business communities they served.

## **2.1.6 The Mercantile Court**

### *2.1.6.1 Introduction*

181. A claim may only be started in a Mercantile Court if it relates to a commercial or business matter in a broad sense and is not required to proceed in the Chancery Division or in another specialist list.
182. The Mercantile Courts have been developed over the last 20 years. When Mr Justice Steyn was the presiding judge on the Northern Circuit nearly 20 years ago he established the Mercantile Court in Manchester. He wanted it to be called the Manchester Commercial Court, but the Commercial Court judges in London were opposed to this idea, because they thought it would represent a dilution of the brand.
183. Outside London the Mercantile judges are required to look to their local High Court Chancery supervising judge for specialist support (because he is on the spot) and their local presiding judge for support in other respects.<sup>185</sup>
184. Mercantile courts are established in the High Court District Registries at Birmingham, Bristol, Cardiff, Chester, Leeds, Liverpool, Manchester and Newcastle and in the Commercial Court in London. Mercantile Judges exercise a High Court jurisdiction, and the claim forms etc must be marked “Queen’s Bench Division, District Registry, Mercantile Court”, or “Queen’s Bench Division, District Registry, the London Mercantile Court.”<sup>186</sup>
185. All Mercantile claims will be heard or determined by a Mercantile judge except that an application may be heard and determined by any other judge who, if the claim were not a mercantile claim, would have jurisdiction to determine it, if the application is urgent and no Mercantile judge is available to hear it, or if a Mercantile judge directs it to be heard by another judge. Unless the court otherwise orders, all proceedings for the enforcement of a Mercantile Court judgment or order for the payment of money will be dealt with by a district judge.
186. A claim should only be started in a Mercantile Court if it would benefit from the expertise of a Mercantile judge.

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<sup>185</sup> If a specialist circuit judge applies to sit part-time for instance, this will be a matter for the presiding judge.

<sup>186</sup> Practice Direction to Part 59 – Mercantile Courts, paras 1 and 2.

187. Mercantile Judges have power to make pre-judgment freezing orders.

#### 2.1.6.2 London

188. The London Mercantile Court opened in June 2006 in its present form, where it operates at the RCJ as a separate List within the Commercial Court. Judge Mackie QC is the judge in charge of the court. He had previously been a Judge in the Mercantile List at the Central London CJC for two years, which had an upper jurisdictional limit of £300,000.<sup>187</sup>
189. Judge Mackie told me that his court seeks to resolve speedily and at proportionate cost business cases of every kind which do not require trial by HCJs in the Commercial Court itself. It aims to resolve all cases within six months of receiving them.
190. He said that he could deal with mercantile matters fast. He might have a 30-minute appointment and see nothing in the defence and direct a Part 24 judgment on a case which would otherwise grind through the County Court from DJ to CJ for ages.
191. He is part of the Commercial Court. There are very few transfers in from the County Courts to the Mercantile Court because cases at that level are largely tried by him anyway but sitting in the County Court. Mercantile cases are case-managed more aggressively. He keeps costs to the minimum. He does a lot on paper and a lot on the telephone. He conducts very few mercantile trials.
192. He told me that in some of the smaller cases it is crucial to have a Mercantile judge to get to the point of a commercial dispute. This can save smaller traders, for whom £100,000 is commercial life or death, from ruinously costly litigation. Generalist judges may understandably make an enormous meal of a case and run up a lot of expense just as he would in an unfamiliar jurisdiction. He thought that the system would benefit from having a specialist judge at a lower level.
193. He would like to see a more relaxed way of sending cases both ways between the High Court and DJs in the County Courts. In particular, he would like a DJ to be designated to whom he could assign smaller work.
194. He works closely with the Judge in charge of the Commercial Court to ensure that cases are assigned to the Mercantile Court or the Commercial Court as appropriate. Mr Justice Andrew Smith confirmed that this arrangement works well.
195. The Court is also the Mercantile Court for the South East Circuit. It is willing to hear County Court cases of any size which may benefit from a specialist judge. The Court is

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<sup>187</sup> That list has now ceased to exist. For Judge Mackie's views on working conditions at Central London, see Section 2.1.3 above.

happy to sit at centres on the Circuit that are convenient to the parties as well as in London. It is very willing to accept transfers from any County Court on the Circuit.

196. Judge Knight QC is also a Mercantile Judge for the circuit, but no mercantile cases are now heard at the Central London Trial Centre. Some CJs and QCs with wide business experience are authorised to sit as judges of the court.

### *2.1.6.3 The Main Provincial Centres*

197. There are two Mercantile judges based in Manchester (Judge Hegarty QC and Judge Waksman QC). They try virtually all the actions in the Mercantile Court in Manchester and Liverpool, assisted, as need be, by the Chancery and TCC specialist circuit judges and also by the DCJ. The Mercantile judges read the pleadings in every case when they are filed, and generally case-manage their cases actions through to trial.

198. On occasions, a case may be transferred to the Commercial Court in London; but only rarely will either of the Mercantile judges direct that a case should be tried by a QB judge on circuit.

199. Judge Langan QC is the Mercantile Judge at Leeds, and Judge Kaye QC hears Chancery and Mercantile business interchangeably. There is more Chancery work than Mercantile at Leeds. Unless a big firm is involved with big mercantile business, cases are generally issued in the Chancery list. Some of the larger firms issue in the Mercantile list because they like to have the actions case-managed by a circuit judge.

200. Judge Simon Brown QC has recently been appointed a Mercantile Judge in Birmingham: Judge Caroline Alton also sits as a Mercantile Judge there on a 50% basis. District Judge Cooke, who was appointed as the second Chancery specialist SCJ at Birmingham in July 2008, acted as the Mercantile DJ for some months. This arrangement worked well.

201. The big Birmingham firms start their heavy commercial litigation in London. Judge Brown would like to see the Mercantile Courts incorporated in the Commercial Court.

202. Judge Havelock-Allan QC is the Mercantile Judge at Bristol.<sup>188</sup>

203. Judge Chambers QC is the Mercantile Judge at Cardiff.<sup>189</sup>

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<sup>188</sup> See Section 2.3.4 below.

<sup>189</sup> See Section 2.3.5 below.

#### *2.1.6.4 Commercial Court judges sitting on Commercial/Mercantile cases outside London*

204. Judges of the Commercial Court are now willing to travel to hear heavy cases outside London. If a Mercantile judge in a centre outside London forms the view that a case in his list should be heard by a judge of the Commercial Court, the suggested transfer will be considered by a Commercial Judge. It has always been possible for a Commercial judge to sit in the Mercantile Court.
205. There were therefore two possibilities: either a transfer to the Commercial Court for a really heavy case, or a recognition that some Mercantile cases warrant a High Court judge.
206. At Manchester the specialist SCJs told me that if it became known that Commercial Court judges were willing to travel to Manchester the legal community would need to be confident that this would actually happen. It might be possible to communicate with the Commercial Court after the first CMC in a top category case.
207. They said that it is always important for the trial judge to conduct the PTR. The timing of the PTR is also important. If a case is transferred to the Commercial Court, a judge of that court should conduct the PTR 4-6 weeks before trial. It was not seen to be a problem if a PTR is held in London. Some PTRs are conducted on the telephone, and the venue of the PTR would have to be decided on a case by case basis.
208. Mr Justice Andrew Smith said that if a case was a top category case the Commercial Court would prefer an early transfer unless it was better to case-manage it in the Mercantile Court until a time closer to the trial date.
209. Judge Brown said that it would be very good for the local Bar and the local business community when Commercial judges came and sat in Birmingham. He would welcome it.
210. The Mercantile Judges at Leeds said that if there was a question of a HCJ coming on circuit to do Mercantile work, they could e-mail Mr Justice Andrew Smith as they already e-mail the judge in charge of the TCC Court in relation to TCC work.
211. If a case is commenced in or transferred to the Mercantile Court, it will almost invariably be tried by a Mercantile judge.<sup>190</sup>

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<sup>190</sup> Unless it is considered appropriate to transfer it to the Commercial Court. Whether such a transfer will be ordered will depend, amongst other things, on the nature of the issues, the potential importance of the case and the amount at stake. But it will be rare for a case to be transferred unless one or more of the parties seeks such a transfer.

## 2.1.7 The Technology and Construction Court (TCC)

212. The TCC has undergone something of a revolution in recent years with the growth of very high value construction disputes.<sup>191</sup> It has taken the place of the Official Referees who used to hear cases which involved “a prolonged examination of documents or accounts, or a technical scientific or local investigation such as could more conveniently be conducted by an Official Referee.”<sup>192</sup> The language of Section 68 of the Supreme Court Act 1981 needs amendment: it does not yet reflect the existence of the TCC.<sup>193</sup>

213. In its new incarnation CPR 60.1(3) prescribes that a claim may be brought as a TCC claim if it involves issues or questions which are technically complex or a trial by a TCC judge is desirable. The Practice Direction to CPR Part 60 gives examples of the types of claim which it may be appropriate to bring as TCC claims—

- building or other construction disputes, including claims for the enforcement of the decisions of adjudicators under the Housing Grants, Construction and Regeneration Act 1996;
- engineering disputes;
- claims by and against engineers, architects, surveyors, accountants and other specialised advisers relating to the services they provide;
- claims by and against local authorities relating to their statutory duties concerning the development of land or the construction of buildings;
- claims relating to the design, supply and installation of computers, computer software and related network systems;
- claims relating to the quality of goods sold or hired, and work done, materials supplied or services rendered;
- claims between landlord and tenant for breach of a repairing covenant;
- claims between neighbours, owners and occupiers of land in trespass, nuisance etc;
- claims relating to the environment (for example, pollution cases); claims arising out of fires;
- claims involving taking of accounts where these are complicated;
- and challenges to decisions of arbitrators in construction and engineering disputes including applications for permission to appeal and appeals.

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<sup>191</sup> The recent Wembley Stadium cases provide a good picture of the heaviest TCC cases (see, for example, *Multiplex Constructions (UK) Ltd v Cleveland Bridge UK Ltd* [2006] EWHC 1341, upheld at [2007] EWCA Civ 443); and *Multiplex (Constructions (UK) Ltd v Honeywell Control Systems Ltd* [2007] EWHC 447). When I interviewed Ramsey J, he was trying a very heavy trial in the world of computer technology which will have lasted for 12 months by the time it is finished.

<sup>192</sup> Rules of the Supreme Court Order 36 r 1(2) (a).

<sup>193</sup> Section 68(1) (a) of that Act provides that provision may be made by rules of court as to the cases in which jurisdiction of the High Court may be exercised by such Circuit judges, deputy Circuit judges or Recorders as the Lord Chief Justice may, with the concurrence of the Lord Chancellor, from time to time nominate to deal with official referees' business.

214. Today the TCC at the RCJ is headed by a HCJ who holds the office of Judge in charge of the TCC<sup>194</sup> for a period of three years.<sup>195</sup> Two other newly appointed HCJs are TCC specialists, assigned to the court for half of each year, and the number of specialist HCJs assigned to the court for half the year may increase slightly in due course.<sup>196</sup> During this period the number of senior circuit judges assigned to the TCC court at the RCJ will be reduced. Seven other HCJs have been nominated to conduct TCC business if their services are needed.
215. TCC business is also conducted in certain District Registries of the High Court and certain County Courts.<sup>197</sup> As a matter of policy the TCC HCJs are willing to travel to hear heavy TCC cases outside London when necessary, as Jackson J did at Leeds in 2007. No HCJ has yet conducted a TCC case at Manchester: at the time of my inquiry there were ongoing discussions about a TCC HCJ being sent to hear a heavy case at Bristol.
216. The current edition of the TCC Guide says:
- “As a general rule TCC claims for more than £50,000 are brought in the High Court, while claims for lower sums are brought in the County Court. This is not a rigid distinction. The monetary threshold for HC TCC claims tends to be higher in London than in the regions. Regard must also be had to the complexity of the claim and all other circumstances. The scale of fees differs in the HC and the County Court. This is a factor which should be borne in mind in borderline cases.”<sup>198</sup>
217. The TCC Guide explains that when a TCC case is issued at the RCJ, the Judge in charge will classify it as fit for a HCJ or a SCJ. In performing this role he will take into account the following matters, as well as all the circumstances of the case:
- The size and complexity of the case;
  - The nature and importance of any points of law arising;
  - The amount of money which is at stake;

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<sup>194</sup> See CPR 60.2(2).

<sup>195</sup> Mr Justice Ramsey is currently the Judge in charge of the TCC. The Lord Chief Justice’s power to nominate circuit judges, deputy circuit judges or recorders to deal with “official referees’ business” in the TCC has been delegated to him. He is required to consult with the Lord Chancellor and the senior judiciary before exercising that authority.

<sup>196</sup> In his Review of the Administration of Justice in the Courts (March 2008) the Lord Chief Justice said at p 40 that he had no doubt that there was scope for further expansion, particularly because of the litigation that was likely to arise out of the contracts that relate to preparation of the Olympics.

<sup>197</sup> The claim form must be marked in the top right-hand corner 'Technology and Construction Court' below the words 'The High Court, Queen's Bench Division' or 'The ... County Court'. TCC claims brought in the High Court outside London may be issued in any District Registry, but it is preferable that wherever possible they should be issued in the District Registries at Birmingham, Bristol, Cardiff, Chester, Exeter, Leeds, Liverpool, Manchester, Mold, Newcastle upon Tyne or Nottingham, because a TCC judge will be available there. TCC claims may be issued in the County Courts at each of these centres and in the Central London Civil Justice Centre. (CPR 60.4 and PD para 3).

<sup>198</sup> I make the comment that as a general proposition this is no longer correct: see the Civil Proceedings Fees Order 2004, as amended.

- Whether the case is of public importance;
- Whether the case has an international element or involves overseas parties;
- The limited number of HCJs and the needs of other court users, both civil and criminal.

218. The Guide explains that most TCC cases in London will be classified SCJ, but there will be a band of cases near the borderline between HCJ and SCJ where the classification will be liable to change depending upon the settlement of other cases and the availability of judges.

219. Mr Justice Ramsey told me that he may also decide that the case should be sent to the Central London Civil Justice Centre. He observed, however, that it may be cheaper to case-manage it at the RCJ and give robust directions. He, too, was critical of the administrative back-up at the Central London Civil Justice Centre, which acted as a disincentive to sending a case there.<sup>199</sup>

220. Full-time TCC senior circuit judges are based at Birmingham (where the complement is 1.5) and Manchester (2). Part-time TCC judges and/or Recorders are nominated to deal with TCC business at most other court centres throughout England and Wales.<sup>200</sup> The way in which the TCC judges cooperate with other specialist judges at courts outside London is described in Section 2.3 below.

221. TCC liaison DJs are based at Birmingham, Bristol, Cardiff, Leeds, Liverpool and Newcastle. Their role is to keep other DJs informed about the role and remit of the TCC; to deal with queries from colleagues concerning the TCC or transfer of cases; to deal with any subsidiary matter as directed by a TCC judge and to deal with urgent applications in TCC cases when no TCC judge is available. The TCC Annual Report 2006-7 sets out the following statistics for new TCC cases at each court:

<i>Court</i>	<i>New Cases</i>
RCJ	407
Central London CJC	53
Birmingham	213
Bristol	18
Cardiff	37
Exeter	3
Leeds	44
Liverpool <sup>201</sup>	65
Manchester (Salford)	147

<sup>199</sup> In 2007-8 only six new TCC claims were issued in the Central London County Court. It received 29 TCC cases that were transferred from other County Courts, and two cases from the High Court.

<sup>200</sup> The TCC Annual Report 2006-7 identified Judge Havelock-Allan QC (Bristol), Judge Hickinbottom (Cardiff), Judge Knight QC (Central London), Judge Mackay (Liverpool) and Judge Cockroft (Leeds) as Principal TCC judges.

<sup>201</sup> The Liverpool statistics record the number of TCC cases on the books of the court at the end of the year.

Newcastle	16
Nottingham	7

222. There were 38 contested trials at the TCC in London during the year. Some of these were substantial. The longest trial was 20 days. A number of other trials started but were settled before judgment. A flavour of the way in which the court conducts its business can be obtained from this passage in the 2006-7 Annual Report:

“During the year 838 applications (including case management conferences, pre-trial reviews and specific applications) were dealt with. Some of these were dealt with in court, some by telephone and some in writing. Hearings varied in length. Some were very short and some took more than one day.

Often the preparation time by the court exceeds the hearing time and enables the applications to be dealt with more rapidly. The TCC encourages the use of paper applications as this saves costs and time, provided that parties are not prejudiced by the lack of oral argument.

#### *Case Management*

The comparative figures for the numbers of claims issued and the number of trials shows that the majority of TCC cases settle at some point between commencement and the date fixed for trial. The strong case management by TCC judges is one of the reasons for this. Case management generally allows the parties at the first CMC to know the timetable for all steps of the proceedings up to an including the trial date.

At this CMC the bundle provided to the court includes the papers produced in complying with the pre-action protocol. This allows the court to review whether there should be an opportunity, by way of stay or timetabling, for the parties to reach a settlement either by negotiation or ADR. Equally where the dispute between the parties cannot be settled, the case management conference allows the court to consider how a determination of that dispute can be dealt with in the most appropriate way, taking into account the overriding objective of the CPR.”

### **2.1.8 Defamation Business**

223. Twenty years ago high profile defamation actions were regularly tried by senior QB judges at the RCJ who had not had much experience in this specialist field before they undertook this work. It is now recognised that the conduct (including the case-management) of defamation cases requires specialist skills. The cases are therefore now



assigned to a very small cadre of QB judges with the requisite skills and experience.<sup>202</sup> Litigants in person who bring defamation claims present particular problems for a non-specialist judge.

224. The QB Masters case-manage all the smaller defamation cases until they approach trial (if they do). At that stage Mr Justice Eady will conduct a PTR, so as to ensure that any remaining procedural issues are tidied up before a jury is empanelled to try the action. For more substantial cases, specialist firms will issue applications with a request that they be heard by a defamation judge, and the Masters will direct that they be heard by a judge without their involvement. These applications may involve issues as to the meaning of words, or the availability of qualified privilege. Closer to the trial date, they may involve disputed issues over permission to amend the pleadings (which usually introduce new issues, and therefore further evidence) or disclosure of documents.
225. It is difficult to obtain a HCJ to try a defamation action outside London.<sup>203</sup> The major newspapers, on the whole, are based in London and they like their cases handled in London. A number of the High Court decisions have a precedential value.
226. Mr Justice Eady told me that about eight years ago he was involved in a high level review which concluded that it was still desirable for the High Court to have exclusive jurisdiction in defamation actions.<sup>204</sup> Since that time the growing English jurisprudence in relation to Article 10 of the ECHR, and its relationship with Article 8, has increased the importance of specialist handling. The specialist defamation judges often hear privacy cases, which raise similar issues.
227. I heard nothing during the course of my inquiry which suggested that it would be appropriate to end the exclusive jurisdiction of specialist HCJs in this very technical field. The skills of these judges are needed just as much for CMCs and PTRs, and they are appreciated by those who use the courts for these disputes. Very few defamation actions now go to trial, but they often involve very difficult pre-trial disputes, some of which go on to the Court of Appeal for resolution.

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<sup>202</sup>202 Following the recent retirement of Mr Justice Gray, Mr Justice Eady and Mr Justice Tugendhat are the two specialist judges who undertake most of this work. Since the High Court has exclusive jurisdiction in defamation actions (otherwise by consent) the Circuit Bench does not attract specialist defamation practitioners. Judge Previtte QC used to assist with defamation work but he is no longer available. The only CJ now in post with defamation expertise (Judge Moloney QC) does not sit at a centre where there is a High Court District Registry at which defamation claims may have to be case-managed and heard. Two specialist defamation QCs (Victoria Sharp QC and Richard Parkes QC) have recently been given s.9 deputy status, so that they may be available, on request, to conduct defamation trials at centres where there may not otherwise be the requisite expertise. With Judge Moloney, they also assist as s.9 deputies with High Court defamation work at the RCJ: for details, see Annex B1 (b) to this report...

<sup>203</sup> Richard Parkes QC recently case-managed and tried a defamation action in Birmingham at the request of the local DCJ.

<sup>204</sup> Twenty years ago claims against the police for false imprisonment or malicious prosecution frequently featured in the Jury List at the RCJ, but nearly all these cases are now heard by circuit judges in the County Court.

228. At least three DCJs told me, however, that they often find defamation claims included, usually by litigants in person, among a number of other quite low value County Court claims brought in connection with matters about which they feel deeply.<sup>205</sup> It is clearly desirable that “hot line” arrangements should be established whereby DCJs can seek from the lead defamation judge a speedy order that this kind of claim may be heard in the County Court without the process of transfer being enmeshed in undesirable bureaucratic technicalities.

## **2.2 The Chancery Division and the Chancery County Courts**

### **2.2.1 The Chancery Division**

229. The Chancery Division is the lineal successor of the High Court of Chancery of England. Fifty years ago there were only six Chancery judges, who were mainly concerned with traditional Chancery business: trusts and partnership and land and company and insolvency matters. Chancery litigation was almost entirely confined to London. Witness list actions were rare.
230. There were still only 12 Chancery judges 20 years ago. Today the Chancellor leads a team of 18 Chancery judges.<sup>206</sup> Six of them are nominated to sit in the Patents Court. With this exception, all the Chancery judges may hear every kind of Chancery business. One Chancery judge will be sitting as the applications judge, normally doing a two-week period of duty at any one time in which he hears short applications<sup>207</sup> in relation to every type of Chancery business. Two of the Chancery judges now spend half their time dealing with Chancery business outside London. The Chancery judges in London are supported by six Chancery Masters, and by six Registrars in the Companies and Bankruptcy Courts.
231. There are eight senior circuit judges who exercise Chancery jurisdiction in the High Court outside the Royal Courts of Justice. Low value Chancery business is also conducted in the County Courts.<sup>208</sup>
232. The three main growth areas of Chancery business over the last 50 years have been company and insolvency work; intellectual property work; and general business and commercial work. According to the Chancery Guide, a major part of the caseload of the Chancery Division today is concerned with business disputes of one kind or another, which often involve very large sums of money. In many types of general list claims<sup>209</sup> the claimant can choose whether to start proceedings in the Chancery Division or in the

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<sup>205</sup> Judge Bursell QC (the Bristol DCJ), for instance, told me that he encountered quite a number of these cases, often brought by litigants in person, which ought to start in the County Court, and did not need a specialist to case manage them. He believed that with increasing use of the Internet the number of these cases may grow.

<sup>206</sup> Mr Justice Barling is almost entirely concerned with his role as Chairman of the Competition Appeal Tribunal, and Mr Justice Etherton spends most of his time as Chairman of the Law Commission.

<sup>207</sup> Special arrangements are made for the hearing of applications that will take longer to hear.

<sup>208</sup> Two senior circuit judges exercise Chancery jurisdiction at County Court level in the Central London Civil Justice Centre.

<sup>209</sup> The Chancery Guide refers to different types of professional negligence claims in this context.

Commercial Court. The decision often depends on the personal predilection of the claimant's lawyers (and particularly counsel). The specialist jurisdiction of the modern Chancery Division is to be found in Schedule 1 to the Supreme Court Act 1981, which identifies business specifically assigned to the Division, although the work undertaken by the Division is wider than this.<sup>210</sup>

233. The Chancery Division also has jurisdiction in relation to the applications of Articles 81 and 82 of the EC Treaty and the equivalent provisions of the Competition Act 1998.<sup>211</sup>
234. In short, the core business of the Chancery Division is the resolution of disputes involving property in all its forms, ranging from commercial, business, intellectual property and competition disputes, through taxation of all sorts to its traditional work relating to companies, partnerships, mortgages, insolvency, land and trusts. Much of the work of the Division has an international element (for example cross-border insolvencies and parallel litigation throughout Europe in patent and trademark cases).
235. Two special features of the work of the Division are its control and supervision of court appointed receivers and judicial trustees, which may continue for a considerable time after the litigation which gave rise to their appointment has concluded, and its specialist work in conducting complex accounts and enquiries (either before or after trial).

## **2.2.2 Chancery Business<sup>212</sup>**

### *2.2.2.1 The Companies and Bankruptcy Courts in London*

236. In the High Court, proceedings under the Companies Act 1985, the Insolvency Act 1986 and the Company Directors' Disqualification Act 1986 are all assigned to the Chancery Division. They are started in the Companies Court or the Bankruptcy Court, as the case may be, depending on whether a corporate insolvency or an individual insolvency is in question. The Companies Court also deals with a number of schemes for transfer of banking and insurance business pursuant to Part VII of the Financial Services and Markets Act 2000.

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<sup>210</sup> Schedule 1 to the Supreme Court Act 1981 assigns to the Chancery Division all causes and matters relating to the sale, exchange or partition of land, or the raising of charges on land; the redemption or foreclosure of mortgages; the execution of trusts; the administration of the estates of deceased persons; bankruptcy; the dissolution of partnerships or the taking of partnership or other accounts; the rectification, setting aside or cancellation of deeds or other instruments in writing; probate business, other than non-contentious or common form business; patents, trade marks, registered designs, copyright or design right; the appointment of a guardian of a minor's estate, and all causes and matters involving the exercise of the High Court's jurisdiction under the enactments relating to companies.

<sup>211</sup> See the relevant Practice Direction (Competition Law) para 2.1(b). The Commercial Court also has jurisdiction in competition cases where the competition aspect is associated with a matter otherwise within the jurisdiction of that court.

<sup>212</sup> In this description of the Chancery Division's specialist work I have drawn heavily on the helpful description of it which was furnished by the Chancery Bar Association in response to a recent Consultation Paper.

237. Business in the Companies and Bankruptcy Court is distributed between the Chancery Judges and the Registrars.<sup>213</sup> In reality, most applications (with a few specific exceptions) start life before the Registrar, who may either hear and determine the application or adjourn it to the judge (which tends to happen in longer cases, or cases of particular complexity or public importance. In the High Court in London, the Registrars' lists are such that any case lasting for three or more days tends to get adjourned to the Judge.)
238. In the RCJ, the staff assigned to the Companies and Bankruptcy Courts deal only with business under these four statutes. They are familiar with basic procedure and are equipped to spot any basic procedural difficulties and refer them (as appropriate) to the Registrar so that they can be addressed in good time. A large volume of work (such as capital reductions, schemes of arrangement and winding-up petitions) require "hands on" attention from well trained case workers. They are responsible for most of the administrative and paper checking work.

#### *2.2.1.2 The Patents Court and Intellectual Property litigation*

239. Patents work in the narrowest sense (patents and registered designs<sup>214</sup>) is allocated under CPR 63 to the Patents Court.<sup>215</sup> There is also a Patents County Court. There are very few registered design cases, so this work is essentially all patents. In 2006 the Patents Court heard 20 actions (taking 160 court days) and 152 applications.
240. In the High Court, patent cases are required to be designated by the parties according to their level of technical difficulty, from 1 (easiest) to 5 (hardest). Any case which is a 4 or 5 is normally supposed to be allocated to the two specialist patents judges.<sup>216</sup> Until fairly recently, the Patents Court had its own list which was administered by the senior patents judge. Now, all Patents Court listing is done by the clerk of the lists of the Chancery Division.
241. In patent and registered design cases Masters only have jurisdiction to deal with a limited number of somewhat routine matters. In practice it often happens that the patents judge will deal with these himself in the course of a CMC or other procedural applications that is in front of him. The Masters have their normal jurisdiction in registered trademark and other intellectual property right cases. by a patents judge.

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<sup>213</sup> On 23<sup>rd</sup> May 2005 the Chancellor issued a Practice Note on the hearing of Insolvency proceedings which identified the applications which should always be listed before a judge, and directed Registrars and DJs to have regard to the following criteria when deciding whether to hear the proceedings themselves or to refer them or adjourn them to the judge: (i) the complexity of the proceedings; (ii) whether the proceedings raised new or controversial points of law; (iii) the likely date and length of the hearing; (iv) public interest in the proceedings; and (v) the availability in the court which was likely to hear the proceedings of relevant specialist expertise.

<sup>214</sup> And appeals against decisions of the Comptroller-General of Patents.

<sup>215</sup> The jurisdiction of the Patents Court is conferred by the Patents Act 1977.

<sup>216</sup> Currently Mr Justice Kitchin and Mr Justice Floyd. Mr Justice Patten, Mr Justice Lewison, Mr Justice Mann and Mr Justice Warren, being Chancery judges who did not specialise in the patents field, are also assigned to the Patents Court.

242. Cases involving other aspects of intellectual property law (copyright, passing off, unregistered design right and trade marks) are almost all allocated under the Practice Direction to CPR Part 63 to the Chancery Division, the Patents County Court, or a County Court at which there is also a Chancery District Registry. In practice, the great majority of the work takes place in London. In the High Court trade mark matters are allocated to a Master with particular trade mark expertise.
243. Intellectual property assets (whether patents, copyright, design right or other) are generated from nothing through intellectual endeavour. The question of who owns such intangible assets when they have been brought into existence is in some cases governed by statute, but in many others falls to be considered under general equitable principles. Where there is no express contractual provision the question of who has the benefit of a licence to use a particular intellectual property right, and on what terms, is determined under general equitable principles.
244. Non-statutory intellectual property claims<sup>217</sup> are also suited to the Chancery Division. The issue of who owns the goodwill in a particular unregistered trade mark or get up is rarely governed by contract; it is more often an issue that can only be determined by examination of the relationship between parties with a competing claim to such goodwill, and a consideration of which, as a matter of equity, is the owner of such goodwill.

#### *2.2.1.3 Tax*

245. Several kinds of revenue proceedings are heard in the Chancery Division: appeals from the Special and General Commissioners relating to income tax, corporation tax, capital gains tax, stamp duty land tax and inheritance tax, and appeals from the VAT and Duties Tribunal. Some inheritance tax appeals start in the Chancery Division, which is also the court of first appeal in stamp duty cases. In recent years the Chancery Division has been involved in many cases involving the Revenue that are proceeding under Group Litigation Orders.
246. Now that the Tribunals Service has been established by statute, much of this appellate work will be transferred to the Tax Chamber of the Upper Tribunal, to which Chancery judges will be seconded from time to time, with an onward appeal if necessary to the Court of Appeal.

#### *2.2.1.4 Pensions*

247. Litigation involving occupational and, to a lesser extent, personal pensions has increased considerably in recent years. It is an Inland Revenue requirement that occupational schemes should be established under trust and an understanding of the law of trusts is fundamental to pension law. There is also now a huge body of legislation and regulatory requirements.

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<sup>217</sup> Such as passing off claims.

248. The Chancery judges have now built up a good deal of familiarity with pension arrangements of all sorts and their practical operation. All of them will, for example, have had to consider actuarial valuations of occupational schemes; and anyone who has had to explain an actuarial valuation to someone who has never seen one before will appreciate what an advantage this is. The judges have also had to consider many parts of the legislation.

#### *2.2.1.5 Contentious probate and trusts*

249. In 1971 contentious probate work was allocated to the Chancery Division which had always heard cases concerning the administration of estates and trusts. The efficient despatch of this sort of work demands knowledge of a specialist area of law. So too does contentious trust work, where it is also a considerable advantage if the judge understands how trusts work in practice and the fiscal and other considerations that affect their operation.

### **2.2.2 The work of the Chancery judges**

250. I have been told that the Chancery system works because the judges do not get ticketed into narrow specialisms, and that this is far more efficient than separate listings. They all do tax and VAT cases.

251. It is accepted by the Chancery judges I interviewed that there are areas in which the Chancery judges do unimportant work which does not require a HCJ. Sometimes claimants bring actions in the High Court because they want the judge to whack their opponent. Chancery judges receive numerous paper applications which do not need the attention of a judge.<sup>218</sup> Judges have to make consent orders which Masters could just as well make. Mr Justice Norris, who had earlier served as a specialist judge in Birmingham, said that some of the time of a London-based HCJ could be more usefully spent. He spends time on summary judgment applications and other applications in London that could be dealt with by s.9 judges.

252. Another Chancery judge told me that inevitably some of the appellate work is quite low value. There are also some quite small property cases. He believes that the Chancery judges and Masters may not be quite tough enough in their gate-keeping role. Injunctions in performing rights cases may also be relatively low value, but this is a relatively specialist jurisdiction, and he believes that it is much more efficient that Chancery judges do the work than non-specialist circuit judges.

### **2.2.3 Chancery statistics at the Royal Courts of Justice**

253. A five-week survey conducted between 31<sup>st</sup> March 2005 and 4<sup>th</sup> May 2005 produced the following statistics:

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<sup>218</sup> I was told that this is being attended to.

Number of cases	288
Estimated hearing length of cases	705.4 days
% settled, withdrawn etc	27%
% listed for trial by a HCJ	84%
% listed for trial by a DHCJ	16%
% (by number of cases) satisfying at least one criterion for trial by HCJ	94%
% (by estimated length) “ “ “ “	95%
% of cases for DHCJ which warranted a HCJ	88%

254. The Chancellor said that the overwhelming number of these cases passed the Bankruptcy Registrars’ filters (PD Insolvency Proceedings paras 5<sup>219</sup> and 9<sup>220</sup>) or the Chancery Masters’ filter (CPR 30.3)<sup>221</sup> for cases fit for HCJs.

255. According to statistics maintained in the Chancery Division DHCJs<sup>222</sup> have sat in the Chancery Division for the following total days since 2000:

	Total Days sat	DHCJs	%
2000	2,976	746	25
2001	3,363	784	23
2002	3,363	736	23
2004	3,530	818	23
2005	3,385	709	20.94
2006	3,384	624	18.43
2007	3,323	750	22.6
2008 <sup>223</sup>	1,613	417	25.85%

256. Details of the number of proceedings that issued in the High Court outside London show the following picture:

	2002	2003	2004	2005	2006
Claims etc issued <sup>224</sup>	1,535	1,802	1,977	1,602	2,025
Companies Court proceedings issued	7,433	5,931	5,458	3,508	7,941

<sup>219</sup> Applications to commit for contempt; for urgent interim relief; to restrain the presentation or advertisement of a winding up petition; for the appointment of a provisional liquidator; petitions for administration orders or interim orders on such petitions; applications for directions, or for variation or discharge of an administration order after it has been made; petitions to discharge administration orders and to wind up; applications to stay a winding up or discharge an administration order or for directions after an administration order has been made; and appeals from a County Court or a Registrar of the High Court

<sup>220</sup> Applications for committal for contempt; for injunctions or the modification or discharge of injunctions; or for interlocutory relief after the matter has been referred to a judge.

<sup>221</sup> See Annex F below.

<sup>222</sup> This expression includes all non-High Court judges and retired High Court judges. These statistics are very slightly different from the statistics for 2006-8 that are set out in Annex B2 below, but the difference is immaterial.

<sup>223</sup> These are the figures for the first five months of 2008.

<sup>224</sup> These figures include originating and non-originating proceedings.

257. I will be describing certain features of Chancery practice outside London, which is largely conducted by specialist senior circuit judges, in Part 2.3 of this report.

## 2.2.4 The work of the Chancery Masters

258. Masters in the Chancery Division are generally responsible for exercising the jurisdiction of the Chancery Division of the High Court where, by statute or under the provisions of Rules of Court, that jurisdiction does not fall to be exercised by a judge. The main business which they conduct can be summarised as follows:

- Acting as procedural judges controlling the conduct of cases in the Chancery Division;
- Hearing interim applications of a substantive nature, such as summary judgment, striking out, disclosure and security for costs;
- Hearing applications to enforce charging orders;<sup>225</sup>
- Trying Part 7 claims, with the consent of the parties;
- Determining Part 8 claims;<sup>226</sup>
- Contentious probate proceedings, comprising procedural as well as substantive matters within their jurisdiction;
- Appointing or removing personal representatives;
- Adjudicating on partnership disputes;
- Controlling the work of judicial trustees and receivers;
- Post-judgment work, including assessments of damages, applications in connection with the enforcement of judgments, and taking accounts and inquiries.

259. The work of the Chancery Masters extends well beyond controlling the conduct of cases as procedural judges. Many (if not most) of the work they do does not feature in the business of other Divisions of the High Court or the County Court. Three years ago the Chancery Bar Association expressed the view that the existence of an experienced judiciary at Master level enabled this tier of work in the Chancery Division to be efficiently despatched by judges with relevant specialised knowledge. A CPR Practice Direction<sup>227</sup> specifies the categories of work the Chancery Masters may not undertake without the consent of the Chancellor.

260. The Chancery Masters say that they are careful to ensure that work coming into the Division does not reach or fall to be dealt with by a High Court Judge unless this is the appropriate course. Except in exceptional cases and cases where the Masters are unable to grant appropriate relief because of limits on their jurisdiction, all pre-trial and

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<sup>225</sup> Where the amount owing in respect of the charge exceeds the County Court limit (currently £30,000) proceedings to enforce a charging order by an order for sale must be made by way of a Part 8 claim in the Chancery Division (Practice Direction to CPR Part 73).

<sup>226</sup> These may encompass the whole range of Chancery Division litigation but typically include claims under the Inheritance (Provision for Family and Dependents) Act 1975, questions of law arising in the construction of wills and other documents, trustees' applications for directions in relation to the administration of a trust or charity, or applications by personal representatives in relation to a deceased person's estate

<sup>227</sup> Practice Direction B to CPR Part 2, section 5.



interlocutory work is dealt with by the Masters, whatever its weight or complexity. They say that they are concerned to ensure that matters which fall to be tried are tried at an appropriate judicial level.

261. When a case remains in the High Court and is sent for trial to the judge, the Masters use the listing categories that are also used by the Queens Bench Masters.<sup>228</sup> The Listing Officer will know that a Category A case should be heard by a HCJ, and that a Category C case could and probably should go to a s.9 deputy. A Category B case could go to either.
262. For Part 8 claims the Masters have a full trial jurisdiction in most cases, and they will never be referred for trial by a HCJ unless either the Master has no jurisdiction (eg construction summonses) or the weight of the matter warrants a HCJ.
263. The Masters have jurisdiction to try Part 7 claims if the parties consent. Certain Part 7 claims, notably those relating to partnership disputes, are rarely tried by a HCJ. In most partnership actions the bulk of the issues in play are accounting issues following the dissolution of the partnership. These are almost always determined by the Masters, who have expertise in this field. If there are apparently triable issues, such as the terms of the partnership, the dissolution date, the assets of the partnership, or the question whether a partnership ever existed at all, these may be sent to the judge although even here very often, and with the consent of the parties, the Master determines them together with the accounts, or as a preliminary issue before the accounts are taken.
264. Typically the work of the Chancery Masters consists of cases concerned with mortgages or the sale of mortgaged land, trusts, administration of estates, inheritance<sup>229</sup> and succession, all of which require specialist expertise and experience and are almost always commenced with a Part 8 claim.
265. 90% of the orders made in the Chancery Division are made by Masters (including case management orders in Part 7 claims intended for trial by a High Court Judge).

## **2.2.5 Chancery business in the County Courts**

### *2.2.5.1 The arrangements for Chancery business in the County Courts*

266. The equity jurisdiction of the County Court is limited by statute to the “County Court limit” (which has been fixed at £30,000 since 1981).<sup>230</sup> Section 24 of the County Courts

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<sup>228</sup>See Section 2.1.2 above.

<sup>229</sup>Including claims under the Inheritance (Provision for Family and Dependents) Act 1975, which are now rarely heard by Chancery Judges.

<sup>230</sup>For s 23 of the County Courts Act 1984, see Annex G below. The County Court limit was fixed at £30,000 by the County Courts Jurisdiction Order 1981. A similar limit is applied to the County Court’s contentious probate jurisdiction (see s 32).

Act 1984 gives the parties power, in relation to certain proceedings,<sup>231</sup> to agree that a County Court should have jurisdiction.

267. Subject to these restrictions and except for restrictions relating to probate claims and to certain claims that may only be brought in the Patents County Court or in a County Court where there is also a Chancery District Registry, a Chancery claim may be brought in any County Court. The claim form must be marked “Chancery business” in the top left hand corner.<sup>232</sup>

268. Unless the jurisdiction of the County Court is limited in any particular case by statute, Chancery actions which do not fall within the terms of its specialist equity jurisdiction<sup>233</sup> can in theory be commenced in the County Court without any financial restriction. It will then be for a case management judge to decide how it should be handled thereafter, unless the claim has already been marked “Chancery business”.

269. In 2005 the Chancery Bar Association described their experiences in County Courts other than the Central London Civil Justice Centre<sup>234</sup> in these terms:

“In other County Courts, where there is no system of ensuring that Chancery cases are allocated to judges with knowledge and experience of the relevant area of law, the position is more unpredictable. There are, of course, many County Court judges who have knowledge and experience of a wide range of Chancery law, gained from practice or from years on the Bench. Equally, there are many judges who have little or no such experience. Some of the latter category find it harder to grapple quickly with a new area of law than do others. In most County Courts it is a matter of chance which of those types of judge a Chancery case will come before, and that can have a significant effect on the progress and outcome of a case.”

270. In July 2004 Lloyd and Hart JJ, who were at that time the Chancery supervising judges outside London, published updated guidance to DJs and DDJs<sup>235</sup> as to the appropriate steps to take as regards case management and trial of cases in the County Court<sup>236</sup> of a Chancery flavour.

271. They said that some cases of a Chancery nature required specialised attention as regards either or both of case management and trial, while others did not. Whether a case did or did not would not always depend only on the type of dispute involved. It might also depend on the particular issues raised. Their guidance identified the main types of

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<sup>231</sup> A wide range of equity proceedings is referred to in s 24(2).

<sup>232</sup> CPR Part 7, PD 2.5.

<sup>233</sup> Such as professional negligence claims with a Chancery flavour, or business disputes involving the application of trust law, for instance.

<sup>234</sup> For which see Section 2.2.5.3 below.

<sup>235</sup> They suggested that their guidance would mainly be relevant in County Courts which did not coincide with one of the eight Chancery District Registries. It might also help with cases commenced in the Queen’s Bench Division in a High Court District Registry, but which might belong better in the Chancery Division.

<sup>236</sup> As a convenient label, they described a County Court which coincided with a Chancery District Registry as a Chancery County Court, and a County Court in which a case was proceeding under the ordinary rules as to jurisdiction as the home County Court.

dispute that were relevant and offered advice as to how to deal with them, while cautioning that in some (perhaps many) cases this would depend on the view taken about, for example, the degree of complexity of the particular dispute, and not just on its type.

272. They reminded them that some types of case ought not to be started except in a Chancery County Court.<sup>237</sup>
273. Apart from these special cases, any claim relating to Chancery business might be started in any County Court, and consideration should be given to the question whether it should be transferred out of the home County Court to a Chancery County Court either for case management or for trial or for both. The purpose of such a transfer would be to see that case management or trial or both were handled by a judge with relevant specialist experience.
274. If the case needed specialist judicial experience it would be easier to secure this at a Chancery County Court, but there might be cases where the trial ought to be in the home court<sup>238</sup> but case management could better be dealt with at a Chancery County Court.
275. In such a case it might be possible, if the need for a specialist judge in the home court was identified far enough ahead, to arrange trial by a specialist judge at the home court even though case management was handled elsewhere.
276. The need to consider a transfer might arise at different stages in a claim. If a case was to be transferred, this should be done as soon as possible, so as to avoid unnecessary delay in listing and in any necessary specialist case management. In some cases the Claim Form or Particulars of Claim or the Defence would show that a transfer should be considered. In other cases the point might only emerge later, on an application to amend a statement of case or, for example, if an extra party was to be joined who had a separate defence.<sup>239</sup> The stage at which the point emerged might be relevant to the decision whether or not to transfer, but even if it emerged at a late stage it might be right to make arrangements such as to allow the case to be heard by a suitable specialist judge.
277. If a DJ or a DDJ who had to deal with a case on the lists of Chancery-type cases<sup>240</sup> was in doubt as to the appropriate course to take, the best way to get help might be to consult any of (a) a DJ in the nearest Chancery District Registry who did have relevant specialist experience, or (b) the specialist Chancery circuit judge for the nearest Chancery trial centre, or (c) the supervising Chancery High Court Judge for the relevant circuit.

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<sup>237</sup> Probate claims might only be started in a Chancery County Court: see CPR Part 57.2(3). Copyright, passing off and some intellectual property claims might only be started in the Patents County Court or in a Chancery County Court: see CPR Part 63.13 and PD 63, para 18.

<sup>238</sup> For example, because of the distances to be travelled and the convenience of witnesses.

<sup>239</sup> Such as a third party in occupation of mortgaged property who claimed priority over the mortgagee.

<sup>240</sup> For which see Annex G below.

278. The effect of this guidance is that outside London Chancery cases of any complexity ought to be transferred to one of the regional centres where there are specialist Chancery senior circuit judges, backed up by specialist Chancery DJs. Mr Justice Patten, as the Vice-Chancellor of the County Palatine of Lancaster and Chancery Supervising Judge in the North of England, has directed that cases should be transferred to the appropriate court, and not to an identified Chancery judge at that court.<sup>241</sup>
279. The Chancery Bar Association said in 2005 that in their experience the Lloyd/Hart guidelines were not always followed.
280. In this context there are no arrangements for regional Chancery liaison DJs with duties comparable to those performed by the TCC liaison DJs whose task it is to:
- keep other DJs in the region well informed about the role and remit of the TCC (in order that appropriate cases may be transferred to the TCC at an early stage, rather than a late stage);
  - deal with any queries from colleagues concerning the TCC or cases which might merit transfer to the TCC;
  - deal with any subsidiary matter which a TCC judge directs should be determined by a DJ pursuant to CPR 60.1(5)(b)(ii);
  - deal with urgent applications in TCC cases pursuant to para 7.2 of the Practice Direction to CPR Part 60.<sup>242</sup>

#### *2.2.5.2 Company and insolvency jurisdiction of the County Courts*

281. County court jurisdiction in company<sup>243</sup> and insolvency proceedings is derived from a number of factors: the relevant company's registered office address and paid up share capital and, in the case of an individual insolvency, whether the debtor resides within the relevant insolvency district and whether the particular court actually has bankruptcy jurisdiction. From time to time, County Courts will transfer the more complex cases either to the RCJ in London or to the nearest Chancery District Registry.
282. In the District Registries and County Courts, there are no specialist Registrars as such.<sup>244</sup> The DJs and DDJs effectively sit as Registrars in Bankruptcy when exercising jurisdiction under the relevant specialist legislation. In the major District Registries, the position (broadly) is that a small number of suitably experienced DJs are allocated Chancery work, including company and insolvency work (personal and corporate) and work under the Company Directors' Disqualification Act 1986.

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<sup>241</sup> For this direction, see Section 2.3.2.2 below.

<sup>242</sup> When no TCC judge is available and the matter is of a kind that falls within the DJ's jurisdiction.

<sup>243</sup> Including jurisdiction under the Financial Services and Markets Act 2000.

<sup>244</sup> i.e. judges appointed purely to that office.

283. Central London CJC does not have any bankruptcy jurisdiction, while the County Courts at Romford, Kingston and Croydon do possess it. I have been told that from a judicial perspective there is a strong case for reducing the list of County Courts that possess company and insolvency jurisdiction, to ensure that judicial expertise in these matters is not too thinly spread.

**2.2.5.3 The Chancery List in the Central London Civil Justice Centre**

284. Judge Hazel Marshall QC and Judge Marc Dight are the two Chancery senior circuit judges at the Central London Civil Justice Centre. They handle business started at the Centre, business transferred to the Centre from other County Courts, and business transferred to the Centre by the Chancery Masters. Other judges at the Centre, particularly Judge Cowell, support them in their work.

285. The amount of specialist Chancery business transacted at the Centre has steadily increased, as this table shows:

	2006 Jan-Jun	2006 July-Dec	2007 Jan-Jun	2007 July-Dec	2008 Jan-Apr
New Issues in CJC Chancery List	27	35	28	38	48
Transfers in from County Court lists	120	232	175	190	118
Transfers from High Court	64	78	80	101	57
Totals	211	345	283	329	223

286. This table shows a significant increase in High Court transfers, a significant increase in transfers of London County Court business into the Chancery list since January-June 2006, and a significant increase in new Chancery business overall between the first and last of the full six-month periods. In each instance the increase is more than 50%. The present practice of the Chancery Masters is to transfer cases out at the earliest opportunity, either by a direction on paper, or if there is an early hearing before them, at that hearing, when they will generally also give directions for the future conduct of the case.

287. Most of the work transferred from the High Court should not, in Judge Marshall’s opinion, have had to start in the High Court at all. She has been quite successful in getting more of the middle and higher ranking solicitors to start proceedings in Central London, in the property field in particular, on the basis that they can apply to have their cases reserved to the senior Chancery judge’s list. They will only wish to start the heavier cases there when they feel confident that they will get a judge of sufficient knowledge and ability.

288. The work in the Chancery List which is transferred to Central London from the High Court is case-managed and monitored by Judge Marshall.

289. Judge Marshall told me that many solicitors are unaware that the County Court's equity jurisdiction is so restricted. They start proceedings wrongly in the County Court, but the defendants then refuse to agree that the County Court should have jurisdiction, and they "buy time" of 6-8 weeks by compelling the claimants to issue in the High Court, from which the action is inevitably transferred to the County Court.<sup>245</sup>
290. Judge Marshall told me that Chancery cases often involve the application of a mix of different principles that are very familiar to Chancery practitioners. These may, for instance, combine company law, trust law and insolvency law principles within a professional negligence claim. A Chancery judge's experience takes her swiftly to a conclusion that a generalist judge would not so easily arrive at.<sup>246</sup> Specialism, she said, should be fostered on the Bench so far as Chancery work is concerned.<sup>247</sup>
291. I was told that proceedings are often started in the High Court to obtain an injunction when the relief is readily available in the County Court.<sup>248</sup> "Common and garden" hairdressers' actions to enforce restrictive covenants in an employment agreement are a good example. There was a feeling that employers wished to frighten their ex-employees by issuing their process in the High Court.
292. There is a marked difference between the quality of the files which come to the Chancery judges from the County Court, and those which come down from the High Court. The papers are often all over the place if the proceedings are started in the County Court, while High Court files are properly prepared. I describe other problems besetting the Central London CJC in Section 2.1.3 above.
293. In the early months of my inquiry I found that there was universal agreement that the Central London CJC should have insolvency jurisdiction, but until its administrative problems could be satisfactorily resolved, the Chancery judges could not accept any additional work there. It has now, however, been decided, in connection with the negotiations over the Chancery Division's move to the Rolls Building,<sup>249</sup> that low value

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<sup>245</sup> She has now made personal arrangements with the Chief Chancery Master to mitigate this nuisance, by sending him an email setting out the problem and transferring the case to the High Court, and he emails an order back (which is then drawn up in the Chancery Division and sent to her) transferring the case formally back to the County Court, whereby jurisdiction is vested in the County Court. The file does not leave the Central London CJC.

<sup>246</sup> She told me how she had recently assigned a case involving an apparently straightforward right of way dispute to a judge who had been an experienced common law QC, but after receipt of an opposing skeleton argument, he passed them back to her (quite reasonably in her view) on the grounds that it would be better if she heard the case after all as he did not have the requisite expertise to assess the merits of the two arguments quickly.

<sup>247</sup> The court manager told me that litigants in person are more frequently involved in the Chancery cases at the Centre.

<sup>248</sup> As SCJs sitting in the County Court, Judge Marshall and Judge Dight do not even have power to grant pre-judgment freezing orders. As a result, actions that would otherwise have been fit for the County Court have to be started in the High Court if this form of relief is being sought.

<sup>249</sup> See Section 4.7 below.

insolvency business should be moved to Central London so long as the requisite legislative sanction is obtained.<sup>250</sup>

## **2.3 The conduct of civil litigation at the main provincial centres outside London**

294. During the course of my inquiry I visited Leeds, Preston & Manchester, Birmingham, Bristol and Cardiff, to see for myself how these centres handled a mix of mainstream and specialist work in civil justice centres which combined a County Court and a District Registry, and also provided the local base for the work of specialist Chancery, Mercantile and TCC judges. This section of my report contains a description of what I saw and heard during these visits.<sup>251</sup>
295. I had hoped to be able to preface this section of my report by setting out statistics which showed the number of High Court claims issued on each circuit, and the types of claim currently being commenced there. Unfortunately the longer I delved into the statistics, the more utterly unreliable they appeared to be. At the root of the problem was the fact that inexperienced staff were using sophisticated computer codes without being taught how to use them. As a result the statistics for High Court claims were totally dwarfed by the numbers of applications for writs of fi fa, which should have been entered under a totally different code. I have set out in Annex J the results of my inquiries, and the reasons why I concluded that most of the statistics I was shown were not worth the paper they were written on.

### **2.3.1 Birmingham**

296. At the time of my visit there was a vacancy in the post of DCJ, and there was only one CJ based at the Birmingham CJC<sup>252</sup>, backed up by Recorders. There are five posts for specialist SCJs at Birmingham: two Chancery,<sup>253</sup> 1.5 Mercantile and 1.5 TCC.<sup>254</sup>

#### *2.3.1.1 High Court QB and non-specialist County Court multi-track work*

297. A QB judge comes to the Birmingham Civil Justice Centre to hear civil cases for four weeks three times a year. The Diary Manager tries to ensure that he will be backed by at

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<sup>250</sup> Creditors' petitions for debts of a lower value than £50,000, and also debtors' own petitions for debts less than £100,000, if the latter are not transferred to the Official Receiver's department. The Chancellor has told me that two bankruptcy district judges and their support staff should be provided for in any future planning for the trial centre's future.

<sup>251</sup> The Chancellor has explained to me that as things now stand, Chancery work outside London is much less specialised and demanding than Chancery work in London.

<sup>252</sup> Judge McKenna. There was a vacancy for another full time circuit judge post.

<sup>253</sup> Judge Purle QC has told me that the Chancery complement is 2.5 judges.

<sup>254</sup> The vacancy was created by the promotion of Judge MacDuff QC to the High Court Bench in April 2008. Judge Purle QC (who was away at the time of my visit) is the only Chancery judge currently in post: there was an unfilled vacancy for the other post which has now been filled by the promotion of District Judge David Cooke. Judge Simon Brown QC is the full-time Mercantile judge, and Judge Caroline Alton is now on 50% working as the other Mercantile judge. Judge Frances Kirkham is the TCC judge, and there is a vacancy for the other 50% post.

least two s.9 judges. During this period the listing officers will be preparing lists for 5-6 judges to hear multi-track business back to back. The HCJ will also hear High Court appeals during his four-week stay.<sup>255</sup>

298. About 95% of the High Court cases will be released to s.9 deputies.<sup>256</sup> This is straightforward QB work.<sup>257</sup> Over 90% of it settles. If an unreleased case cannot be heard while the HCJ is in Birmingham, the litigants may be offered a transfer to London, or the presiding judge may be invited to reconsider the original decision not to release the case.
299. At any one time there may be about 1,100 multi-track cases being case-managed at Birmingham.<sup>258</sup> Three case-workers will be responsible for these cases from allocation to trial. The listing officers list four one-day multi-track cases per judge per day.
300. The Birmingham Diary Manager shares an office with the Diary Manager for the adjoining area, who is listing for trial centres at Coventry and Walsall.<sup>259</sup> By close co-operation they can make judges or courtrooms available to ensure the best use of available judicial resources throughout their two areas of responsibility. So long as a s.9 judge was available for any High Court case, it made no difference from a listing perspective whether a case was proceeding in the High Court or the County Court.<sup>260</sup> Judge McKenna told me that in Birmingham the system works seamlessly: occasionally a mistake is made and a case is listed before an inappropriate judge, but there are all sorts of ways in which a problem like this can be remedied relatively quickly.

### 2.3.1.2 Specialist work

301. Mr Justice Norris<sup>261</sup> told me that if a claim is issued in Birmingham, it will be immediately taken out of mainstream processing and allocated to a specialist team of eight clerks. It might then go before any DJ. At the first hearing he will (if appropriate) mark it for a Chancery DJ. There is a specialist administration team, consisting of three Chancery, two Mercantile and one TCC clerk, overseen by a Chancery clerk. They oversee the entire management of the case.<sup>262</sup> In consequence there will be 1-4 people

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<sup>255</sup> If a HCJ is needed to decide something urgently, and there is no HCJ in the city, staff ring round the county or contact the High Court liaison officer who knows where all the HCJs are on the circuit. I detected a feeling that it would be better to have a hotline to a specialist HCJ who understands civil business, as opposed to a specialist in criminal justice who is relatively inexperienced in civil work.

<sup>256</sup> DJs prepare summaries of High Court cases, which are sent to the presiding judges for release decisions. Treacy J and Macur J are the presiding judges. Neither is a civil justice specialist. The decision is then emailed back to the relevant case worker and retained on the court file to ensure accurate listing.

<sup>257</sup> Some of it is relatively low value personal injury work.

<sup>258</sup> Both High Court and County Court. The Diary Manager told me that although she has no statistics, she estimates that 15% of this is High Court work.

<sup>259</sup> Warwickshire and the West Midlands.

<sup>260</sup> The Diary Manager told me that it is important to have listing guidelines agreed with the judiciary and good quality data checking to maintain accurate information and identify training needs as early as possible. Birmingham use the more experienced staff to do this work so as to ensure a high level of accuracy.

<sup>261</sup> He was one of the Chancery SCJs at Birmingham before his promotion to the High Court Bench in 2007.

<sup>262</sup> In contrast to mainstream processing where the cases are managed by successive teams who each perform one management task: e.g. issue, or DJ listing, or judges' diary manager, or enforcement.



in the clerks' team who will know the case if a solicitor rings up about it and any enquiry can be immediately dealt with or any application immediately issued and listed. A Chancery case will be case-managed throughout by a Chancery DJ. There are five DJs who are ticketed for this work and also for other things.

302. The file will eventually land up on the Chancery judge's table, marked "List for trial." He will read it through and work out what the real issues are and how the trial will go. He may ask why experts were needed to attend the trial. He may order a split trial, confining the issues at first to paras 1-3 of the prayer for relief. At that stage one can work out the length of the case and identify the appropriate judge to hear it.
303. On my visit I met the Chancery specialist listing officer. He confirmed what Mr Justice Norris had told me. He said that Judge Purle QC and Judge Kirkham hear applications on Mondays. Mercantile applications are heard on Fridays. The judges may operate a shared list on other days. He said that it is hard to get hold of a s.9 judge with a Chancery ticket. It is easier to obtain civil recorders with Chancery expertise.<sup>263</sup> Judge Purle QC now makes all the allocations in the Chancery High Court and in Chancery County Court business.<sup>264</sup>
304. Significant co-operation between judges handling specialist lists at a major provincial centre was initiated in Birmingham about seven years ago. Judges Alton, Norris and Kirkham enjoyed a very good working relationship and were happy to share their work, where appropriate. Co-operative listing arrangements brought about a huge increase in the work level. They experienced no difficulties over the boundaries between each other's work. Judge Kirkham told me that she heard Chancery, Mercantile and TCC cases, and there was often little difference between them.
305. She said that the other really important factor contributing to the success in Birmingham was that they had very willing specialist staff who are very quick and have easy access to the judges. Some are university graduates and even have law degrees. They are eager to progress with the use of IT to deal with cases electronically as much as possible. Judge Brown told me that he regards it as essential that he should have a very intelligent clerk who is not only able to work in a team of specialist clerks but can also act as PA to the Judge.
306. Judge Kirkham believes that the most important factor in handling civil work effectively is that the trial judge conducts the pre-trial case-management from beginning to end.<sup>265</sup> The best approach to litigation, in her view, is for the ultimate trial judge to case-manage a case from its earliest days. This is the approach of the TCC and Mercantile courts at

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<sup>263</sup> See Annex C1 below for details. The Court stands down deputies if there is no work for them. They do not get paid for days booked when there is no work for them. If they are turned away they may be less likely to sit in the future.

<sup>264</sup> I was given a copy of his standard form. He may allocate in six ways, to himself, to Lewison J, to a DH CJ, to a shared list, to a recorder, or to a Chancery DJ. He gives a time estimate, states whether he requires a pre-trial review to be listed, and gives a brief summary of the case.

<sup>265</sup> When she conducts trials in London she often feels that she would have preferred different pre-trial directions and that the shape of the trial she has to conduct was all wrong.

Birmingham; it also applies, although to a lesser extent, in Chancery.<sup>266</sup> Judges in these jurisdictions develop a good feel for the issues which will be of real significance at trial and the information the judge will need to try the case. She conducts a lot of case-management conferences by phone.

307. Mr Justice Norris told me that when he was a specialist Chancery judge at Birmingham the Chancery High Court supervising judge would visit Birmingham three times a year for a total period of four weeks. 2% of Chancery High Court trials were conducted by a HCJ. Long cases are always conducted by the local s.9 judge.<sup>267</sup> Tax and intellectual property cases were issued in London because it was not possible to provide a dependable specialist service in Birmingham<sup>268</sup>. He said that the Birmingham Bar was strong in Chancery and commercial and insolvency work. The specialist judges are all cross-ticketed at Birmingham. Chancery applications are heard on Mondays, and TCC and Mercantile applications are heard on Fridays. For any case with an overlap between specialisms they operate a shared list. If an action settles, another is drawn from the shared list. They are listed back-to-back, with no reading or judgment-writing time allowed for. They do that work when their trials go short.<sup>269</sup> Their cases are listed up to nine months after being marked "List for trial".<sup>270</sup>
308. I did not see Judge Purle QC, who was then the sole Chancery SCJ at Birmingham,<sup>271</sup> during my visit there in May, but he sent me a helpful message afterwards. He had nothing to add to Mr Justice Norris's description of the arrangements for Chancery business, but he wished to stress that the key to the feasibility of the present system in Birmingham was judicial control of listing. The specialist judges' support staff were dedicated to the specialist sections, with the result that they will not alter the judges' lists for administrative convenience without first consulting the judge who has given the relevant listing direction. They also act as an informal barrier between the specialist judges and the general administrative staff of the court. Although he had been himself almost exclusively concerned with Chancery business in the absence of a second Chancery judge at Birmingham, the specialist judges there were always willing to help out with the general list, so long as this did not undermine the efficient conduct of the specialist lists.<sup>272</sup>

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<sup>266</sup> Judge Purle QC later told me that it would not be practicable for a s.9 judge to case-manage the Chancery work on account of its volume, but the presence of specialist DJs at Birmingham and the opportunity for frequent discussions between the judges there gave rise to them sharing a common expertise. .

<sup>267</sup> The 2007-8 figures at Annex C1 below show in that year there were 365 Chancery High Court sitting days, and Lewison and Norris JJ sat for 26 of them. With nine months' notice Lewison J was conducting one five-week trial in Birmingham this year.

<sup>268</sup> He would encourage solicitors to believe that they would get a specialist judge, such as the patents County Court judge or a specialist intellectual property QC as a deputy judge, but they did not trust him to deliver.

<sup>269</sup> Alternatively, if specialist judges are free, they are willing to do anything to help with other lists.

<sup>270</sup> He said that this arrangement was no good for a HCJ if his availability was not known early enough. A visiting HCJ cannot be assigned a heavy case if he is there so infrequently. It is quite difficult to get cases for the HCJ which fit the parameters. One also has to consider the convenience of the litigants, so far as dates are concerned.

<sup>271</sup> District Judge David Cooke has now been promoted to the vacant post of second Chancery SCJ at Birmingham with effect from 17<sup>th</sup> July 2008.

<sup>272</sup> He told me that there was a worry that the establishment of an office of the Administrative Court at Birmingham might encroach on the availability of the civil judges there, unless proper arrangements were made.

309. Although he did not support civil court unification himself, he sent me a transcript of a recent judgment of his, where unnecessary delay and expense had occurred when everybody, including the deputy district judge, had forgotten that the County Court lacked jurisdiction to enforce a charging order in respect of a debt in excess of £30,000.<sup>273</sup> He added that he was often irritated by pointless differences between High Court and County Court jurisdictions.<sup>274</sup>

### **2.3.2 Manchester (and the Northern Circuit)**

310. The Manchester CJC opened for business in October 2007. In the past High Court civil work was handled at the Manchester Crown Court, and TCC work was handled at the Salford County Court. With the closure of the Manchester County Court and the opening of the new Centre the conduct of all civil justice business in the city has been brought under one roof. Mr Justice McCombe, who was until recently one of the presiding judges for the Northern Circuit, told me that the quality of the new court building has revitalised staff and judges. This was very evident on my visit. The fact that all the judges exercising civil jurisdiction are now based in the same building works very well.
311. I was told that local professionals are very enthusiastic about the facilities now available in Manchester. The Bar is good, there are fine firms of local solicitors, and there is a real enthusiasm for conducting heavy civil business locally. There are now civil justice centres in Chester, Manchester and Liverpool.

#### *2.3.2.1 Queen's Bench and heavy County Court work*

312. Mr Justice McCombe told me that when he was a presiding judge (2003-2007) he set out to make a QB judge, dedicated to civil work, available within a 30 mile radius of any major centre in the south of the Circuit. The Civil Listing Co-ordinator does all the co-ordination for High Court work on the Northern Circuit. The Diary Manager at Manchester maintains the list for Manchester, Liverpool and Chester as a single list. For heavy civil non-specialist business each day at Manchester there are likely to be one HCJ, three mainstream CJs who will try High Court QB and County Court cases and one mainstream DJ who will try County Court cases.
313. They take cases from local towns and centres as far away as Nottingham and London.<sup>275</sup> The Diary Manager is usually in touch with Preston, Chester and Liverpool on a daily basis. Cases may be switched for trial in Manchester the day before trial.

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<sup>273</sup> See *Gill and Gill v Grove Farm Dairies*, 11<sup>th</sup> March 2008, Judge Purle QC. He said in his judgment that the history of the case gave those who were “doubting Thomases” on the issue of court unification food for thought.

<sup>274</sup> From time to time he came across an action started in the County Court which had picked up a High Court seal at some stage (or *vice versa*), so that it appeared to have been transferred when in fact it had not, but during his first year in the post he had not come across any case where this had been productive of injustice, as opposed to irritation.

<sup>275</sup> If a trial is transferred at the last minute to Manchester, the losing party has to pay the costs involved in the move.

314. At the Preston District Registry the district judges will deal with all questions relating to case management and allocation to track. The trial judge in theory should conduct the PTR, but in practice the DJs do because it cannot be determined in advance who the trial judge will be. Very few actions actually run on to trial in the High Court. If an action is going to run to trial, the DJ will direct trial in Manchester, Liverpool or Preston. They will try to arrange that a Carlisle case is heard in Carlisle.
315. Under arrangements that were introduced when the Manchester CJC was opened, a QB judge is assigned to Manchester, Liverpool and Chester for half of every legal term.<sup>276</sup> A composite list of cases from all three centres is kept, so that a case may be transferred for hearing in the city where the judge is sitting: he will not, for example, be restricted to hearing Chester cases when he is in Chester. A trial will only be released to a s.9 judge if the HCJ cannot deal with it e.g. because he is hearing another case. In practice nearly all the HC trials that are listed for hearing during this period are heard by a HCJ.<sup>277</sup>
316. The venue for the hearing of trials and applications<sup>278</sup> will be, if practicable, Manchester for claims commenced in or transferred to the Manchester District Registry, and Liverpool for similar claims at the Liverpool District Registry.<sup>279</sup> Urgent applications will be heard at the venue at which the relevant Judge is sitting.<sup>280</sup>
317. There is no differentiation in the deployment of staff on County Court or High Court work except for the section dedicated to the six specialist judges and the Chancery DJ who is conducting trial work. Some practitioners issue personal injury claims for up to £750,000 (and not much more) in the County Court. Others issue in the High Court at lower values.

### 2.3.2.2 Specialist Work at Manchester and Liverpool

318. There are two Chancery SCJs, two Mercantile SCJs, and two TCC SCJs based at Manchester.<sup>281</sup> Chancery work there is confined to five of the DJs. In a typical day there

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<sup>276</sup> He will usually sit at Chester for a short period, then at Manchester for a longer period, and finally at Liverpool for a short period.

<sup>277</sup> There is a greater likelihood of s.9 judges (especially the DCJs) dealing with contested applications (e.g. for an interim payment) and settlement approvals. Case management is also on occasions referred by a DJ to the DCJ.

<sup>278</sup> Other than applications in the Chancery and Mercantile applications lists.

<sup>279</sup> Subject always to the convenience of the parties, if they prefer Manchester or Liverpool as a hearing place of choice.

<sup>280</sup> Mr Justice Mackay, who is a very experienced mainstream QB judge, told me that he spent four weeks in Liverpool and four weeks in Manchester after Easter 2008. His time in both cities was fully booked up with a list of cases above the indicative value of £500,000, although he did other smaller work when these cases settled. In Liverpool he was involved with one £5 million claim which settled after three days, while in Manchester he had one heavy seven day case and one heavy four-day case (which originated in Liverpool) in his list, in addition to lower value multi-track work. He heard one injunction application that required a HCJ because of its sensitivity, and he also had a large quantity of paper applications: he was willing to hear a fast track case if his list was otherwise empty for the day. Judge Stewart QC, the Merseyside DCJ, tried an unusual mesothelioma case (released only to him) when Mr Justice Mackay was involved with even heavier work.

<sup>281</sup> It is a condition of the appointment of the Chancery specialist judges that they sit for six weeks each year in London, where they hear similar work to the work they conduct in Manchester. In practice the TCC and

will be six specialist senior circuit judges trying predominantly High Court Chancery, Mercantile and TCC work. In addition, if he is in Manchester, the Vice Chancellor of the County Palatine will try Chancery work. There will also be one Chancery DJ trying Chancery County Court cases.<sup>282</sup>

319. Except for the TCC claims, which are handled by two members of staff throughout, all other claims are issued by the Civil Business team. Each of the three specialist types of claim has a unique reference number. Cases can therefore be easily identified. The files for Chancery and Mercantile cases are colour coded blue and red. The Civil Business team also deals with the Acknowledgements of Service, the Defences and the Allocation Questionnaires for the Chancery and Mercantile lists.
320. Once a case has been allocated to the Chancery list, it will be referred to one of the three principal Chancery DJs for directions. A Mercantile case will go to one of the two Mercantile judges. The files will then go to the Specialist Listing team<sup>283</sup> for listing. A Protocol has been prepared which governs the arrangements for Chancery and Mercantile listing at these two centres. The Specialist Listing Officers at Manchester are responsible for listing Chancery and Mercantile cases at both Liverpool and Manchester.
321. In August 2007 this team also took on responsibility for the listing of all hearings (trials, applications etc) before the Chancery DJs, so as to streamline the listing of specialist cases.
322. There are five Chancery DJs. Three of them do more Chancery work than the other two (one of whom acts as a 'reserve'). One of them deals with trials each week, one sits on applications at least two days per week, and one deals with applications for the entire week once a month. The specialist circuit judges case-manage the weightier Chancery cases.<sup>284</sup> The Mercantile and TCC judges case-manage all the cases in their lists. If a County Court case is sent to Manchester it will be sent back if they do not raise specialist Chancery issues.
323. Chancery DJs now conduct a substantial number of Chancery trials, including some for six figure sums. The parties usually consent to trial by a Chancery DJ. The trial listing arrangements for Chancery DJs are working well. A Chancery DJ is willing to travel to try a case where it is most convenient.<sup>285</sup>

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Mercantile judges also sit for about the same period in London usually hearing Chancery cases. In addition, with effect from June 2008, three of the specialist judges (one Chancery, one Mercantile and one TCC judge) have been authorised to sit in the Administrative Court, initially in London but locally once the local Administrative Court office has been established in Manchester in 2009. There is also a TCC circuit judge based at Liverpool.

<sup>282</sup> See below.

<sup>283</sup> The Specialist Listing team consists of five members of staff. Two members of staff primarily deal with TCC work, but all of them can assist with queries.

<sup>284</sup> Once a heavy case is identified by the parties, the Chancery specialist judges will conduct the PTR in all cases that will last five or more days.

<sup>285</sup> For example, District Judge Smith has gone to Anglesey to try an action in the County Court there, where there were several local witnesses and a site visit was required.

324. In 2006 there were seriously long waiting times in the Chancery List in Manchester. These waiting times have now been dramatically reduced.

325. The issue rate for Chancery claims in recent years has been:

	Dec 2005- Nov 2006	Dec 2006- Nov 2007
Manchester	696	699
Liverpool	200	138

326. The issue rate for Mercantile claims in Manchester has been:

Dec 2005-Nov 2006	63
Dec 2006-Nov 2007	70

327. The waiting times as at 16<sup>th</sup> April 2008 were:

Trials	Chancery	Mercantile
1 day	Immediately	Immediately
2 days	3 weeks	Immediately
3 days	3 weeks	Immediately
4 days	3 weeks	Immediately
5 days plus	6 weeks	Immediately

328. In the same period 40 appeals were heard by the Chancery and Mercantile judges, of which 34 were heard, 4 settled in advance, one settled on the day, and one was vacated by order. The Chancery SCJs and DJs also undertake a substantial volume of insolvency work which does not feature in these statistics.

329. The Mercantile and TCC judges conduct CMCs themselves because they find that this is much more convenient. Conducting CMCs make it possible for them to direct cases to be heard by the appropriate judge on an individual basis.<sup>286</sup> The Chancery s.9 judges are willing to undertake case management work and do so in practice for the more substantial cases that are likely to be tried by them or by the Vice-Chancellor.

330. However, their other commitments prevent them from undertaking case management of every Chancery case that is issued and many such cases are destined to be tried by district judges in any event. Thus the management of all Chancery cases in the first instance by Chancery DJs ensures that each case receives attention from the appropriate level of judge from an early stage.

331. I was told that the local business community is comfortable with the service the specialist judges provide. The work undertaken by the s.9 judges on this circuit is predominantly (that is in excess of 90% of their time) taken up with trying High Court Chancery Mercantile or TCC cases (and in the case of the Chancery judges hearing

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<sup>286</sup> They told me that they understood that one purpose of the CJC was to move heavy work up to Manchester and to encourage mercantile firms to use their local court. The top category cases will go to London.

appeals from Chancery DJs in Chancery HC cases as well as hearing insolvency applications and appeals).<sup>287</sup>

332. The reason why waiting times have been significantly reduced over the last two years is because of the new judges who have been appointed and because staff and court users have confidence with the judges who deal with the specialist work. Work has also been transferred from other court centres, including the Royal Courts of Justice, due to the shorter waiting times. Court users can lodge documents with the Specialist Listing team by email.
333. The TCC work is not backed up. Chancery and Mercantile work is, and three trials are listed before each specialist judge each day.<sup>288</sup> They do not have shared lists. They are all cross-ticketed, but listed individually.
334. At Liverpool there is a Chancery applications day on the first Friday of each month, and a Mercantile applications day on the third Friday of each month.<sup>289</sup> The Chancery and Mercantile Judges are always willing to deal with applications prior to their daily list.<sup>290</sup>
335. Listing officers at Liverpool CJC would have access to the electronic diary to view lists and to list applications on the Applications day at Liverpool. Listing trials would be the responsibility of the Specialist Listing Officer at Manchester.
336. The Vice-Chancellor of the County Palatine<sup>291</sup> sits for 45 days in every year on the Northern Circuit (30 days in Manchester and 15 days in Liverpool), but some days are lost to other commitments. He was currently scheduled to try a long Chancery matter in Manchester, and a heavy director's disqualification case was due to be heard in Manchester soon. He deals with less than 10% of the Chancery High Court work undertaken at Manchester and Liverpool. All the other trials in the Chancery Division are undertaken by the two Chancery SCJs, with the other specialist judges available to help, if needed.<sup>292</sup> 90% of the High Court Chancery work on the Northern Circuit is tried by these judges. In Chancery disputes the costs are often out of proportion to the sums in issue. The Vice-Chancellor recently tried a case where the costs were completely out of hand.
337. Before July 2006 outlying County Courts were in the practice of directing that cases transferred to a Chancery District Registry on the Northern Circuit should be heard by a specialist Chancery judge. This practice clogged up their lists with cases that could more appropriately be tried by a DJ or by a CJ in the general County Court list. In July 2006

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<sup>287</sup> Recently the Court of Appeal has reiterated that judges in the County Courts are bound by the decisions of HCJs.

<sup>288</sup> Each judge may have a 5 day case, a 3 day case and a 2 day case placed in his list on the basis that most cases settle and there is always likely to be a back-up judge available if more than one case has to be tried.

<sup>289</sup> Consideration was being given to combining these Application days into one, depending on demand. These two lists have in recent times consisted largely of cases issued in Manchester.

<sup>290</sup> Sitting at 9 am if necessary.

<sup>291</sup> Patten J.

<sup>292</sup> See Annex C2 for details in 2007-8.

the Vice-Chancellor issued a Practice Note in which he prescribed that such cases should be transferred with a case summary and a list of issues, and should be listed on arrival before a Nominated DJ,<sup>293</sup> who would give appropriate directions. He said that it ought to be possible to identify cases suitable for transfer at an early stage. Ideally they should be transferred at the allocation stage, and before any CMC.

338. No County Court cases may be listed before a Chancery SCJ except by the DCJ or in accordance with this Practice Note. Ultimate control of what appears in the Chancery lists remains with the Chancery SCJs who may decide that any case so listed is to be transferred out of the specialist list or heard by a specialist DJ.

### **2.3.3. Leeds**

339. Judge Simon Grenfell is the DCJ. There are three Chancery and Mercantile SCJs based in Leeds, who also travel to Newcastle to hear cases there. There is no TCC SCJ: Judge Cockroft is the designated lead TCC judge. There is a complement of 10 district judges at Leeds, handling civil and family work.<sup>294</sup> There are a number of recorders with s.9 tickets who help with the specialist work. At Leeds there is a Civil Justice Centre in all but name, with all the civil judges sitting at the same building.

340. In percentage terms the DJs case-manage and/or try most of the work. They may be allocated multi-track cases to try. They case-manage cases under the Mesothelioma Practice Direction.<sup>295</sup> They told me that problems tend to arise if a fixed financial limit is placed on a DJ's jurisdiction.

#### *2.3.3.1 Listing and HCJ Categorisation in the Specialist Lists*

341. In Leeds staff in the District Registry and the County Court Office work as a single unit. There is a lot of flexibility, and the same staff handle cases in both streams when they arrive at the court. There is nothing recognisable as a separate District Registry. The files are all in the same colour each year, with the file references marking the distinction between High Court and County Court cases. Company/insolvency and Chancery/Mercantile files are all readily recognisable.<sup>296</sup>

342. So far as Chancery business is concerned, some cases are identified at an interlocutory stage as being suitable to be tried by only a HCJ. This identification can take place at the suggestion of the parties' advisers at a CMC or on an interlocutory application. The

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<sup>293</sup> One DJ was nominated at each of the four centres, to ensure that a continuity of approach was maintained.

<sup>294</sup> There was one vacancy at the time of my visit. The DJs at Leeds come from a very mixed background. The work goes to those who want to do the different types of work. This is said to cause no real problems.

<sup>295</sup> See Section 2.1.2 above.

<sup>296</sup> Since my visit I have been told that the staff at Leeds are considering whether the processes can be accelerated when a case is transferred from the County Court to the High Court by simply amending the relevant entry on CASEMAN and marking the file "Chancery Business" or "Mercantile Business". This would take out a link in the process and save the Chancery staff having to re-enter the case details under a new case number.



identification would be by a DJ, one of the SCJs or by a HCJ. Once a case has been so identified it would only be released with the approval of the HCJ.

343. In many cases there is no such identification. In such a case the listing officer, after consultation with the HCJ or one of the specialist judges, will determine which of the cases in the list are to be tried by the HCJ as opposed to the other available judiciary.
344. Virtually all the Mercantile and TCC cases are handled by the circuit judges at Leeds. If there is a TCC case of exceptional weight or length it is referred to a High Court TCC judge who decides if he (or she) will hear it and – if so - where.<sup>297</sup>

#### 2.3.3.2 Case Management: Chancery and Mercantile

345. There are 8-10 staff in the Chancery/Mercantile section, who handle a case for case management purposes before it moves to the Listing Section for listing and trial.
346. DJs case-manage Chancery cases and CJs case-manage Mercantile cases. Once a direction is given for trial, the file moves to the listing section.

#### 2.3.3.3 Listing

347. The manager who runs the High Court listing section has one full-time and one part-time member of staff to assist him.<sup>298</sup> They list continuously throughout the year for Chancery, Mercantile, QB and TCC cases. The diary manager was away on sick leave at the time of my visit: I have been told that another member of the court's staff has now taken over the diary manager's role.
348. There are 3 two-week periods each year when a High Court QB judge is in Leeds to hear civil business, and s.9 judges sit back to back. There are also 3 two-week periods in which TCC trials are conducted back to back.
349. There are block lists every Friday for applications lasting less than two hours: CMCs, PTRs and injunction applications, for example. Contested injunction applications have largely, but not completely disappeared, because practitioners know the ground rules and advise their clients sensibly. The judges grant a lot of freezing orders. At CMCs there may be contested issues, such as applications for the interim preservation of documents. Sometimes parties issue applications returnable before a circuit judge, and they always accept them. These applications can be heard on three days' notice.

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<sup>297</sup> Jackson J heard a four-week TCC case at Leeds in 2007.

<sup>298</sup> I have been told that since my visit a further member of staff has been assigned to the High Court listing section who has the extra responsibility of providing administrative support to the Diary Manager.

350. For Chancery/Mercantile trials 2-3 trials are listed for each judge each day, with only one marked as a first fixture. There will be at least two and sometimes three judges sitting each day,<sup>299</sup> and the High Court Chancery Judge sits back to back with two other judges during his visits. There is a culture of late settlements in Chancery business, and listing for a one-judge list is unsatisfactory.
351. Two of the specialist judges are very willing to help with civil County Court work, if not otherwise needed, and the other is very willing to help with family work.<sup>300</sup>
352. The Lloyd/Hart guidance on the transfer of Chancery County Court cases works well. They receive cases from a catchment area which includes Nottingham, Sheffield and Hull. They may send out Chancery judges and recorders to conduct Chancery trials in this catchment area. The files are marked “Chancery business” and the High Court Listing Office handles them for listing purposes. They may send cases back if they are not really appropriate business for a Chancery County Court under the Lloyd/Hart guidelines.
353. For Chancery cases the DJ recommend the level of judge: there are no formal written criteria. They send those recommendations to Mr Justice Patten. They work very closely with the specialist circuit judges.
354. In Manchester the Chancery DJs also conduct final hearings. The practice in Manchester, whereby Chancery DJs conduct some final hearings, is being considered by the three specialist judges at Leeds.
355. There are a lot of judicial resources available at Leeds with 6-8 judges sitting in civil work on any one day and quite big judicial teams deployed on family and criminal work. In addition to the DCJ, the specialist judges, other mainstream CJs and the five DJs, there are a number of s.9 (1) recorders who assist with the work. There are usually two specialist courts sitting in Leeds.<sup>301</sup> Sittings take place less frequently in Newcastle. There is seldom more than one specialist court sitting there, except when a High Court Judge is there). One of the specialist judges usually visits Newcastle for one or two weeks in every month.
356. The Vice Chancellor of the County Palatine visits the North East for three 3-week sessions each year. In each session he sits for one week in Newcastle and two weeks in Leeds. Unless he has been allocated a specific case, he sits as part of the team. Whilst he

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<sup>299</sup> Sittings in Newcastle are less frequent, and only one specialist judge goes there at any one time for one or two weeks each month. Unless the Vice-Chancellor is also in Newcastle at the time, he will not be backed up by another judge.

<sup>300</sup> On most days there will be a specialist Judge sitting at Leeds who will be available to deal with any Chancery/Mercantile matter that may need a hearing. This ensures that cases are dealt with by the correct level of Judge.

<sup>301</sup> Sometimes there are three and sometimes there is only one. For details of High Court sitting days in the North-East in 2007-8, see Annex C3 below.

will be expected to deal with the most important of the cases in the lists, it is possible that he will end up dealing with cases in the County Court.<sup>302</sup>

#### 2.3.4. Bristol

357. The civil courts at Bristol operate at present from two sites.<sup>303</sup> These inconvenient arrangements will end when a new Civil Justice Centre opens, it is hoped, in September 2010. It will have 11 courtrooms, including two for jury trials.
358. The DCJ for Avon, Somerset, Gloucester and part of Wiltshire and the two specialist SCJs on the Western Circuit are all based at Bristol.<sup>304</sup> Two other circuit judges, with occasional help from recorders (who tend to be high quality local QCs) help with the mainstream civil work. There are five district judges.
359. As at other large provincial centres, the same staff handle the County Court and District Registry work interchangeably until it is assigned to specialist lists. When a claim is issued, it will be assigned to the appropriate jurisdiction and given an appropriate file reference. So far as mainstream cases are concerned, the QB listing officer will handle all the High Court case and also all County Court cases with a value of over £250,000 in what is called the “Section 9 List”. A DJ may direct that a complex County Court claim under £250,000 be referred to the DCJ for special treatment.<sup>305</sup>
360. So far as High Court releases are concerned, the QB Listing Officer will prepare a brief outline of the issues in a High Court Section 9 claim, to which the DCJ will add his recommendation.<sup>306</sup> The presiding judge’s decision usually comes quickly by email. 90% of the section 9 work consists of personal injury and clinical negligence claims.<sup>307</sup>
361. If a High Court claim is not released, the Regional Judicial Liaison Officer (based at Exeter) will be approached and told the dates that are suitable for the parties. Judge Bursell told me that ideally such cases should be listed at Bristol, to accommodate the convenience of the parties and the expert witnesses in the case. In fact, no civil trial has been conducted by a HCJ in Bristol in the last two years, except when a HCJ’s criminal list has gone short and he has helped out with civil business.<sup>308</sup> Of the eight cases for which the services of a High Court judge were requested, four settled, two were moved

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<sup>302</sup> From time to time he may even deal with fast track trials if all his other work has settled.

<sup>303</sup> The CJs are based at the Guildhall, where their courtrooms are, while the DJs and all the supporting staff are based in Greyfriars Building, five minutes walk away.

<sup>304</sup> Judge Bursell QC, the DCJ, retired from the Bench in July 2008. Judge McCahill QC is now the Chancery SCJ, and Judge Havelock-Allan QC the Mercantile SCJ (who also handles the limited amount of TCC work). The two specialist judges each have a clerk assigned to them.

<sup>305</sup> Particularly clinical negligence cases, which the DCJ manages from start to finish.

<sup>306</sup> Which may be that the case should not be released, or that it should only be released to him.

<sup>307</sup> I was shown the list kept by the QB Listing Officer. 10% of the claims on the pages I saw were classified misrepresentation, fraud, professional negligence, breach of contract etc.

<sup>308</sup> Mr Justice Owen told me that he had not conducted any civil trial during the three years when he has been a presiding judge on the Western Circuit. For details of High Court sitting days see Annex C4 below.

to London for trial, and two are listed for trial next autumn.<sup>309</sup> In the same period 211 High Court cases were listed for trial at Bristol by s.9 judges, of which 187 settled, and only 24 (11.4%) were tried.<sup>310</sup>

362. Although the Chancery and Mercantile judges do not operate a shared list as such, Judge McCahill was familiar with the arrangements in Birmingham, where he had previously been based. Judge Havelock-Allan told me he sends 20% of his time hearing Chancery cases.

363. 107 Chancery actions were issued in or transferred to Bristol in the first four months of 2008.<sup>311</sup>

364. I was given the following statistics for Mercantile business:

	2005	2006	2007	2008 (4 months)
New Claims	52	59	49	11
Transfers in	11	6	17	2

365. And for TCC business (with County Court TCC cases marked with a + sign):

	2006	2007	2008 (2 months)
New Claims	10	15+2	1
Transfers in	1	3+5	0
Claims for Adjudication enforcement	4	4	0
Applications	3	8+2	0+2
Settlements	3	8+2	0

366. The TCC DJ Liaison Judge for the Western Circuit is based at Bristol.

### 2.3.5 Cardiff (and Wales)

367. Cardiff was the first city to have a civil justice centre, incorporating the traditional County Court and the new specialist jurisdictions. The accommodation at the Civil Justice Centre, which originally had four courtrooms, is now badly stretched. There are now seven courtrooms and seven hearing rooms, and there are plans for two more courtrooms, including the new Administrative Court.<sup>312</sup>

368. At the time of my visit His Honour Graham Jones, a very experienced former DCJ, had come back from retirement for seven months to act as DCJ pending the appointment of a successor to Judge Hickinbottom, who returned to his former post as Chief Social

<sup>309</sup> One of these is already expected to settle.

<sup>310</sup> Of these, 13 were tried in 2006, 9 in 2007 and only two in the first three months of 2008, thereby reflecting the greater modern tendency to settle cases that was reflected in other evidence I received.

<sup>311</sup> Of these, 11 were County Court cases transferred into the Bristol County Court from other County Courts. Two High Court cases were transferred out of the District Registry during this period.

<sup>312</sup> There are not nearly enough consultation rooms: now that there is a mediation suite for the new small claims mediator, parties can use the side rooms there if they are not in use.

Security Commissioner on 1<sup>st</sup> January 2008.<sup>313</sup> There was also a long unfilled vacancy in the post of local Chancery SCJ, now held by Judge Milwyn Jarman QC.<sup>314</sup> Judge Nicholas Chambers QC is the Mercantile SCJ. TCC work is shared between the three SCJs at Cardiff, who are all cross-ticketed.

369. The volume of litigation in Cardiff (and Wales generally) is significantly lower than at the other cities I visited. This meant that the specialist judges conducted a much greater volume of County Court work than those who held similar posts in larger cities. Mr Justice Davis, who is now the senior presiding judge in Wales, told me that *de facto* the civil justice system is unified in Wales, and in his last report as DCJ Judge Hickinbottom said that the only trials he had conducted were High Court trials. The presiding judges left it to the DCJ to decide whether to refer any High Court action to them for a release decision, and Judge Hickinbottom told Mr Justice Davis that he would not normally put a personal injury case before a High Court judge if it was worth less than £5 million.<sup>315</sup>
370. HH Graham Jones told me that it is largely a random matter whether heavy personal injury cases are conducted in the High Court or in the County Court, although the very heaviest cases would usually be issued in the High Court. Since he came back from retirement he has done 50 days of High Court work and 53 days of County Court work.<sup>316</sup> A HCJ now comes to Cardiff for civil work for two weeks three times a year, sitting back to back with the DCJ or another s.9 judge. He and the listing officers try to provide a suitable High Court list for the HCJ, but it is not easy, particularly as so many cases settle. There are likely to be expert witnesses in all the High Court cases, and the listing officers have to take into account the experts' convenience, too. He believes that it would be better if a HCJ could come and sit on an "as needed" basis. If there were a unified court, one would still have to mark cases so that they came before the right judge.
371. Judge Chambers QC sees no need for a Commercial Court judge to come to Cardiff. He did not believe there were any top category mercantile cases in Cardiff. If there were, such as a big oil/gas case, it is likely that London solicitors would be involved, and the litigation would take place in London. He considers that he has been appointed to do specialist work, sitting sometimes in the High Court and sometimes in the County Court. It is irrelevant what his status is at any particular time. Cardiff copes well with its mercantile work. He sometimes handles cases involving a few million pounds. He accepts County Court cases into his mercantile list if a DJ asks him if he will treat a case as mercantile. While specialist SCJs in the larger provincial centres see themselves as doing mainly High Court work in their specialist jurisdiction, there is insufficient work of this kind in Wales to enable that practice to be followed there.
372. Judge Jarman QC said that there is a real need to give practitioners what they want. They want a specialist judge at a certain level. Mr Justice Lewison comes to Cardiff three

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<sup>313</sup> Anthony Seys Llewellyn QC has now been appointed as the new DCJ with effect from 17<sup>th</sup> July 2008.

<sup>314</sup> It was unfilled between the departure of Mr Justice Wyn-Williams to the High Court Bench in December 2006 and the arrival of Judge Jarman QC on 10<sup>th</sup> December 2007.

<sup>315</sup> For details of High Court sitting days in Wales in 2007-8, see Annex C5 below.

<sup>316</sup> These County Court days may also include appointments concerned with High Court case management.

times a year. There are some complex Chancery cases in Cardiff: he has handled a £1.5 million case and a £2 million case. He divides his time equally between the High Court and the County Court, and he also takes TCC cases. Litigants expect a certain degree of specialism, and in Wales the system works very well.

373. There is a lot of Chancery work in Wales, although the Principality suffered badly when there was a vacancy in the Chancery judge post for a year,<sup>317</sup> and Welsh Chancery work went to Bristol or London as a result. It is now picking up again. Rural areas produce plenty of Chancery disputes: disputes over family property and farmland etc. Judge Jarman is willing to go and sit and conduct the trial where the parties are. He has sat in Haverfordwest, Wrexham and Llangefni in the last six months.
374. Until 2006 there was one DCJ for South Wales and another for North Wales (and Chester). When Chester was relocated to the Northern Circuit, the Cardiff-based DCJ became DCJ for the whole of Wales, with two deputy DCJs, one based in Swansea and one in Rhyl.<sup>318</sup> I was told that North Wales is poorly resourced, both with civil judges and with courtrooms. There are courtrooms available for civil work at Llangefni, Caernarfon, Rhyl and Wrexham,<sup>319</sup> but judges cannot sit back to back in those courts, and each court is individually listed:<sup>320</sup> there is no central diary manager in charge of the co-ordination of civil business, in contrast to the two who perform this function in different parts of South Wales. There is a need for a sixth circuit judge in North Wales, and a DJ's post there has now been left unfilled for 18 months.<sup>321</sup>
375. One of the three senior circuit judges will visit North Wales each month, hearing a mixed list of civil cases (although very specialist work will be reserved for the next visit of the particular specialist). On their visits they will each take cases across the system. They will all do appeals and CMCs – and fast track work if necessary.
376. They are looking forward to the creation of the Administrative Court Office in Wales, and hoped that this might lead to the development of specialist public law practices among local lawyers. Mr Justice Beatson had visited Cardiff the day before my visit, and the new office is likely to open early next year. Wales has given rise to some interesting public law cases in recent months, and the judges thought it right that these cases should be heard in Wales. Judge Jarman will be sitting as a deputy in the Administrative Court, as will some QCs with public law experience who are local recorders.

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<sup>317</sup> In his report for 2006-7 Judge Hickinbottom, the then DCJ, said that the absence of a specialist judge for such a long time had a potentially devastating effect on specialist work.

<sup>318</sup> Judge Vosper QC at Swansea and Judge Farmer QC at Rhyl.

<sup>319</sup> For the time being a courtroom at Chester is also used, but it is hoped that these arrangements can be dispensed with fairly soon. Two courtrooms will be available in Mold in July 2008.

<sup>320</sup> With a mix of civil and family work. Under these arrangements civil justice always suffers, because family work inevitably takes precedence.

<sup>321</sup> I was told that the need for a Welsh-speaking judge became apparent during the recruitment process, which helped to delay the eventual appointment.

377. At Cardiff the DJs will give directions on the future conduct of the case, whether it is in the High Court or the County Court: any case of any weight will go before the DCJ or a specialist judge. In March 2007 Judge Hickinbottom gave written instructions to case managing judges whereby cases would be given an A-G grading and the file cover would be marked with the selected grading.<sup>322</sup> I was told that this system worked well, and any member of staff who handled the file would be able to see very easily the grading that had been given to the case.
378. As at the other civil justice centres I visited, claims in the High Court and in the County Court were handled by the same staff, and I was told that staff readily understood the difference between them. The Diary manager was away at the time of my visit, but I met the Circuit Judge Listing Officer, who demonstrated to me the problems they were experiencing over the current slowness of the E-Diary system. The scale of late settlements still persisted as a problem in Cardiff.<sup>323</sup> As at other centres, the judges case-manage the Mercantile and TCC cases, while Chancery cases may be referred by the DJs to Judge Jarman if they consider that there is anything he ought to be handling himself at a CMC stage: he will conduct the PTRs himself.

## **Part III. The present arrangements**

379. I now turn to answer the questions I was invited to address in my Terms of Reference.

### **3.1 What percentage of “High Court” actions are tried by Deputy High Court Judges?**

380. It is not possible to give a precise answer to this question because statistics are not kept in such a way as to permit a simple answer, and it has been a great struggle to obtain any more or less dependable statistics at all. I have included in Annexes B1-B5 tables which show High Court sitting days on five of the circuits in 2007-8,<sup>324</sup> but they must not be taken to be 100% accurate. The general picture they portray, which is that between 85 and 93% of High Court sittings outside London are conducted by s.9 deputies, is almost certainly correct.

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<sup>322</sup> High Court Judge only (A); s.9 judge (B); Specialist Judge – Mercantile, Chancery, TCC or Industrial Disease (C); Circuit Judge (D); Experienced Recorder (E); Recorder (F); suitable for release to District Judge (G). Files graded B or G were to be referred to him as DCJ so that appropriate release instructions could be given. The appropriate large capital letter was to be marked in the top left hand corner of the front of the file, preferably in felt or marker pen, with the initials of the judge who made the marking, and the date. If it was subsequently considered that the marking was no longer appropriate, the capital letter should be changed in the same way.

<sup>323</sup> In 2007-8 there were 1,300 County Court claims allocated to the multi-track in Wales; 1,222 settlements; and 169 trials. The great majority of these were Cardiff claims.

<sup>324</sup> High Court sittings in the South-East outside London are very small indeed.

### 3.1.1 Non-specialist QB actions outside London

381. For what they are worth, the figures included in Annexes C1-C5 give the following picture. The vast majority of QB actions settle, and the proportion actually tried by deputies would have been very much higher but for this fact.

	HcJs	s.9 SCJs <sup>325</sup>	s.9 CJs	s.9 QCs	Total
Midlands	42	100	64.5	8	214.5
Northern <sup>326</sup>	96		?	?	96 + ?
North-Eastern	54	20	30	3	107
Western	8.5	31	11		50.5
Wales	26	[153]	1	2	[182]
Total	226.5	[304]	106.5	13	[739.5]

382. A large preponderance of non-specialist QB actions outside London are released for trial by s.9 deputies, or for trial by a named deputy, or are assessed suitable for trial either by a HCJ or a named deputy.<sup>327</sup> In practice, all QB actions will be the listing responsibility of the same listing officer, who will also be responsible for listing heavy County Court cases which have been assessed (by a convenient shorthand) as fit for trial by the DCJ or by a s.9 judge.<sup>328</sup> The listing officer notes the listing directions given for each case. He will therefore know of the non-released HC cases that must be tried by a HCJ.

383. 90% of these actions are likely to be personal injury or clinical negligence actions. At least 90% are likely to settle before trial.

384. On the Midland, Northern and North-Eastern circuits arrangements are made every term for HCJs to come and hear civil cases either for half the term (in the Midlands nine days in Nottingham and four weeks in Birmingham; on the Northern six weeks divided between Manchester, Liverpool and Chester) or for three weeks (in the North-Eastern two weeks in Leeds and one week in Newcastle).<sup>329</sup>

385. During those periods the HCJ sits back to back with other local judges who are s.9 deputies. On the Northern Circuit he is likely to hear all the High Court actions listed for trial which have not settled. In Birmingham it is calculated that as a result of these arrangements 10% of High Court actions are tried by a HCJ. In Nottingham, a HCJ has actually tried one HC case and the DCJ has tried four in the last 12 months, but the HCJ would have tried more but for late settlements.<sup>330</sup> I have not been told the position in the North-East.

<sup>325</sup> This column includes two days sat by a retired High Court judge. The Welsh figures contain a very large number of days sat by HHJ Chambers QC (and others) in the Mercantile Court.

<sup>326</sup> The Northern Circuit does not retain records of days sat by s.9 deputies who sit on mainstream QB work.

<sup>327</sup> At Manchester it is believed that about 50% are released.

<sup>328</sup> Sometimes this list is known as the Section 9 list.

<sup>329</sup> If a HCJ is assigned to Winchester, he will sit for not more than the first two weeks hearing civil work (part of which may be taken up by a travelling day and other duties) before turning to criminal work.

<sup>330</sup> Instead, they agreed to hear cases in the County Court general list: see Annex C1 below for details.



386. London is in effect now the HC trial centre for all District Registries in the South-East Region: a civil HC trial at Oxford or Norwich is almost vanishingly rare. Only about 120 QB claims were commenced outside the RCJ, and Mr Justice Bean told me that he had only received six applications for release to a s.9 judge in the first six months of 2008. There were about 70 sitting days on High Court work, almost all conducted by s.9 CJs. Those actions that are not released are transferred to London, where a QB Master will grade them with a Category A, B or C grading. Most of these actions are likely to be graded Category B, and whether a Category B case is in fact tried by a HCJ or a s.9 deputy depends on the number of HCJs and the number of late settlements in the QB General List at the relevant time.
387. On the Western and Welsh Circuits a non-released case is very rare. Unless a HCJ pays a traditional circuit visit to Winchester, special arrangements have to be made to find a HCJ to try it (if it does not settle). On the Western Circuit this is done through the Circuit Judicial Co-ordinator. These arrangements are untidy, because very often the action settles after arrangements have been made for a HCJ to try it, and there is no suitable alternative work for him to do. Only eight cases at Bristol have not been released in the last two years. Four settled, two were transferred to London and tried by s.9 judges, and two await trial in the autumn: there were 24 trials at Bristol by s.9 judges during the same period. There were also four HC trials by a HCJ at Winchester and two by a s.9 deputy during this period: all the rest settled.
388. The available statistics are so unreliable that it is probably safest to say that the proportion of trials actually tried by HCJs depends heavily on the amount of sitting days allotted to HCJs on each circuit. If most of the HCJ's original list all settles, he will try cases that were released to a s.9 deputy but will be tried by him for want of anything else to try. On that basis the proportion of HC trials conducted by a HCJ probably varies between about 50% and 80%. Details of High Court sittings on five of the circuits (excluding the South East) are set out in Annex C1-5.

### 3.1.2 Specialist QB actions outside London

389. The figures in the Tables in Annexes C1-C5 for the year 2007-8 probably convey a fairly accurate picture:

	TCC						Mercantile					
	HCJ	SCJ	CJ	s.9 QC	Total	% heard by deputies	HCJ	SCJ	CJ	Total	% heard by deputies	
Midlands		129	25	1	155	100		210	28.5	239.5	100	
Northern		304			304	100	15	134		149	89.9	
North-Eastern	22	32	23		77	71.4	1	52		53	98.1	
Western		16			16	100					100	

Wales		19			19	100						100
Total	22	500	48	1	571	96.1		16	396	28.5	441.5	96.3

390. It will be seen that virtually all this work is heard by s.9 deputies. During this year Mr Justice Jackson heard a 17-day TCC trial in Leeds, and Mr Justice Patten conducted a 15-day Mercantile case on the Northern Circuit.

### 3.1.3 Chancery actions outside London

391. The tables in Annexes C1-C5 show the following breakdown for the year 2007-8. The different proportions of Chancery and Mercantile cases on the Northern and North-Eastern Circuits (if the figures are correct) may reflect the fact that all three SCJs at Leeds were originally Chancery specialists. The comparatively low figure for Chancery cases in Wales reflects the fact that there was no Chancery specialist SCJ at Cardiff for about a year between the promotion of Judge Wyn Williams QC to the High Court Bench and the appointment of Judge Milwyn Jarman QC to the vacancy, so that the great surge in Chancery work in Cardiff that took place under Judge Wyn Williams QC fell away because there was no Chancery specialist based in Cardiff for a year. Throughout my inquiry I witnessed very serious disruptions to the conduct of heavy civil business which were caused by very long delays in the appointment process for recruiting and selecting new SCJs to posts vacated by others.<sup>331</sup>

	HCJ	SCJ	CJ	S9 Recorders	Total	% sat by deputies
Midlands	26	291	11	37	365	92.9
Northern	26	305		4	335	91.4
North-Eastern	20	381.5	20	67	488.5	95.9
Western	38	191		13	242	84.3
Wales	14	52.5		9	75.5	81.5
Total	124	1221	31	130	1506	91.8

### 3.1.4 Most categories of action at the RCJ

392. The figures in Tables B1-B5 (which do not include TCC sittings) provide what is likely to be a fairly accurate picture of the scene. This Table shows the statistics for High Court sittings for the year 2007:

	HcJs	Retired HcJs	SCJs	CJs	s.9 Recorders	s.9 QCs	Total	% sat by deputies
QB General	1688	28	220	135	127		2198	23.2%
Chancery	2613	88	172		265	130	3268	20%
Admiralty & Commercial	1507		28	37			1572	4%
Mercantile			52.5		7		59.5	100%

<sup>331</sup> In the Lord Chief Justice's Review of the Administration of Justice in the Courts (March 2008) Lord Phillips said at para 4.29; "There is a particular difficulty when a vacancy arises from a promotion because there will be usually little advance notice, but lapse of time presently being experienced can have serious repercussions. The [Judicial Appointments] Commission is working through the problems that it faces and it has my total support."

Administrative	1765	77	45	20	108		2015	12.4%
Total	7573	193	517.5	192	507	130	9312.5	18.7%

### **3.2. Who determines which cases are tried by High Court Judges?**

#### **3.2.1 Non-specialist QB actions outside London**

393. The initial release decision will be made by one of the presiding judge following a recommendation by the DCJs, except where there are formal or informal local instructions whereby actions below a particular value are automatically released to a s.9 deputy. In such cases, if the DCJ considers that there is something special about them that requires the decision to be made by the presiding judge, he will refer it to the presiding judge with a recommendation in the usual way.
394. A brief summary of the case and the issues will have been prepared either by a DJ or by a listing officer. Except on the Northern Circuit,<sup>332</sup> this summary will be emailed to the DCJ, who will make his recommendation, and the presiding judge will then make his decision. Forms are used on some circuits. These make the recommendations and directions easier to give (in tick-box form).
395. Even if an action is released, it will be placed in the s.9 list (see above) and it may still be tried by a HCJ, particularly in a major centre, if other actions settle.

#### **3.2.2 All other actions**

396. In relation to most other actions the DJs and the Masters will give appropriate directions in accordance with the instructions given to them by the senior judiciary from time to time. For example, at the RCJ the High Court Masters will allot Category A, B or C markings. In the Commercial Court virtually all the cases are heard by HCJs. In the Administrative Court the HCJs will give directions as to whether the case is appropriate for a s.9 deputy when granting leave to apply for judicial review. In the TCC in London all these decisions are taken by the Judge in charge of the TCC.
397. The specialist SCJs outside London play a major role in deciding which cases should be allotted to which level of judge, under the general direction of the Chancery supervising judges in relation to Chancery and Mercantile work. If a TCC case warrants a HCJ, a request will be made of the Judge in charge of the TCC in London.

### **3.3 What criteria are used when deciding on the cases which should be tried by High Court Judges?**

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<sup>332</sup> On the Northern Circuit, previous presiding judges have refused to accept these summaries by email.

### 3.3.1 Non-specialist QB actions outside London

398. Formal guidance in relation to general QB business outside London was given by Lord Justice Auld, as Senior Presiding Judge in 1998, although nobody (other than Lord Justice Thomas) referred me to it during my inquiry. In practice on two circuits there is written local guidance. On the other circuits decisions appear to be made intuitively.

399. The 1998 guidance (accompanied by a note suggesting that on different circuits different criteria might be adopted) was in these terms:

“1. Release of High Court civil cases is still necessary because there is not enough High Court Judge time to take all civil cases assigned to the High Court. The aim must be to ensure that High Court Judges do High Court calibre cases.

2. Release must be unrestricted and flexible, and at the discretion of Presiding Judges.

3. As a broad guideline, the following categories of cases should not normally be released:

- Professional negligence where the damages are likely to be very large or the allegations are particularly serious.
- Cases involving novel or difficult points of law.
- Cases involving public rights or special features such as exceptional local or public interest.
- Cases where the damages are very heavy.
- Cases involving difficult disputes between experts.

4. Each case must be released only by a Presiding Judge personally.

5. Both Deputy High Court Judges and section 9 Circuit Judges should be treated alike, i.e. they may try cases specifically released by the Presiding judges. There should be no en bloc release.

6. A case should be released to a given Judge without inviting the views of the parties.

7. This Direction will be reviewed following the implementation of the civil justice reforms.”

400. The Presiding Judges on the Northern Circuit issued the following formal guidelines on 23 May 2000:<sup>333</sup>

“In general, the following categories of claims should not be released:

- Where the damages are heavy, ie over £500,000.

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<sup>333</sup> These Guidelines were developed by Mr Justice Douglas Brown from the Senior Presiding Judge’s Direction. Judge Holman, the present DCJ at Manchester, told me that he has been using somewhat higher monetary guideline figures than those set out above.

- Professional and clinical negligence claims where the damages are likely to exceed £250,000 or the allegations are particularly serious.
- Fatal accidents and claims where the claimant is a child or under a disability where the damages are likely to exceed £250,000.
- Claims against the Police (excluding claims by police officers for injury in the course of employment)
- Claims involving novel or difficult points of law
- Where there are allegations of fraud or undue influence.
- Claims involving public rights or special features (eg exceptional local or public interest)
- Jury trials.
- Claims involving difficult disputes between experts.”

401. On the Midland Circuit the presiding judges issued formal guidance in January 2005 in these terms:

“Each case has to be considered on its merits, and the following guidelines based on value are no more than a starting point. Some small value cases may call for trial by a High Court Judge. They may, for example, be of particular public importance or sensitivity or give rise to complex or novel legal issues. On the other hand, some larger cases are straightforward and may be released. Value is only one indicator of the right level of trial judge. At the lower end of the scale, some cases subject to automatic release may also be appropriate for transfer to the County Court.

In general, cases where the value is not more than £1,000,000 are considered appropriate for release.

Cases which remain in the High Court, and where the value, for allocation purposes, does not exceed £500,000, ignoring contributory negligence, may automatically be released for hearing by a Section 9 Judge, except as mentioned below.

In every case, consideration should be given to whether the complexity of the facts, the legal issues, remedies or procedure involved and/or the importance of the case to the public in general are such that the case should be heard by a High Court Judge.<sup>334</sup> All cases with a high profile, or of public importance, or of great sensitivity must be referred to a Presiding Judge for directions.”

402. I was not shown any formal written criteria that are used on the other circuits. On the South-East Circuit cases valued at less than £750,000 are automatically released, unless the DCJ considers that there are special factors that warrant a presiding judge’s consideration. One DCJ on the Western Circuit told me that there was a general release of all cases up to £1 million to him. On the Welsh Circuit matters are left to the discretion of the DCJ. The last DCJ would not consider referring a personal injuries action to a presiding judge for decision if its value was less than £5 million.

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<sup>334</sup> This would rarely apply to claims which do not exceed £250,000.

403. Criteria quoted to me by DCJs included the following: “the amounts involved and the perceived importance of the case”; “value, complexity, unusual or novel point of law, any other particular sensitivity”; “value, difficulty and sensitivity”; “difficulty, public importance, availability of a HCJ”; “real public importance, the amount involved, whether it is a test case, the availability of local s.9 judges with the relevant expertise (eg defamation).”
404. I formed the impression that in practice most of these decisions are taken intuitively. Sometimes a presiding judge trusts the expertise of a particular DCJ (or other named s.9 (1) judges) so much that he is willing to release the action to them by name. In any event, once a case is released, it will usually be for the DCJ to give directions as to which judge or judges should try the case.<sup>335</sup>

### **3.3.2 Other actions**

405. I do not believe that any formal criteria are used on a day to day basis elsewhere, although it was clear that decisions were taken along the lines set out in Section 3.3.1 above, very often dictated by the non-availability of HCJs outside London for all but the heaviest cases. The Jackson Committee<sup>336</sup> assembled a list of different criteria that were being allegedly used in different sectors of High Court work in London, but so far as I am aware these criteria were not published and most decisions were being taken by intuition. I was often told by case management judges that although they could not clearly articulate what work was fit for a HCJ, they could identify it fairly quickly when they saw it.<sup>337</sup>

### **3.4 Are the current arrangements for allocating cases to High Court Judges satisfactory, and if not, why not?**

406. In the answer to this question I am concerned only with the cases assessed as “HCJ only” or “HCJ, if available: otherwise a s.9 deputy” and not those cases that have been unreservedly released to a s.9 deputy.
407. The arrangements are generally satisfactory.
408. They are unsatisfactory, however, outside London in relation to centres where a HCJ does not pay a regular visit for civil work, or in relation to centres (such as Newcastle)

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<sup>335</sup> In Manchester the Diary Manager has the responsibility of locating an appropriate judge. She will start by looking at the availability of the s.9 (1) CJs at the Centre, and then move on to consider other names if none of these are available.

<sup>336</sup> See Section 4.3 below.

<sup>337</sup> Many of them referred to the difficulty of describing an elephant in this context. They could not describe it, but they knew when it was in the room.

which a HCJ may only visit for a week for civil business (of which one day may be a travelling day).<sup>338</sup>

409. They are unsatisfactory partly because the short visit may be at a time that does not suit the convenience of the parties, or because the length of the visit will not accommodate more than one four-day trial, or because the special arrangements that are made are rendered nugatory because the action settles shortly before the trial and the HCJ is then given no suitable alternative work to do.<sup>339</sup>
410. A HC multi-track action fit for a HCJ has to be fixed about nine months in advance. At that distance of time the identity and expertise of the prospective HCJ trial judge will not be known, and the parties may prefer the “devil they know” in the form of the local DCJ or other local s.9 judge, and consent to trial by a s.9 deputy who will be able to case-manage it through to trial (or, more likely, settlement).
411. The arrangements now in place on the Northern Circuit and in Birmingham and Leeds appear to work well. The flexible way in which, for instance, a QB civil judge in Liverpool may hear Chester or Manchester business if there is no sufficiently weighty Liverpool business is an imaginative way of introducing the requisite flexibility. This cannot be achieved unless a diary manager has control of the relevant lists in two or more centres at once.
412. I detected no particular difficulty in relation to other work outside London or to in the allocation processes in London, given the small number of HCJs who were available in most sectors of court business outside London and the much larger pool available in London.

### **3.5 What problems are caused by jurisdictional constraints?**

413. For present purposes I will simply list the problems and anomalies I encountered. These mainly arise from the fact that the country between the High Court and the County Court needs revisiting now, or because the process of unifying the procedural rules has not yet been completed. I will consider all the items on the list in greater detail in Section 5.1.3 below.

1. In a civil action in the County Court a judge, however experienced, has no power to grant any form of freezing order except for the purpose of freezing the property which forms or

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<sup>338</sup> In the annual County Court report for 2007-8 complaint was made of the volume of late settlements of High Court cases at Newcastle. “The High Court listing period is something of a farce. The HCJ turns up to find the only civil work left are the appeals of vexatious or *Bhamjee* litigants. In the most recent 2-week period Mr Justice Wilkie heard a one-day case.”

<sup>339</sup> I discuss these problems at greater length in Section 5.1.4 below.

may form the subject matter of proceedings, or in aid of execution of a judgment or order made in the proceedings.<sup>340</sup>

2. This either means that the action, however trivial, has to start in the High Court (or, often, in the Mercantile Court), or a clumsy form of application has to be made in the local District Registry for a freezing order which is to apply in the County Court action. Often this will be heard by a s.9 judge (who may turn out to be the same judge as would hear the County Court action). Once the freezing order is in place, the action generally goes back to the County Court.

3. A s.9 (4) deputy has no jurisdiction to sit in the County Court, if no High Court business is available. If he is a s.9 (1) Recorder who has been booked to sit as a s.9 judge in the High Court for a period he will be remunerated at a lower rate if he is willing to sit as a Recorder in the County Court.<sup>341</sup>

4. A s.9 deputy may be ticketed to sit in Chancery business, but may not be ticketed to sit in Mercantile or TCC business, even if a case to which the listing officer would like to assign him raises issues with which he is extremely familiar.

5. A HC trial may be accidentally listed before a judge who does not have a s.9 ticket, and the mistake is not spotted until after the trial has started, or until after it has been completed (when a complaint may be made by the losing side that the trial judge had no jurisdiction).<sup>342</sup>

6. Although County Court actions may be concerned with claims of the same weight and value as High Court actions, the contempt jurisdiction of the County Court is different.<sup>343</sup>

7. So long as a released action is retained in the High Court, an experienced circuit judge has no jurisdiction to hear an interlocutory appeal from a district judge unless he has a s.9 ticket, even though he may be hearing appeals from district

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<sup>340</sup> See further Section 5.2.6 below.

<sup>341</sup> See further Section 5.2.10 below.

<sup>342</sup> See further Section 5.2.10 below.

<sup>343</sup> The High Court has power to punish any contempt by up to two years imprisonment. That power is available in the County Court only for breach of an injunction or undertaking. In the County Court the maximum sentence for assaulting an officer of the court in the execution of his duty is 3 months (County Courts Act 1984 s.14) and for insulting (which includes threatening) a judge, juror or witness or for misbehaving in court is one month. (*ibid*, s.118). There is also a maximum sentence of one month for rescuing goods taken in execution (*ibid*, s.92). It has been drawn to my attention that where proceedings for committal are in train pursuant to CPR 32.14(1) when a witness in a County Court action has made a false witness statement without an honest belief in its truth, two of the Practice Direction give misleading advice as to the procedure, which must be by way of application for committal in the Divisional Court: compare PD32 para 28 and the Contempt PD at para 2.1 with RSC Order 52 Rule 1(2) (in CPR Schedule 1). See further Section 5.2.8 below.



judges in comparable County Court work with no need for a ticket.<sup>344</sup>

8. A notice of appeal to a High Court judge may be filed at a time when there is no suitable HCJ available and the emergency relief that is sought is in effect dispositive of the appeal.<sup>345</sup>

9. An appeal may be ready for hearing by a HCJ on his visit to a provincial centre, but the appellant (often a litigant in person) is not available during his short visit.<sup>346</sup>

10. Some of the complexities of the arrangements are not easily understood, and inexperienced staff or practitioners – or judges – may make mistakes.<sup>347</sup>

11. In a non-unified system litigants in person may “play the system” either deliberately or through ignorance.

12. The specialist equity jurisdiction of the County Court is limited to £30,000.<sup>348</sup>

13. The County Court’s jurisdiction in relation to the enforcing of charging orders (in respect of property held in one name<sup>349</sup>) is similarly limited to £30,000.<sup>350</sup>

14. The County Court’s contentious probate jurisdiction is limited to £30,000.<sup>351</sup>

15. The County Court has exclusive jurisdiction in a matter (or matters) which it would be appropriate to appoint a HCJ to hear.<sup>352</sup>

16. There are some disproportionate anomalies about the execution of low value County Court judgments.<sup>353</sup>

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<sup>344</sup> See further Section 5.2.14 below.

<sup>345</sup> See further Section 5.2.14 below.

<sup>346</sup> See further Section 5.2.13 below.

<sup>347</sup> See further Section 5.2.10 below.

<sup>348</sup> See further Section 5.2.4 below.

<sup>349</sup> Where the property is held in more than one name, the County Court has unlimited jurisdiction to enforce a sale on an application made under the Trusts of Land and Appointments of Trustees Act 1996: see High Court and County Courts Jurisdiction Order 1991, Article 2.

<sup>350</sup> See further section 5.2.4 below.

<sup>351</sup> See further Section 5.2.4 below.

<sup>352</sup> See further Section 5.2.9 below.

<sup>353</sup> If a judgment is for a sum less than £600 or arises out of a regulated consumer credit agreement, it must be enforced in the County Court. If the judgment is for £5000 or more it must be enforced in the High Court. The creditor has the choice of County Court or High Court where the debt is for a sum less than £5000 unless the enforcement of the judgment must be in the County Court. See further Section 5.2.5 below.

17. Defamation claims, however trivial, cannot be issued in the County Court, or tried there except by consent or on a transfer from the High Court.<sup>354</sup>

### **3.6 To what extent does trial by deputies cause (a) confusion (b) disillusion/disappointment to (a) the litigant and (b) his advisers?**

414. Outside London, where people are used to High Court actions being tried by deputies, the evidence of many DCJs was to the effect that this did not constitute a problem. Judge Stewart QC (DCJ, Liverpool) said that most ordinary court users (i.e. the general public) are not aware of the difference between a HCJ and a deputy and are not concerned. For the commercial and public clients who are aware of the difference, there is little, if any, confusion. Nor was he aware of any dissatisfaction, speaking from his experience as DCJ and, previously, as a local QC. At local court users' meetings and judges' forums this has never been raised as a contentious issue.
415. Judge Holman (DCJ, Manchester) said that he would be surprised if there was any significant evidence of confusion. Judge Griggs (DCJ, Devon & Cornwall) said that the system seemed to be reasonably well understood by court users, and his local court administrators were not aware of any disillusion or disappointment. Judge Geddes (DCJ, Worcester) said that the system of deputies caused no confusion that he knew of. Judge Harris QC (DCJ, Oxford) said that the assignment of a deputy to hear a case was sometimes a disappointment, especially if the action has been transferred to London to get a HCJ and is allotted a deputy. On my visits to courts, the local court manager sometimes told me that the system was confusing to litigants in person.
416. At the RCJ, where there is a prevailing culture for solicitors in QB actions to feel that their clients are entitled to a HCJ,<sup>355</sup> disappointment and anger is sometimes voiced to the listing officer when they are told that they will be allotted a deputy, particularly if the action has been transferred for trial to the RCJ, and particularly if the deputy to whom the case is assigned comes from the city from which the action was transferred.
417. Judge Grenfell (DCJ, Leeds) told me that it is confusing for litigants and their lawyers to have to address him as "Your Honour" most of the time and "My Lord" if he happens to be hearing a HC trial or application.
418. The overall impression I obtained was that the very frequent use of deputies, particularly outside London, does not cause any significant disillusion, disappointment or confusion, except that disappointment is caused to some solicitors conducting actions in the QB General List in London when their cases are allotted to a deputy.

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<sup>354</sup> See further Section 5.2.3 below.

<sup>355</sup> Often for claims at a far lower financial value than would be contemplated for a HCJ outside London.

### **3.7 What are the practical differences between the handling of cases in the High Court and the County Court?**

419. In general, there are very few practical differences (except that the HC trial judge is always called “My Lord”) outside London, because there are unified arrangements for filing, listing and case management.
420. The clerking and order production are undoubtedly better in the RCJ than elsewhere, although the level of administrative support at the RCJ has also been reduced in recent years.
421. The PTR for QB HC actions outside London that are released are likely to be conducted by the eventual trial judge.<sup>356</sup> The entire case-management of TCC and Mercantile cases outside London will be conducted by the eventual trial judge, as will be the case with TCC and Commercial Court actions in London. QB HC actions in London will be case-managed by QB Masters except for group litigation assigned to a particular HCJ or heavy QB actions, where the trial judge may, exceptionally, conduct the PTR.
422. There has been a Chancery tradition that actions are case-managed by Chancery Masters at the RCJ and by Chancery DJs outside London except for the heavier cases which will be case-managed by Chancery specialist judges outside London. In London a Chancery HCJ will conduct a PTR only if the Chancellor has nominated him for this purpose.
423. In lower value County Court multi-track cases questions of proportionality are likely to play a larger part (e.g. greater use of single joint experts, and perhaps less sympathy for late applications to adjourn).
424. Except on circuits which have adopted arrangements for the automatic release of many cases, the DCJ (and the relevant presiding judge) has to deal with release recommendations in all HC actions, even though on some of the circuits the vast majority of them are in fact released by the presiding judge.
425. HC and heavy County Court actions outside London are assigned to a specially selected listing officer, supported by more skilled or experienced administrative staff. Chancery, Mercantile and TCC actions are handled and listed by dedicated specialist staff, and the practice of identifying specialist DJs for Chancery and Mercantile work is developing at centres where this work is conducted by SCJs. In each circuit there is a designated TCC liaison judge whose duties are to encourage DJs on the circuit to recognise TCC cases that need specialist handling.

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<sup>356</sup> In Manchester the DJs will generally continue case-managing an action until trial or settlement, but on occasions one of the two local DCJs will undertake this role.

### **3.8 How valuable is the practice of starting litigation in a Division (as opposed to a specialist court or list)?**

426. Outside London this is irrelevant. Cases destined for a Chancery judge will be marked “Chancery business” in the County Court and will be started in a Chancery District Registry in the High Court. TCC cases will be similarly identified at both levels, as will Mercantile cases in the High Court.
427. So far as the conduct of business in the High Court is concerned, if an experienced lawyer considers that his non-specialist action deserves High Court treatment, he will start it in the High Court and in the QB Division, but it is the level of court and the absence of a specialism that need to be identified for case-management and listing purposes.
428. I received a good deal of evidence that there are many categories of High Court claim that are capable of being issued, case-managed and tried in either the Chancery or the Queen’s Bench Division (Commercial Court or Mercantile Court). In these cases the choice depends mainly on the predilections of the claimant’s lawyers. A desire for the case to be case-managed by a Commercial Court or Mercantile judge (as opposed to a DJ or Chancery Master) may play a part in the choice. So may the waiting times for trial (if they differ).<sup>357</sup>
429. At High Court level the Divisions provide a valuable cadre of skilled and experienced judges who do not require to be individually “ticketed” for any of the business conducted within the Division,<sup>358</sup> although in practice cases will be assigned by listing officers, in consultation with the relevant lead judge, judge in charge, or Head of Division, to judges with the requisite expertise.<sup>359</sup>

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<sup>357</sup> See also Section 1.7 above.

<sup>358</sup> Within the Chancery Division six judges (two of whom are specialists) are currently assigned to the Patents Court. Within the Queen’s Bench Division 13 judges are currently assigned to the Commercial Court; 45 judges are nominated to sit in the Administrative Court; three HCJs are nominated to sit full-time or half-time in the TCC, and a further seven HCJs have been nominated to sit in the TCC if required. There are now two judges within the Division who customarily case-manage and hear defamation cases, but there are no formal arrangements for nomination.

<sup>359</sup> The Chancellor has observed to me that if there were no Divisions, there would still need to be the same groupings of judges under a different name.

## Part IV. Future developments

### 4.1 The effect of the Judicial Resources Review and the Justice Outside London report

#### 4.1.1 What will be the practical effect of implementing the recommendations in these two reports?

430. This question cannot be answered without first making reference to the studies conducted in January 2008 by Lord Justice May and the Chancellor of the ongoing needs of the Chancery and Queen's Bench Divisions respectively.

##### 4.1.1.1 Queen's Bench Division

431. In November 2004 and January 2008 Lord Justice May, as the judge in charge of the deployment of HCJs in the QB Division, conducted studies of the total requirement for QB judges (as compared with the number of such judges in post). On the first occasion a detailed survey had been arranged, which resulted in a report issued in April 2005. On the second occasion he noted that things had not changed materially, and that a re-run of the November 2004 survey (which was very laborious) was not justified.<sup>360</sup> On this occasion he concluded that the approximate *shape* of the current practical need for judges sitting in QB jurisdictions and of the actual deployment of the 72 QB judges was set out in the following Table:<sup>361</sup>

Court	Need	QB judges
QB non-jury and jury list	8	5
Court 37 <sup>362</sup>	1	1
Divisional Court	2	2
Administrative Court (inc. SIAC)	14	9
Circuits	25	23
Commercial and Admiralty Court	9	8
TCC	4	2
CACD	12	9
EAT	2	2
AIT	1	1
Long criminal trials	6	5
Long civil trials/Inquiries	2	2

<sup>360</sup> At about the same time he told me that staff reductions at RCJ made it unrealistic for me to request that such a survey be carried out to underpin my inquiry.

<sup>361</sup> He explained that these figures were not examples of actual practical need or deployment; but a simplified theoretical version to show the general shape.

<sup>362</sup> The modern equivalent of the QB Judge in Chambers who used to sit in Room 98 at RCJ to hear applications for injunctions, appeals from Masters and other interlocutory business which warranted the attention of a HCJ.

Tribunals/conferences/etc.	1	0
Compensatory leave/illness	3	3
Totals	90	72

432. He added that further demands on QB judge-time could result from the implementation of the UK Borders Act 2007 in its present form (3 judges); time out of court that is reasonably required by presiding judges for their administrative duties (at least 3 “judge-years”); interviewing and sifting for the Judicial Appointments Commission (significant); the new Upper Tribunal within the Tribunals Service (?2 judges); and Induction training for QB judges.
433. In his April 2005 report he expressed the view that there was virtually no spare capacity among the judges sitting in the QB Jury and non-Jury Lists, and none that could be safely diverted elsewhere in advance, and that almost all the matters heard during the survey period by HCJs (and a significant proportion of those heard by deputies) were classified as High Court work.
434. In January 2008 he said that the number of judges assigned to hear work in the QB General List varied. This was because it was in practice the last place to which he assigned judges when all other necessary slots were filled. He added that there had to be some part of the whole to which this applied, and that it was also the first place to look for a fire brigade judge when problems arose.
435. There was a real need for just a little bit of slack. There was a constant (almost daily) need to find solutions to problems which arose somewhere in the system. Some of these were real emergencies.<sup>363</sup> Other problems arise when:
- judges are ill
  - trials overrun;<sup>364</sup>
  - judges have to undertake other functions, sometimes at short notice;<sup>365</sup>
  - a judge imperatively needs time in which to write a judgment after a long case;
  - judges cannot hear particular cases because of apparent conflicts of interest.<sup>366</sup>

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<sup>363</sup> In the first week of that term a QB judge had to be replaced in Birmingham for a 7-10 day criminal trial at effectively one working day’s notice.

<sup>364</sup> This particularly applied to heavy criminal trials on circuit, where there was literally no alternative to the trial continuing. In long criminal trials, there was an increasing tendency for juries to take days, rather than hours, to reach their verdicts.

<sup>365</sup> For example, Boundary Commission, Parole Board, administrative meetings, seminars, sometimes duties abroad etc.

436. He said that there were, of course, compensating factors,<sup>367</sup> but taking the QB operation as a whole, the majority of the judges sat in courts or lists whose cases did not habitually settle or go short.
437. In his earlier report he gave detailed reasons for his conclusion that the minimum continuing need for QB judges in this list was then seven.<sup>368</sup> The survey had showed that the number of QB judges theoretically required to hear matters which were properly called High Court work during November 2004<sup>369</sup> was 7¼ judges. There was some work currently being heard in the QB list which could (theoretically<sup>370</sup>) devolve downwards. If it were to do so, it would reduce the need for deputies, but not reduce the need for QB judges in this list. The amount of work in this list judged in the survey to be s.9 work was 34 judge days or 19% of the total. The amount of this done by QB judges was insignificant.
438. 34 judge-days of work in 4 weeks was the theoretical equivalent of fewer than 2 judges. This was less than the average number of deputies sitting in the list.<sup>371</sup> If this small amount of work went, for example, to the Central London Civil Justice Centre, it would simply be moving it from one circuit judge to another; or even to the same circuit judge in a different place, if the circuit judge sitting as a s.9 judge in the QB list came from Central London in the first place.
439. He considered at that time that any reassessment of the work in this list which was currently regarded as High Court work would tend to destroy the list completely, and should not be contemplated. Any such reassessment would have to consider the jury list<sup>372</sup> which, though somewhat attenuated, was still properly regarded as a full and necessary High Court element. An important consideration was that QB judges needed the experience of trying ordinary civil work (a) for variety, and (b) as a necessary training for possible promotion.
440. In April 2005 he believed that there was scope for remodelling the QB list to be a *more specialist* list. This, however, he said, was a large subject, and it could not be done without quite significant reconstruction, which was beyond the scope of that survey. At that time he had judged that the minimum continuing need for QB judges in this list was seven judges.

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<sup>366</sup> I was told that this happened last autumn when the specialist judge assigned to hear a heavy clinical negligence case realized when he read the papers shortly before trial that he would have to recuse himself, and a substitute had to be found at very short notice.

<sup>367</sup> For instance when cases settle or are heard in a shorter time than was estimated.

<sup>368</sup> He explained that the Table in his January 2008 report contained the number 5 simply in order to make the numbers work.

<sup>369</sup> This was a reasonably typical month.

<sup>370</sup> “Theoretically” because the arrangements to achieve this would not be easy.

<sup>371</sup> The average number of deputies, including circuit judges, who sat in the QB list during 2004 was 2½.

<sup>372</sup> Now restricted to defamation cases, and increasingly to case-management work because defamation cases now rarely go to trial.

#### 4.1.1.2 Chancery Division

441. In January 2008 the Chancellor referred to the table which showed the number of days sat by s.9 deputies in the Chancery Division at the RCJ between 2000 and 2007, and the table which showed the number of High Court claims issued outside London between 2003 and 2006.<sup>373</sup> He said that the need to use s.9 deputies continued at an average level of 22%, that the work of the Division was increasing, and that no reduction in work was foreseeable in the immediate future. The transfer of business to new specialist Chancery judges outside London had not reduced the need for s.9 deputies in London, as the figures showed.
442. The more detailed survey conducted in a five week period in March-April 2005 had shown that 94% of the cases considered in the survey had warranted a hearing by a HCJ, but that only 84% had actually been heard by a HCJ. He had no reason to suppose that a further survey would not produce the same conclusion.
443. He believed that the introduction of the Upper Tribunal was likely to be at best neutral, since the loss of work into the High Court would be offset by the need for HCJs to do that work in the Upper Tribunal.<sup>374</sup> Furthermore, the current economic outlook was only consistent, based on past experience, with a substantial increase in High Court work in the Chancery Division arising from corporate insolvencies. The impact of a recession on property litigation of all sorts was always considerable.

## 4.2 The recommendations of the Judicial Resources Review in 2005

444. In 2005 the Judicial Resources Review was requested to agree the necessary features of those cases that, exceptionally, required to be dealt with at High Court level.<sup>375</sup> It proposed three broad features of High Court work, according to the nature of each case, that should be the benchmark applied in assessing the “exceptionality test”. These features were:

*Complexity.* This could be unusual complexity either in points of law (e.g. judicial review) or points of fact (e.g. City fraud cases) or specialist evidence (e.g. the upper end of the work of the TCC, intellectual property or revenue work).

*Public impact, importance or significance.* These could be cases where the court’s decision would have a significant impact on society (e.g. “right to life cases), or where the case involved high profile litigants or witnesses. Cases involving criticisms of public officials or particularly serious issues of professional reputation (e.g. of a consultant surgeon) also fell

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<sup>373</sup> He had been told by Mr Justice Patten and Mr Justice Lewison that there had been no abatement in 2007 in the number of High Court Chancery claims issued.

<sup>374</sup> E.g. tax appeals. See, further, on the effect of the introduction of the Upper Tribunal, Section 4.5 below.

<sup>375</sup> In his comment on these terms of reference Lord Woolf CJ said that the better approach was to start off with an assumption that with limited exceptions cases should not be dealt with by HCJs unless they had features which justified their being dealt with by HCJs which made them exceptional.



into this category, as they had implications for perceptions of expert or authoritative figures in public life. Cases of public importance tended to have a legal significance attached to their result, often requiring specialist expertise that required them to be dealt with at High Court level. Cases of public interest might not be of High Court complexity, but because of the attention and pressure put on the judge hearing the case (particularly where leading counsel were involved) it might be preferable that they were heard by a High Court Judge.

*Precedent-setting.* These were cases of legal significance, which tested points of law and affected legal precedents. Examples of such cases were cases brought under the Human Rights Act 1998, judicial review cases in the Administrative Court and appeals from lower courts and from tribunals.

445. The Review suggested that there was a hierarchy of work - ranging from the highly specialist “inner core” of work that must be dealt with by a HCJ with a specific specialism to more general work that could be dealt with by suitably experienced s.9 and/or Circuit Judges – and that the system should be organised to recognise this reality. The work of the High Court should be recognised as falling into one of two categories:

Category 1 – a limited number of cases that must be heard by a High Court judge with exceptional competence in the specialist subject(s) with which the case is concerned;

Category 2 – cases that must be heard by a High Court judge, but can be tried by any High Court judge with the suitable skills and experience.<sup>376</sup>

446. Below these two categories, the remaining work should be recognised as falling into one of these two categories

Category 3 – cases that can be heard either by any High Court judge or sufficiently experienced less senior judges.

Category 4 – cases that should not normally be heard by at High Court level (because they do not meet the proposed “exceptionality test”).

447. The Review considered that such a categorisation of work already operated in practice in most areas, but on a less formal and systematic basis. The value of placing such systems on a more formal footing was to achieve greater transparency, to encourage greater consistency, and to enable a more rigorous assessment of which areas of work fit into which category. It was recognised that at the margins practical listing sometimes required cases to be heard by whichever suitable judge was available at that time, and when the alternative on the ground might be unacceptable.

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<sup>376</sup> It was considered that there would be more cases in this category than in Category 1.

448. The Review suggested an indicative list of the sort of work that would fit into each of the four categories:

**Category 1** work must include that which is most complex, which has the greatest public impact, importance or interest and where there was a need to test points of law and to establish precedent. This category, therefore, should include cases where a declaration of incompatibility with the European Convention on Human Rights is claimed and civil cases of a particularly complex *and* specialist nature, particularly in emerging areas of law or where there is no precedent to follow.

**Category 2** work must be of sufficient complexity, public /impact/ importance/ interest and/or of a precedent-setting nature to require it to be heard at High Court level. This category should therefore include civil cases of a particularly complex nature, but where specialist knowledge is not necessarily required, appeals from circuit judges and those tribunals where the appeal route is to the High Court, and civil claims which, if successful, could well result in an award exceeding £5 million.

**Category 3** work need not necessarily be dealt with at High Court level, but exhibits some of the features of that higher level work. This category should therefore include civil claims which, if successful, could well result in an award exceeding £ [500,000]<sup>377</sup> (but not more than £5 million); appeals from district judges; specialist civil work, but not of particular complexity, and generally involving cases over a given monetary amount (e.g. TCC, Mercantile etc); and cases involving quite difficult points of law where the law is not yet fully settled.

**Category 4** work is that which does not warrant High Court attention. It should include less complex civil work and some Proceeds of Crime Act work from the Administrative Court (where disputes are on points of fact rather than points of law).

### **4.3 The recommendations of the Jackson Committee in 2006**

449. Following a period of public consultation on these recommendations, Mr Justice Jackson was invited by the Civil Procedure Rules Committee (“CPRC”) to chair a sub-committee to suggest how the recommendations in this review should be implemented, so far as they related to the conduct of heavy civil business.

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<sup>377</sup> When he was Lord Chancellor Lord Falconer suggested (provisionally) that this figure should be reduced from £1 million to £500,000 after considering the responses to consultation.

450. After considering the allocation criteria used in different areas of High Court business the Jackson Committee concluded<sup>378</sup> that the present system of allocation was not entirely equitable. Litigants in some areas got more than their fair share of High Court Judges, while litigants in other areas got less.
451. They agreed with the Judicial Resources Review proposal to establish a uniform set of criteria to be applied across the board for the allocation of civil cases to High Court Judges for trial or substantive hearing, and recommended the adoption of a new Draft Practice Direction in the following terms:
1. The High Court bench comprises 108 High Court judges (“HCJs”), only some of whom are available for civil work. The criteria set out in this practice direction are intended to assist in determining which civil business (other than appeals under CPR Part 52) should be allocated to those HCJs.
  2. In determining whether a trial or substantive hearing warrants allocation to an HCJ, both judges and listing officers shall take into account the following criteria: (a) complexity, size and difficulty; (b) public impact and significance; (c) the nature and importance of any points of law or practice arising; (d) the severity of the remedy sought or the amount of money which is at stake.
  3. (a) Complexity, size and difficulty. The factors to consider here are the length of hearing, the volume of written and oral evidence, whether the subject matter is of a specialist nature, the complexity of the evidence (both factual and expert) and, in general terms, the difficulty of the case. It is appropriate for HCJs to be assigned to cases which are particularly difficult.
  4. (b) Public impact and significance. The factors to consider here are the impact on society of the outcome, public interest in the case, and the nature of the case (e.g. does it seriously affect reputation?). If the case concerns the performance of a public duty or a challenge to the conduct of a public authority, this is a pointer towards the need for an HCJ. In general terms, it is appropriate for HCJs to be assigned to cases which are particularly significant.
  5. (c) The nature and importance of any points of law or practice arising. Many civil cases raise questions of law on which there is no authority directly in point. It is necessary to consider whether the case in question is likely to set a precedent, and how important the points of law are (i) in relation to that case and (ii) generally. Occasionally cases

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<sup>378</sup> Their report was published in August 2006.

raise questions of practice or procedure which are of general importance and merit allocation to an HCJ on that ground.

6. (d) The severity of the remedy sought or amount of money which is at stake. The severity of the remedy sought (e.g. a swingeing injunction or substantial interference with an individual's rights) is a relevant factor in some cases. The value of the claim, or the sum of money which is at stake, is generally a relevant factor, but not determinative unless the sums involved are very high. Financial value must always be considered in the context of the type of case. Any claim below £500,000 is unlikely to warrant trial or substantive hearing by an HCJ and claims generally need to be well above that level before they merit an HCJ on grounds of value alone.
7. When any trial or substantive hearing is designated as warranting allocation to an HCJ, the reasons for such designation shall be stated in writing.
8. A trial or substantive hearing, which has been designated as warranting allocation to a High Court judge, may be re-designated if this becomes appropriate in the light of developments in the case or changes in the availability of judicial resources.
9. In this practice direction "High Court judge" means a puisne judge of the High Court. It does not include a recorder or a circuit judge acting as a High Court judge pursuant to section 9 (1) of the Supreme Court Act 1981 or a deputy High Court judge appointed pursuant to section 9 (4) of the Supreme Court Act 1981, although such judges may well be appropriate for cases re-designated under paragraph 8."

#### **4.4 The recommendations of the Justice Outside London Review**

452. In April 2006 Lord Justice May was invited to chair a judicial working party<sup>379</sup> to consider the arrangements for access to justice at High Court level outside London and to make recommendations. Their study concentrated on the hearing of civil and Administrative Court cases by HCJs, and they were mainly concerned with the deployment of QB HCJs outside London. Their report was published in January 2007.
453. They recommended that fully operational offices of the Administrative Court should be established in Cardiff, Birmingham, Manchester and Leeds, and that judges should sit

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<sup>379</sup> Its other members were Mr Justice Patten, Mr Justice Gibbs, Mr Justice Roderick Evans and Mr Justice McCombe, and its work was greatly helped by Mr Justice Simon...

regularly to hear Administrative Court cases in those centres.<sup>380</sup> There should be a strong expectation that Welsh cases in the Administrative Court should be heard in Wales.<sup>381</sup> The implementation of these proposals for the Administrative Court should not, however, detract from the quality of the High Court and specialist jurisdictions as they currently operated out of London.

454. They said that there were powerful constitutional reasons for a properly operational Administrative Court in Wales. The Welsh Assembly derives its powers (including the power to make secondary legislation) from various sources, and the Government of Wales Act 2006 will increase its powers.<sup>382</sup> Planning matters are set in a framework and policy that is unique to Wales. In 2001 one third of the Assembly's general statutory instruments were distinctly Welsh in character, and this divergence, which has increased since then, would increase still further under the 2006 Act. Even when the law is the same, decisions affecting Wales were made in Wales by the Welsh Assembly or by the ministers of the Welsh Assembly Government, and judicial review of these decisions should be heard in Wales.<sup>383</sup> Welsh cases could be listed for hearing at any appropriate centre in Wales even if they were administered in Cardiff.
455. At least three CJs, trained and nominated as s.9 deputies<sup>384</sup> to sit in the Administrative Court, should be attached to each of the four regional centres, and two QB liaison judges should operate in tandem with the two Chancery supervising judges.<sup>385</sup> If a HC presence for half the legal term was insufficient, a second nominated judge of the Administrative Court could be deployed on a pre-arranged co-ordinated sitting pattern. The Chancery supervising judges and the QB liaison judges should, with the presiding judges, provide support for specialist SCJs and DCJs.
456. Administrative Court work outside London would represent the first call on the sitting time of these QB judges.<sup>386</sup> Further QB judges should be deployed to hear civil and Administrative Court cases if the volume of work required this.<sup>387</sup>

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<sup>380</sup> Applications under the Terrorism Acts 2000 and 2005 and applications which must or usually are heard by a Divisional Court should normally be heard in London.

<sup>381</sup> Rules of court or a Practice Direction should make provision to that effect. This apart, the court would have the normal power to transfer a case to a different centre if requested.

<sup>382</sup> In particular it will confer on the Assembly powers to promulgate "Assembly measures", i.e. the equivalent of an Act of Parliament in relation to specified matters in devolved fields.

<sup>383</sup> Judges hearing Welsh judicial review claims needed to be familiar with specifically Welsh legislation, and bi-lingual judges might be needed, or desirable.

<sup>384</sup> They would undertake the majority of the paper applications, including AIT opt-in applications, and where appropriate they should have sitting times listed for this purpose. They would also hear judicial review cases which did not require a HCJ. The QB liaison judge would have general oversight of the Administrative Court lists in co-ordination with one of the nominated CJs who would be identified for this purpose.

<sup>385</sup> Mr Justice Beatson has now been appointed in this capacity on the Midlands, Western and Welsh Circuits, and Mr Justice Langstaff on the Northern and North-Eastern Circuits.

<sup>386</sup> If their cases in the Administrative Court settled, they would be available for back-up work from the HC general or Mercantile or TCC lists. Co-ordination by Regional Listing Co-ordinators between the circuits should see that the judge's sitting time was most appropriately used in the provinces.

<sup>387</sup> The governing principle would be that there should be deployed the number of judges required to hear civil and Administrative Court cases outside London that needed to be heard by a HCJ.

457. The listing of all HC and specialist civil cases at each centre should be co-ordinated under the same administration and preferably in the same place. This would facilitate back-up listing between the specialist judges and the HCJ (if available). There should be appropriate training for the nominated s.9 deputies and for administrative staff in the new Administrative Court offices.

#### **4.5 *The effect of the creation of the new Tribunals Service***

458. Under the Tribunals, Courts and Enforcement Act 2007 a Tribunals Service consisting of a First Tier Tribunal and an Upper Tribunal was given statutory form. HCJs may be seconded to sit in the Upper Tribunal, and it is envisaged that the President of one of its chambers, the Administrative Appeals Tribunal will be a HCJ.
459. It is not yet certain how much of the present work of the Administrative Court will be transferred to the new Upper Tribunal. If an appellate tier of the AIT is established, then large quantities of immigration and asylum work could be transferred over the course of the next two or three years. As to the rest, I have seen estimates that suggest that much less than 10% of its caseload will pass to the Upper Tribunal. Part of this work will go automatically, and the size of the remainder will depend on the extent to which new powers are exercised whereby judicial review applications are transferred to the Upper Tribunal, whether as individual applications or as a class.
460. The best estimate that can be given at the moment is that, when taking into account the extent to which cases will be transferred to it out of the courts, the creation of the Upper Tribunal will place greater pressure on available High Court judge-power, probably to the extent of two judges per year when the arrangements are fully operational.

#### **4.6 *Future IT developments in the civil courts***

461. No strategic planning for the future of our civil courts can be sensibly undertaken without a clear understanding of the nature and likely effect of the IT developments in the pipeline. Some of them have reached an advanced planning stage, while some are already in use, albeit in need of significant improvement. In Part I of this report I described how the modernisation initiatives at the start of this decade had been stymied by the Treasury's unwillingness to back them beyond a certain point. As a result, there is still no LINK network in a number of the smaller civil court centres, and our courthouses have been equipped with software designed for general office use and not for handling cases in the courts.
462. This was at least a start, however, and it has meant that staff and judges have now been able to familiarise themselves with modern office and communications software tools in the four or five years since the LINK network was installed at their courts.

### 4.6.1 The modernisation strategy

463. In spite of the setbacks – together with the complications caused by the integration of the magistrates’ courts service in 2005 and a change in HMCS’s major IT suppliers two years later – the essential features of the modernisation strategy have never been abandoned. They involve taking out of the courthouses all the undefended business that does not require any judicial involvement at all. Court process will be issued elsewhere and cases transferred to the appropriate courthouse only when a decision is needed by a judge.<sup>388</sup>
464. They also involve scrapping the antediluvian Oracle database which is now installed at each of our civil court centres and replacing them all with a single integrated Oracle database fit for modern times.<sup>389</sup> They involve equipping the courts with simple electronic diary systems appropriate for a few courtrooms at once together with the more sophisticated electronic diary and listing systems that are needed for the heavier litigation with which this report is concerned. They involve the enhancement and much more widespread use of the Money Claims Online (MCOL) and Possession Claims Online (PCOL) systems that are already making an impact. And, above all, they involve installing up to date electronic filing and document management systems.<sup>390</sup>
465. The tools needed to implement the strategy are called the Service Upgrade Project (SUPS), the Electronic Diary and Management project (EFDM), E-Diary, MCOL and PCOL. No priority has yet been given to the need for the more sophisticated diary and listing tool that was identified as a judicial requirement as long ago as 2001.<sup>391</sup>

### 4.6.2 SUPS

466. The Service Upgrade Project (SUPS) started in 2003. Pilot applications have now been successfully installed in the County Courts at Wolverhampton, Coventry and Northampton, and at the County Court bulk claims handling centre at Northampton. Although it was hoped that a national roll-out could begin in September 2008, the start date has been delayed for six months. It is currently hoped that SUPS will be installed in all our civil courts (including those which have no access to the LINK network at

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<sup>388</sup> Needless to say, if an emergency application before a judge is required, appropriate arrangements will be made to facilitate this

<sup>389</sup> Oracle 5 is being replaced by Oracle 10.2.0.4.

<sup>390</sup> It is intended that EFDM will work alongside SUPS, and that these two systems will be properly integrated to avoid any re-keying of information. The overall plan is that CASEMAN, the antiquated case management system now in use, will be replaced by SUPS (the enhanced version of CASEMAN - and of FAMILYMAN, the system used for family cases). EFDM will then be developed and linked to SUPS to provide enhanced document management capability and other services. The two applications (SUPS and EFDM) will be integrated so that court staff and judiciary will be provided with a single desktop screen showing, for instance, a combination of parties’ names and case events (from SUPS) and documents (from EFDM). The end user will have the impression that only one system is in use.

<sup>391</sup> See “Modernising the Civil Courts: the Judges’ Requirements” (August 2001). This report of a judicial working party chaired by Mr Justice Cresswell envisaged four interlocking systems: a “court record” system feeding in turn an electronic diary/listing system; and electronic case management system fit for both court staff and procedural judges; and an electronic court file for use by judges conducting defended hearings.

present) by September 2010, and that the networks at all those courts will also have been upgraded by then. I have been assured that the necessary funding is in place.

467. This will make an enormous difference to the effectiveness of all these courts. It will enable back office data centres to process routine business away from expensive city centres, it will enable HM Courts Service to operate centralised calls services, instead of taking up the time of busy staff at the courthouse in responding to routine calls, and above all it will represent an essential building block for the electronic filing and document management system that is so very badly needed.
468. It will not, however help judges or court staff in the management of cases once the claim form and the defence have been sent to the courthouse for onward handling. A lot of routine checking could, however, be performed electronically, and court-based staff would be able to do routine processing work in collaboration with the back office data centres once SUPS is in place.

### **4.6.3 EFDM**

469. I am told that the HMCS Board has set in motion a high level review which is due to reporting October 2008 on the strength of the business case and on the general viability of this project. If this review gives it the go-ahead, the EFDM project will give the judges and their support staff the modern working tools they have been promised since 1998. The Business Model is complete, and a series of workshops have identified judicial, staff and user requirements. As things now stand, everything is now in place for a procurement exercise, and after the preferred suppliers have been identified, a Business Design Study<sup>392</sup> will provide the confidence (if it be the case) that the software and the suppliers can deliver what is required of them. The way will then be open for an investment decision to be made in 2009. If all went well, a pilot project could take place in 2010,<sup>393</sup> leading to national roll-out in 2011-2012. There is nothing at all revolutionary about the software that is needed. It is well-tried in other jurisdictions. As I have said, decisions still have to be made on affordability.<sup>394</sup>

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<sup>392</sup> It will be conducted between November 2008 and February 2009.

<sup>393</sup> Involving a major court centre and a back office.

<sup>394</sup> The adoption of EFDM will present a formidable challenge to judges and court staff alike, but the technical and social issues connected with electronic filing projects are well known in other jurisdictions, and unless technical difficulties are now uncovered the prospective gains far outweigh the downside concerns. From my personal knowledge of what occurred when I was a member of the Courts and Tribunals Modernisation Board in 2001-4, there is no reason why the Court Service cannot be relied upon to manage successfully an IT project of this scale and complexity, so long as it has proper leadership and a supportive Board. The £160 million LINK project was completed on time and within budget, and recent difficulties on the IT front are attributable in the main to the fact that the withdrawal of Treasury funding in 2002 left the IT planners to do their best with inadequate tools and resources, or to have the unenviable task of completing a major project (the LIBRA project) after they had had no involvement in the project at all up to the time things started going seriously wrong.



#### 4.6.4 E-Diary

470. Although e-Diary has been rolled out to the County Courts, it has proved something of a disappointment so far. It is clearly inappropriate for Circuit Judge and High Court Judge listing on the scale with which this report is concerned. Efforts are now being made to make the system work reliably in a 4-6 courtroom environment.<sup>395</sup> Development work is continuing, and I have no reason to suppose that it will not prove a useful working tool for small-scale use. Nothing, however, has yet been done to address the need for a more robust diary and listing system to support large scale listing. This should be made a priority within a four-year planning time frame. In its absence the more strategic deployment of our higher judicial manpower, such as is contemplated in this report, cannot sensibly take place.<sup>396</sup>

#### 4.6.5 MCOL

471. Two thirds of all the claims issued by the courts are now issued electronically, far away from the courthouses.<sup>397</sup> Anyone can use MCOL through a PC at their home or at their office to issue a simple money claim at any time of the day or night,<sup>398</sup> so long as the claim is not for £100,000 or more, there is only one claimant and not more than two defendants. In the next 12 months it is hoped that the (now obsolete) Operating System will have been upgraded, the system's capacity will have been increased and its performance improved; and other business requirements, including the facility to pay by direct debit, will have been satisfied.

472. Once EFDM is in place, MCOL's functionality can be significantly enhanced.

#### 4.6.6 PCOL

473. PCOL was rolled out to the courts over a year ago. It enables simple possession claims based on rent or mortgage arrears to be issues online away from the courthouse. The claim form will include the details of the first hearing date, because default judgments are not available in possession actions.

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<sup>395</sup> At the time of my inquiry the need to improve the speed of the system and the way cases can be moved around the list, and the need to develop its capability to produce cause lists in Word software were being actively addressed.

<sup>396</sup> The report has identified on the one hand a need for HCJs to handle more of the heavy trials that take place, or should take place, outside London, and on the other hand the very high incidence of pre-trial settlements that have frustrated most previous efforts to address this need. Diary and listing staff must have modern working tools if they are to identify, in consultation with the judiciary, robust, workable solutions to these problems.

<sup>397</sup> In the 12-month period up to 31<sup>st</sup> March 2008 755,814 claims (55% of the total) were issued by the Claims Production Centre and 152,151 (1% of the total) were issued by MCOL. 907,965 claims were issued through these two systems, representing 66% of the total. It is an important part of HMCS planning, backed by strategically selected fee discounts, that these numbers should increase still further. The manual handling and keying of undefended court business should form an insignificant part of the work of the courthouse of the future.

<sup>398</sup> In June 2008 the system was "down" for a week, but I was assured that this is most unlikely to happen again.

474. All eligible claims have been input to PCOL either direct by users or manually by HMCS staff.<sup>399</sup> In the month of April 2008 55% of all claims input to PCOL were input direct by users.<sup>400</sup> PCOL has had its fair share of teething troubles, however, and staff have been understandably concerned with its slowness and all the inefficiencies inherent in the system at present. I watched PCOL in use on my visit to Birmingham, where staff were compiling and forwarding to the Project team a running tally of the problems they experienced.<sup>401</sup>
475. I understand that urgent steps are now being taken to cure the main defects in the system, and there is no reason to suppose that the value of PCOL – and its take-up – will not continue to increase as time goes on. The roll-out of SUPS will make a difference here, too, and EFDM will complete the computerisation of this pivotal part of the courts' overall business, thereby making the task of the DJs and their support staff in the courthouses significantly more straightforward.

## **4.7 New court buildings in the pipeline**

### **4.7.1 The Rolls Building**

476. The Rolls Building is a five-storey office block in Fetter Lane, about two hundred yards away from the RCJ, which is being converted to provide courtrooms, judges' rooms, consultation rooms and ancillary facilities for the judges of the Chancery Division, the Commercial Court and the TCC. The arrangements were still being finalised during the course of my inquiry, and it has now been decided that in addition to all the HCJs in the Chancery Division, the Commercial Court and the TCC, all the Chancery Masters and four of the Company and Bankruptcy Registrars will move there, along with their support staff. The twenty Social Security Commissioners, who form part of the new Upper Tribunal, will occupy 50% of the fifth floor of the building together with the eight lawyers and 20 administrative staff who support them.
477. Final decision-making over the Rolls Building was delayed in part by continuing discussions over the future of that part of the Chancery Division's High Court jurisdiction at the RCJ which is concerned with low value insolvency matters. It is now proposed that two of the Bankruptcy Registrars and their support staff of 20 will not

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<sup>399</sup> About 22,000 claims per month (85% of all possession claims) were input to PCOL in the 12 months prior to March 2008. The balance (about 15%) were not simple arrears cases, and were input manually to CASEMAN in the traditional way.

<sup>400</sup> Online take-up varies from 63.9% in the North West Region to 44% in London. The reduction in the PCOL issue fee from £150 to £100 led to a dramatic increase in user take-up. On one of my regional visits, however, I learned that the local City housing authority were not using PCOL for want of the £5,000 needed to make it compatible with their own rent arrears systems. At another I learned that a major firm of solicitors, with offices and clients nationwide, were still refraining from using PCOL and sending all their requests for claim forms to be input manually and laboriously by court staff. These curiosities will surely be ironed out as time goes on.

<sup>401</sup> They told me that it was very bad for customer relations to have to tell them that PCOL had crashed yet again. On the other hand, they already appreciated the advantages, denied to them by CASEMAN, of having the relevant Court order accessible on the system, and to be able to type a postcode that brings up instantly the name of and address of a solicitor or a party to the action.

move to the Rolls Building and a large part of the RCJ's low level insolvency jurisdiction<sup>402</sup> will be devolved to the Central London Civil Justice Centre.

478. It is hoped that the Rolls Building will be open for business by January 2011 at the latest. All the HCJs from the three different sectors who will be making the move told me that they were hopeful that with the passing of time there will be much greater collaboration and much less sectional rivalry than has been the case as things stand at present, when most of the Chancery judges are located in the Thomas More Building<sup>403</sup> and many of the Commercial Court judges and all the TCC judges are located 300 yards away in St Dunstan's House.<sup>404</sup> There seems to be no good reason why the same sort of constructive collaboration should not be developed within the Rolls Building as I have witnessed on a smaller scale among the specialist senior circuit judges and their supporting staff on my visits to Leeds, Manchester, Birmingham, Bristol and Cardiff.

#### **4.7.2 The Costs Judges**

479. I have not been concerned during this Inquiry with any issues concerned with the Costs Judges, but it may be useful for the sake of completeness to note that the lease of their present accommodation is due to expire in the early part of 2010. It is planned that they should be relocated in the Thomas More Building.

#### **4.7.3 The Central London Civil Justice Centre**

480. The two buildings at Park Crescent are held on separate leases, the second of which will expire in 2015. subject to a break clause for the main office building. The Centre has been plagued by the administrative problems I have described in section 2.1.3 above, and the relocation of HCJs to the Rolls Building and the advent of SUPS and EFDM (if approved) afford a golden opportunity to relocate this important sector of London civil business on a new more central site where the judges can receive administrative back-up which is "fit for purpose" and West End and City firms can reasonably expect to have their clients' business heard without the serious risk of their letters being unanswered or lost, skeleton arguments and late pleadings not reaching the judges before the trial starts in court, and court files being mislaid against a recurrent history of staff turnover exceeding 30% per year in the past and rising to 38% in 2007-8 (see below).<sup>405</sup>

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<sup>402</sup> 80-85% of bankruptcy petitions are based on debts of less than £50,000. It is proposed that creditors' petitions for debts of less than £50,000 and debtors' own petitions for debts of less than £100,000 (which are more straightforward since they embrace the totality of the debtor's indebtedness) should be hived off when the move to the Rolls Building takes place. There is, incidentally, a concurrent proposal by the Department of Business Enterprise and Regulatory Reform (BERR) to the effect that jurisdiction over debtors' own petitions should be relocated within the Official Receiver's department, so that it is taken out of the court system altogether. This may well happen in the autumn of 2010.

<sup>403</sup> On the north-west corner of the RCJ site,

<sup>404</sup> St Dunstan's House is also in Fetter Lane and it will be disposed of once the Rolls Building is open for business.

<sup>405</sup> There is nothing new about all this. At a late stage of my inquiry Mr Justice Bean told me that he had sat as an Assistant Recorder, and then as a Recorder, at the Central London County Court for a couple of weeks a year between 1993 and 2004, and that it had always been an administrative shambles. A little later His Honour Dennis Levy QC, who had served there as a Chancery judge for a number of years before his recent retirement,

481. When I revisited Park Crescent in July 2008, I met the court manager and the trial centre manager. At a busy court like this, junior managers form a vital part of the management team. All the junior managers in post 20 months ago had now left. The nine junior managers currently in post had all enjoyed less than 12 months' experience. In 2007-8 the Centre had a complement of 78 members of staff,<sup>406</sup> but 30 (38% of the total) had left in the previous 12 months (18 of them on transfer or promotion). Because the pay is so poor<sup>407</sup> and the working conditions are so poor,<sup>408</sup> it is very difficult to recruit staff of the requisite quality. Even when they are recruited and trained for the job, many of them do not remain in post for very long, because once they have been trained they will be lured away to better paid jobs where the working conditions are better. Then new staff have to be recruited and trained, and the sorry cycle starts again.<sup>409</sup>
482. Problems affecting the administration of civil justice in London at multi-track level are by a very easy margin the most deep-seated and intractable of all the problems I encountered during the course of my inquiry.<sup>410</sup> I cannot see how they can be remedied unless a completely fresh start is planned for the trial centre, whether it is still linked with the County Court or floated off as a separate entity. Ideally the trial centre would have been relocated in the Thomas More Building once the migration to the Rolls Building has taken place, jurisdiction over debtors' own petitions has been relocated within the Official Receiver's department (while jurisdiction over creditor's petitions to a value less than £50,000 has passed to the trial centre), and the courtroom needs of the Administrative Court have been reduced to manageable proportions once more.
483. I have been told, however, that the relocation of the Employment Appeal Tribunal in the Thomas More Building represents a vital ingredient of the financing package for the

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told me that the only way a judge could be sure of receiving the papers for the next day's court business (so that he could read them overnight) was to go down to the court office and search for them himself. I recall that while I was still the Judge in charge of Modernisation five years ago I saw an extremely senior LCD director and an extremely senior DCA consultant, both new to the court scene, who told me, after visiting Central London, that they had not realised that such low levels of administrative provision still existed anywhere in the public sector.<sup>406</sup> There is now an approved staff complement of 80: 26 at the trial centre and 54 at the County Court. The trial centre is now treated as a ring-fenced business, so that if staff numbers at the County Court go down, trial centre staff are not transferred there simply to keep the show n the road.

<sup>407</sup> The pay for Associates at the RCJ, for instance, is significantly higher than the pay for the equivalent staff who support the trial centre's work, although the higher value cases at the trial centre are weightier than the lower value cases at the RCJ.

<sup>408</sup> For anyone used to working with modern software, exposure to CASEMAN and FAMILYMAN, the antediluvian software tools still in use at the trial centre and the County Court, represents a journey back to a mostly forgotten past. The problems the London County Courts experience with missing files were not evident in the major centres I visited outside London, because these software tools, antique as they are, contain a file-tracking facility which staff who are properly trained and supervised have little difficulty in using effectively.

<sup>409</sup> I have described in section 1.6.7 above how in addition to the special oath by which he is bound (see section 17 of the Constitutional Reform Act 2005: "in the office of Lord High Chancellor of Great Britain I will ... discharge my duty to ensure the provision of resources for the efficient and effective support of the courts for which I am responsible. So help me God") the Lord Chancellor now has a statutory duty to have regard to the need for the judiciary to have the support necessary to enable them to exercise their functions (*ibid*, section 3(6)(b)). As things stand at present any advocate instructed to resist a judicial review challenge to the adequacy of the resources provided for the judges at Central London – and at the other London County Courts struggling with the same problems – would need the forensic skills of an Erskine or a Marshall Hall to be able to persuade a court that all was reasonably well on the resources front.

<sup>410</sup> Lord Justice Thomas, who was the Senior Presiding Judge between 2003 and 2006, told me that he agreed with this assessment.

Rolls Building.<sup>411</sup> In these circumstances the trial centre must be found a new home as close to the RCJ as possible, so that its business (on the Chancery, the General List and the TCC side) can be managed by the diary managers who are in control of the RCJ High Court lists in these areas, and files can be transferred between the Rolls Building or the RCJ and the trial centre without all the problems that have characterised the movement of files when they are sent across London from the RCJ to Park Crescent and back.

484. I revisited Central London in July to find out whether I was correct in my belief that if necessary the trial centre could be managed as a separate entity, with common diary managers and subject to RCJ administrative backup. Judge Collins welcomed the idea. He had always regarded the trial centre as a referral centre, and he believed that there would be great advantages in the arrangements I suggested. His long experience has convinced him that it would be much better if each CJ was in control of a docket of cases, and was assigned a personal assistant who was personally responsible for the custody of all the files that were allocated to his or her judge.<sup>412</sup>
485. On the Chancery side Judge Marshall and Judge Dight also welcomed the idea of a closer relationship with High Court Chancery business. They said that a single joined up list, run by a high quality diary manager, backed by RCJ administration, would be a great improvement on the present unsatisfactory position. They believed that they should operate as if the Chancery list was a District Registry of the High Court at RCJ, after the examples set by the London Mercantile senior circuit judge and the London TCC senior circuit judges. On the TCC side much more business could be generated if the Central London TCC judge was not isolated on his own in a distant ill-staffed outpost. The local court managers, too, had no difficulty with the concept that the trial centre should exist as a central entity if it proved impossible to secure a location for the whole of the Central London enterprise close to the RCJ site.
486. The trial centre manager at Central London told me that she thought it would be easier to run the trial centre lists on a day to day basis if they were joined up with the RCJ lists. It would make for a better utilisation of judge at the proper level, and would be popular with the public.<sup>413</sup>
487. The area director for civil and family business in London, on the other hand, has expressed to me on two occasions her understandable concern that there would need to

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<sup>411</sup> Even though there is no immediately obvious business need for that tribunal to be situated within the RCJ complex.

<sup>412</sup> These arrangements would be comparable to what is provided for specialist circuit judges in some of the centres I visited outside London, where the files are kept in the specialist support sections.

<sup>413</sup> When I discussed this idea briefly during July 2008 with the Lord Chief Justice and the Chancellor, neither of them raised any objection in principle. For the Chancellor's view that the two bankruptcy district judges who are to be assigned to Central London must form part of the trial centre, along with their support staff, see Section 2.2.5.3 above. The Senior Master also did not oppose the idea, but because he holds a different philosophy from Judge Collins about the desirability of trial judges becoming involved in case-management, he believed that provision should also be made in the trial centre for two DJs.

be clear lines of accountability because two different HMCS Directorates would be involved and unless changes are made two different HMCS Directors would have different competing priorities for the administration of the lists. I am not qualified to suggest a solution to this problem, which was caused by the reordering of HMCS areas three years ago, when the Director of the Supreme Court Group became no longer responsible for London's civil and family courts.<sup>414</sup> It would be a pity, however, if any unwillingness to change administrative lines of responsibility were permitted to override judicial business needs, and I have detected no evidence that any such unwillingness exists.

488. At all events, whether the Central London enterprise moves as a whole, or the trial centre moves first, leaving the County Court on its present site till the lease runs out, I consider that the relocation of the trial centre to a suitable site in or very close to the RCJ (and administered from RCJ, with both SUPS and EFD in place) should form a critical component of any coherent strategic plan for the civil courts over the next five years.<sup>415</sup>

#### **4.7.4 Other courts (and court software)**

489. I have already described how the new Bristol Civil Justice Centre should be available from about January 2011 at the latest. There is also a need for a Civil Justice Centre in North Wales to replace the very unsatisfactory arrangements I described in Section 2.3.5 above. Once this need has been provided for, by the end of a five-year planning period there will be a network of civil courts and civil justice centres in place, properly equipped with modern "fit for purpose" court software (so long as the EFD in place project is permitted to continue to fruition). The development of data centre back offices, which will take a lot of undefended business out of the courthouses, will also then be in train. The development of centralised call centres<sup>416</sup> will also take a lot of the strain off the court managers and staff at the courthouses.

490. All that will then be needed is the heavy purpose diary software fit for managing heavy multi-court business which I identified as an important priority in Section 4.6.4 above. Such software is already in common use overseas, and once the shortcomings of E-Diary

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<sup>414</sup> I remember serving as a senior judicial member of a board convened about seven years ago which the then Director of the Supreme Court Group convened to help him plan for the better provision of civil and family courts in the London area, and for better co-ordination with the courts at the RCJ.

<sup>415</sup> The way in which the London civil courts are now teetering on the edge of collapse was exemplified by an episode which was brought to my attention after my second visit to Central London. A temporary member of staff was seconded between 3<sup>rd</sup> June and 31<sup>st</sup> July to look after the section at Central London which serviced the Chancery judges. When he left, it appeared that there was nobody who could replace him until the results of the next recruitment round were known: it was likely that any substitute would then have to be trained from a standing start. The court's deputy manager was absent as acting manager at the Gee Street County Court, another senior manager was off work through stress, and a third was recovering from an operation. A plea for help from the Chief Chancery Master elicited the response that the Chancery Masters, too, were woefully understaffed themselves: they had no one to spare. Furthermore, the Chancery Court manager at the RCJ was leaving at the end of July, and her replacement had no Chancery experience. And all this at a time when the Chancery judges and Masters in London are providing a broad-based service of unprecedented quality.

<sup>416</sup> About five years ago I visited the Loughborough centre for the Immigration Appeals Authority, which handled the receipt and administration of all immigration and asylum appeals, and included a call centre whose staff were able to respond to requests for information from all over the country. A similar facility is now operating at Leicester.

have been remedied so that it is fit for use by those managing a few courts at a time, the need for a heavy duty tool for larger centres (and for managing lists in different towns) must be seriously addressed.

#### **4.8 The future of the Administrative Court**

491. When my inquiry began the Administrative Court was under very severe pressure<sup>417</sup> by reason of the very high volume of low level asylum and immigration work it had had to undertake when the Government abolished the Immigration Appeals Tribunal and took other steps to limit the availability of statutory appeals. I have described in Section 2.1.4 above how “opt-ins” and “fresh claims” in the asylum and immigration field represents over 70% of the current caseload of the court.
492. This pressure was being alleviated during 2008 on a temporary basis by the assignment of more HCJs to the court and by appointing more s.9 deputies (and allocating the necessary resources to permit their use) as means of bolstering the judicial manpower of the court.<sup>418</sup>
493. A longer term solution, which would involve the transfer of all this low level Administrative Court work to the new Upper Tribunal, was being devised by a working party co-chaired by Lord Justice Richards and Lin Homer (who is now the chief executive of the new Borders and Immigration Agency). If their proposals were to be approved by ministers, the way would be open for the movement of all this work, probably in two stages, over the next three years. So long as similar strategies are also put in place for protecting the court from being overwhelmed by a torrent of judicial review challenges to expulsion decisions made under the Borders Act 2007,<sup>419</sup> the way would be open for the Administrative Court to resume its proper role as a specialist jurisdiction, manned by specialist judges, along the lines envisaged by the Bowman review eight years ago.<sup>420</sup>

#### **4.9 Pulling the threads together**

494. A much clearer picture of the next five years for civil justice has now emerged as a result of the inquiries I have made. So long as the EFDM project is approved, it looks something like this:

2009	
	Opening of new Administrative Court offices in Manchester, Leeds, Birmingham,

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<sup>417</sup> Delays within a grossly overburdened court had grown so great that the Public Law Project threatened the Lord Chancellor with judicial review proceedings on access to justice grounds because litigants were not being afforded a hearing by the court within a reasonably acceptable time.

<sup>418</sup> I have included in Annex B4 below a list of the s.9 deputies who have served in the Administrative Court since 2006. The use of s.9 deputies in the Administrative Court (and particularly of practising lawyers, as opposed to circuit judges and retired High Court judges) is problematic because the work of that court represents the judicial power of the state in the field of public law.

<sup>419</sup> Or other contentious new legislation in which inadequate statutory appeals mechanisms have been provided

<sup>420</sup> For the recommendations of the Bowman review, see section 2.1.4 above.

	and Cardiff
	Asylum “opt-ins” transferred to the Upper Tribunal.
	SUPS roll-out starts in March.
2010	
	EFDM pilot project at a major court centre and a back office.
	SUPS roll-out ends in September. By now MCOL, PCOL and e-diary are all stable and working well. Back office data centres are being developed to take pressure away from the courthouses.
	Opening of Bristol Civil Justice Centre.
	Introduction of tough new rules restricting the use of High Court judges in Chancery and QB business. <sup>421</sup>
	Opening of the Rolls Building in the autumn. Chancery Division, Commercial Court and TCC judges move to the Rolls Building. The Costs Judges and the Employment Appeal Tribunal are relocated in the Thomas More Building. Jurisdiction over creditors’ petitions up to £50,000 is assigned to the Central London County Court and the examination of debtors’ own petitions is probably assigned to the Official Receiver’s department (and if not, to the Central London County Court).
2011	By now asylum “fresh claims” have been moved to the Upper Tribunal. The business of the Administrative Court as a specialist court is back to manageable proportions.
	Roll-out of EDFM starts.
2012	Roll-out of EDFM ends. All civil courts are now equipped with modern “fit for purpose” software. A large volume of undefended business is being taken out of the courthouses completely. Court files can be transferred electronically to document management systems at the courthouses and processed electronically there. Both court managers and judges will be able to concentrate their attention to defended court business.

495. What is absent from this table, but is an essential ingredient of any coherent five-year strategy, is the relocation of the Central London trial centre close to the RCJ, and the development, piloting and roll-out of a modern heavy duty electronic diary system.

## Part V. The case for introducing a Single Civil Court

496. In this last main section of my report I address the six questions my Terms of Reference have invited me to answer:

What in more detail than just generalisations will be the continuing problems with the system once these reforms have been introduced?

Could those problems be remedied or alleviated without introducing a Single Civil Court? If so how?

Could those problems be remedied or alleviated by the introduction of a Single Civil Court? In particular:

<sup>421</sup> Along the lines of the Practice Direction prepared by the Jackson Committee two years ago. See Section 4.3 above and see, further, Section 5.2.1 below.



How would a Single Civil Court work in the vital area of case allocation? Would a Single Civil Court require additional resources? If so, could one rely upon these additional resources being provided?

Is a Single Civil Court system practicable and would it achieve the desired remedies?

Standing back, how great is the risk that a Single Civil Court system would end up reproducing the present system in a different guise without achieving worthwhile improvements?

### ***5.1 What in more detail than just generalisations will be the continuing problems with the system once these reforms have been introduced?***

497. Part IV of this report shows that given a fair wind we could hope to see within the next five years properly resourced civil justice centres at Birmingham, Manchester, Leeds, Bristol and Cardiff supporting the civil courts in Central London as vehicles for the conduct of heavy civil business. These courts all provide the home base for the specialist Chancery and Mercantile judges who work alongside the DCJ. At three of them there are also specialist TCC SCJs, and soon the specialist judges at four of them will provide an Administrative Court service as well.

498. There are also major ancillary centres in cities like Liverpool, Nottingham and Newcastle, with centres like Preston, Sheffield, Winchester, Exeter, Swansea and so on, attracting a smaller level of heavy business.

499. I have not been concerned in this inquiry with the conduct of small claims or fast track claims, not because they do not represent the lion's share of the defended business of the civil courts, but because they do not lie at the problematic interface between the High Court and the County Courts which are at the centre of my inquiry.

500. The major continuing problems are:

The deployment of judges in the No Man's Land lying between what is unquestionably High Court business (that is, if the High Court remains as a separate court) and what is unquestionably County Court business;

The absence of clear-cut strategic lines of authority at DCJ level in the major centres;

The continuation of avoidable difficulties over jurisdiction at different judicial levels.<sup>422</sup>

The need to make better arrangements for hearing what is unquestionably High Court business in centres outside London.

### 5.1.1 The deployment of judges in the No Man's Land

501. It is the existence of the No Man's Land between the lower levels of the High Court and the higher levels of the County Court which furnished the main stimulus to the civil court unification movement. In the past difficulties arising from concurrent jurisdiction have not seriously impinged on the conduct of Chancery business. This absence of any real difficulties in relation to Chancery work seems to have arisen because the top limit of the specialist equity jurisdiction in the County Court has remained so extraordinarily low and because the gaps in judicial provision at High Court level have been filled by the Chancery Masters and also by a very large number of Chancery and Commercial silks sitting as occasional deputies.<sup>423</sup> It has only been in recent years that what are still fairly small centres of Chancery expertise have been built up in the County Courts by the innovative creation of the Chancery specialist SCJs.
502. In the TCC no such difficulties exist because by a historical oddity a TCC judge, like an Official Referee before him, exercises High Court and County Court jurisdiction interchangeably. Similarly, no real problem exists in the Commercial (or Admiralty) and Mercantile Courts. The Commercial and Admiralty Court judges have always been confined to what is unquestionably High Court business, and the Mercantile Courts now all form a discrete part of the High Court where only CJs have ever sat and nobody expects to see a HCJ. Because the Mercantile judges are all SCJs, they can also hear cases of a business character in the County Court without any demarcation problems at all.<sup>424</sup>
503. The Administrative Court presents challenges of a different nature. Because it embodies the judicial power of the state in the public law field, the use of s.9 deputies is problematic, particularly if they are people who spend most of their professional lives as practising lawyers. In 1994, when considering the contemporary pressures on the judges of what was then the Crown Office List the Law Commission said:<sup>425</sup>

“In principle it is much more desirable that a full-time judge, specially selected if he or she is a circuit judge, should hear these cases, rather than a Queen's Counsel.”

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<sup>422</sup> To which may be added untidy curiosities, like the difference between the summary contempt powers of a judge in a County Court and a judge in the High Court which could usefully be tidied up in a general spring clean.

<sup>423</sup> See the table in Annex B2 below.

<sup>424</sup> Judge Chambers QC, the Mercantile judge at Cardiff, told me he spends 50% of his time hearing County Court claims.

<sup>425</sup> *Administrative Law: Judicial Review and Statutory Appeals* (1994) Law Com No 226, Appendix C, para 8.21.

504. The same concern exists today, although it seems to be generally accepted that less harm is done if s.9 (1) Recorders or s.9(4) deputies are restricted to dealing with leave applications and with substantive public law applications in matters not concerned with challenges to decisions made by central government or by statutory authorities of major public importance. At all events, it is to be hoped that with the departure of the low level asylum and immigration work over the next three years, the Administrative Court can revert to being on the whole a specialist jurisdiction manned by specialist full-time judges (who should for the most part be HCJs).
505. This leaves the difficulties concerned with the conduct of general common law business – and also of Chancery business, if the equitable jurisdiction of the County Court were to be raised to an appropriate level (even if the financial limits on that jurisdiction were not totally abolished).
506. In my view the present position is unsustainable. Even if there remains a High Court, recognisable as such and reserved for appropriately heavy business, it is absurd that identical business is conducted by HCJs and s.9 deputies in the High Court and by CJs and Recorders in the County Court, with the latter often hearing heavier cases than the former at a lower rate of remuneration.<sup>426</sup> I believe that very strong respect should be paid to the opinions of the very experienced DCJs at the major centres<sup>427</sup> who spend their lives in this border territory, all of whom (apart from Mr Justice MacDuff, the last DCJ at Birmingham, who told me he had changed his mind on the topic) said that they supported unification because of all the oddities and anomalies of the system they were charged to administer. Although I received no specific submissions from the Council of Circuit Judges, I also bear in mind that with the exception of some of the specialist SCJs, they expressed unanimous support for the principle of court unification last year, as did the Association of District Judges.
507. It is not only the different pay scales for the fee-paid judges that create the problems, or the curiosity, on which Judge Grenfell remarked, that a circuit judge with a s.9 ticket has to be variously called “My Lord” or “Your Honour” when hearing virtually identical cases, one of which happens to be in the High Court and the other in the County Court. Nor is it the difficulties that are inherent in explaining the system to lay litigants, which a number of court managers mentioned to me, or all the technical issues that confront inexperienced court staff. The problems also stem from all the jurisdictional anomalies I noticed in Section 3.5 above, and from the fact that judicial responsibility for administering the system outside the RCJ is undesirably diffuse.

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<sup>426</sup> A Recorder QC, who has received induction and continuation judicial training, will be paid at the rate of £570 a day when hearing a heavy civil case in the County Court, while a Chancery QC, when invited to sit as a s.9 (4) judge notwithstanding that he has had no judicial training, will be paid at the rate of £774 per day when hearing what may be a less complex case in the High Court.

<sup>427</sup> Judge Holman at Manchester; Judge Grenfell at Leeds; Judge Bursell QC at Bristol; and HH Graham Jones, the acting DCJ at Cardiff. Although he is no longer a DCJ and he does not sit at a major centre outside London, Judge Paul Collins CBE, the lead judge at Central London also shares this view.

### 5.1.2 The absence of clear-cut strategic lines of authority at DCJ level in the major centres

508. As my inquiry proceeded, I encountered more and more problems that arose from the fact that the DCJs at the major centres had a quite limited territorial jurisdiction. The DCJ for Manchester has no responsibility for Greater Manchester, the DCJ for Birmingham has no responsibility for judges in the West Midlands courts that encircle Birmingham, and so on. In the level of judicial business with which I have been concerned, heavy cases are now routinely case-managed towards settlement, and they ought to be case-managed by judges (at both CJ and DJ level) with the requisite expertise in handling and trying heavy civil cases. This means that heavy multi-track cases should be transferred to the major centres (even if any eventual trial, if it occurs, may take place at a local trial centre that is convenient for the litigants and their witnesses).
509. At one major centre I heard of DJs just outside the DCJ's jurisdiction holding on to cases for pre-trial case management which required a level of experience and expertise which they did not possess. At another I was shown disastrous case management directions made by a DJ at an outlying court which sent a trial off in a wholly inappropriate direction. At other centres court staff produce High Court orders as if they were County Court orders, and nobody, whether at staff or DCJ level, seems to be in effective control. The inability of inexperienced staff to make the correct entries in CASEMAN, which has so plagued the preparation of reliable statistics relating to High Court work,<sup>428</sup> provides a further reason for greater centralisation in the control of heavy civil business.
510. Part of the difficulty arises from the fact that a number of DCJs have a mixed portfolio of civil, criminal and family work, and are not civil justice specialists. Judge Farnworth, who has just retired, combined the responsibilities of DCJ and DFJ<sup>429</sup> for the Hertfordshire and Bedfordshire group of courts in one person, and there may be others like him. It was noticeable that most of the DCJs in this mixed portfolio category did not respond to any of the emails I sent them in relation to aspects of my inquiry, and I know that they were contacted by the Council of Circuit Judges as well.
511. Judge Holman believes that the situation might be remedied by reducing the number of District Registries, so that High Court business would have to be case managed by specialist DJs and CJs at a major centre. Mr Justice MacDuff, for his part, like others, thought that it would be better to make a drastic reduction in the number of DCJs on each circuit.<sup>430</sup>
512. I discussed this issue with Mr Justice Gross,<sup>431</sup> who was responsible for civil business in London (outside the RCJ) and the South-East when he was first appointed a presiding

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<sup>428</sup> See Annex J below for the inability of staff to understand the difference between High Court originating claims and High Court applications for writs of *fi fa*.

<sup>429</sup> Designated Family Judge.

<sup>430</sup> I recommend in due course that both these remedies should be considered.

<sup>431</sup> He is now the senior presiding judge on the London and South-Eastern Circuit. He put his point of view succinctly when he said that fewer DCJs with more "clout" would be a good idea.

judge on this circuit, and he showed me the results of a consultation he had initiated on the topic in 2006, which received mixed responses. His personal belief is that the number of DCJs on that circuit should be greatly reduced, although he did not wish to create any more “layers” of judiciary. His views are shared by Mr Justice Bean, who is now the presiding judge on that circuit responsible for civil business. Mr Justice Bean told me that although the job specification for a DCJ requires him or her to sit mainly in civil business and give it first priority, in one or two areas in the south-east the DCJ has in reality been a CJ doing mainly Children Act cases, spending not more than 10-20% of his time on civil work.<sup>432</sup>

513. When I visited Birmingham, I was shown papers which reflected a recent airing of this issue on the Midland Circuit, where opinion was divided. Although this was a matter for the Senior Presiding Judge to decide, the presiding judges of that circuit were concerned that any expansion of the Birmingham post would leave the DCJ less able to sit in court.
514. On my visit to Cardiff I discussed the issue with His Honour Graham Jones. He had been the resident and designated judge at Cardiff County Court from 1994 onwards, and was appointed DCJ for South Wales four years later, a capacity in which he served until his retirement two or three years ago. His successor Judge Hickinbottom then became DCJ for the whole of Wales when Chester no longer fell within the circuit, and during that time deputy DCJs were appointed at Swansea and Rhyl. Graham Jones then returned from retirement to serve in an acting role as DCJ for Wales during a seven-month period before the new DCJ was appointed.<sup>433</sup>
515. He greatly welcomed the fact that the DCJ had now been allocated a personal assistant, financed from regional funds. This made a huge difference. He also expressed the clear view that it was right to appoint a DCJ for the whole of Wales, and that if the decision had been up to him, he would not have appointed any deputy DCJs. He had enjoyed the happiest of working relationships with Judge Hickinbottom before his retirement during the period when the latter had been the senior civil judge in Swansea, with responsibilities for civil justice throughout south-west Wales.<sup>434</sup> The creation of a deputy’s post made it less easy for the DCJ to put things right in the deputy’s area when he could see they were going wrong. Like Mr Justice Gross, he was worried about the creation of “layers” of judges, or local fiefdoms.
516. He told me he had always believed that there should be fewer DCJs. The DCJ should be a civil specialist (although he might do a bit of criminal work), and he had to have control of all the civil work in his area, including the DJs. Although the DCJ must have the requisite authority throughout his area, a great deal of tact was needed, too. With video links and telephone conferencing a single DCJ could be responsible for a large area like Wales, although he had to get about his area from time to time. The DCJ

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<sup>432</sup> He believes, like others, that the DCJs should sit hearing civil business for the great majority of their time.

<sup>433</sup> Anthony Seys Llewellyn QC was appointed to this office as a senior circuit judge with effect from 17th July 2008.

<sup>434</sup> He had trusted Judge Hickinbottom, who was not a deputy DCJ, to tell him about the cases (or other matters) he needed to know about. He said that this was the correct relationship.

should be able to trust the CJs in his area who had responsibilities for civil justice to tell him what he needed to know.

517. I know that this is an issue which the Senior Presiding Judge has under active consideration. In this part of my report it is sufficient for me to express the view that there is a serious problem here which needs resolving. There is a world of difference between having a senior judge who is resident in his area all the time and is solely responsible for civil business, and having a presiding judge who usually does not live in his circuit, visits it for 50% of each year, has his hands full with other matters, particularly crime, and departs for other things when his four-year term of office is over.<sup>435</sup> And there is also a world of difference between a SCJ who sits in a major centre and concentrates on civil business, and a CJ based at a small centre who is hardly ever concerned with heavy cases and who combines his civil justice responsibilities with heavy judicial duties in the field of family law or criminal law, or both.
518. This is not to say that there is not a need for an identified CJ within a county, or a pair of counties, to have oversight responsibilities of a pastoral nature for all the CJs and DJs exercising civil jurisdiction in his or “patch”. In a different economic climate such responsibilities would almost certainly warrant the payment of a special allowance (but no special status) while a judge is discharging them.

### **5.1.3 The continuation of avoidable difficulties over jurisdiction at different judicial levels**

519. In Section 3.5 of this Report I set out a list of the problems and anomalies I encountered during my inquiry, and I will not repeat them here. In Section 5.2 below I will discuss the ways in which these problems might be remedied or alleviated if the High Court and the County Courts are not unified.

### **5.1.4 The need to make better arrangements for hearing what is unquestionably High Court business in centres outside London**

520. The quality of civil justice provision outside London cannot be enhanced in any significant way unless local solicitors can be confident that if they start major litigation in a provincial centre, it will be case-managed and then heard – if the action does not settle – by a judge with the necessary skill and experience. The current arrangements for providing for this need include the presence on circuit for half the year of two Chancery HCJs, and the regular visits that are now being made each term by QB HCJs to conduct

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<sup>435</sup> The huge new responsibilities for the magistrates’ courts and the effect of the Concordat have greatly increased a presiding judge’s responsibilities since the arrangements for DCJs were first created ten years ago. I have read the recent reports from individual presiding judges which led Lord Justice May to conclude that it would require the allocation of three “High Court judge years” if they were to be given the opportunity to do their jobs properly with appropriate allowance being made for time out of court, without the deep inroads into their private lives in the evenings and at weekends which the job now necessitates.

civil business at Manchester, Liverpool and Chester (on the Northern Circuit), Leeds and Newcastle in the North-East, and Birmingham and Nottingham in the Midlands.<sup>436</sup>

521. Future developments include the idea that the QB judges who will be deployed on circuit on Administrative Court business for half the year will be available for civil work when public law work is not available. I have described how Mr Justice Jackson conducted a four-week TCC trial in Leeds in 2007, and how discussions are currently proceeding for the deployment of a TCC HCJ to hear a very heavy case in Bristol in the foreseeable future.
522. The main difficulty, of course, is that so many civil cases settle, and a lot of them still settle just before a trial is due to start.<sup>437</sup> A linked difficulty is that it is not very satisfactory to place a heavy High Court trial in a floating list, or to force it into a very short trial window (to coincide with a HCJ's very short routine visit) when the timing may not be convenient for the litigants, their legal advisers, or their expert witnesses. I was told that the two Chancery HCJs on circuit are able to hear a few heavy civil cases provided that the certainty that they will be available is known sufficiently far in advance. I was also told that when a DCJ discusses with the parties' lawyers the arrangements that should be made for a QB trial, they will often express a preference for him rather than for an as yet unidentified HCJ who may not turn out to have the same experience of civil justice as the DCJ.
523. These problems would not be solved by posting a HCJ permanently on a circuit to hear civil cases, even if there were enough HCJs to make this possible or if the concept of the resident HCJ had not been repeatedly ruled out whenever it came up for consideration. Because so many cases settle, his or her time would not be spent usefully hearing "filler" cases until the next heavy case can be listed – and then that case may settle, too. More flexible arrangements must be made if the conduct of heavy civil business is not to remain so excessively London-centred. HCJs should support the work of the SCJs at the major centres whenever there is a case weighty enough for them to handle and hear.

## ***5.2 Could those problems be remedied or alleviated without introducing a Single Civil Court? If so how?***

### **5.2.1 Jurisdictional Changes**

524. If the civil courts are not to be unified, changes would have to be made at three different stages: the stage at which a choice is made whether to start in the High Court or in the County Court; the stage at which a procedural judge in the High Court decides whether to retain the case there or to transfer it down; and the stage at which the directions for trial are to be implemented.

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<sup>436</sup> The volume of work available at Bristol and Cardiff does not justify a regular visit.

<sup>437</sup> When I inquired why HCJs who visited Nottingham in 2007-8 had always heard cases in the County Court, the Listing Officer told me that no matter how many High Court Cases she listed, they ended up by settling or being adjourned. She said she always liaised with the Regional High Court Listing Co-ordinator to see if there was any urgent High Court work which she could take. On the last occasion she even phoned the QB Listing Officer in London to see if there was any outstanding work down there which she could take.

525. The power to make orders setting out matters of jurisdiction as between the High Court and the County Courts is vested in the Lord Chancellor.<sup>438</sup> The language of a Jurisdiction Order needs to be clear-cut, so that it is easy to see which level of court has jurisdiction. Thus criteria which identify the value of a claim (£50,000 or less) or a class into which a claim falls (e.g. personal injury claims) are more appropriate for this purpose than criteria that depend on the exercise of judicial discretion. On the other hand, once a case has arrived in a court that possesses jurisdiction over it, experience shows that a fine exercise of judgment may be needed when judges decide whether to transfer it to a different court or when they decide on the level of judge who should try it.
526. Outside London things work relatively well at present, and inside London no significant changes can be made until the Central London Trial Centre is relocated and properly resourced. Over the next two years care should be taken to develop a new set of boundary lines, a new set of criteria for determining whether cases should be transferred from the High Court to the County Court and vice versa, and a new set of criteria to decide which level of judge should hear the case if it does not settle during the case-management process. There also needs to be a judicial structure in place to ensure that any new arrangements work in the way that they were intended.
527. So far as jurisdiction is concerned, the starting point should be the High Court and County Courts Jurisdiction Order 1991. In the sections that follow I suggest that changes need to be made to Articles 2, 4A, 5 and 8 of this Order. I also suggest that the provisions of section 15 of the County Courts Act 1984, which give the High Court exclusive jurisdiction in certain matters, should also be revisited, although the rule that defamation claims must commence in the High Court should remain.

#### 5.2.2.1 *Extending the Chancery jurisdiction of the County Court*

528. Article 2 of the 1991 Order contains provisions that limit the jurisdiction of the County Courts in Chancery matters. All the Chancery judges I consulted agreed that the jurisdiction of the County Court should be enlarged. At present its equity jurisdiction, its jurisdiction to enforce charging orders, and its jurisdiction in contentious probate matters are still restricted to the very low “County Court limit” of £30,000.<sup>439</sup>
529. The existence of this limit was acceptable in the days where there was very little Chancery expertise among DJs or on the Circuit Bench, but with the emergence of the Chancery SCJs those days are over, and Judge Marshall’s frustrations about the lowness of the County Court limit<sup>440</sup> were understandable.

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<sup>438</sup> Under the Courts and Legal Services Act 1990, s.1 (1). The concurrence of the Lord Chief Justice is required before the Lord Chancellor may make any order conferring jurisdiction on the High Court in relation to proceedings in which the County Courts have jurisdiction and *vice versa* (*ibid*, s.1(1A)).

<sup>439</sup> In this Section I am also concerned with the financial limits to the jurisdiction of the County Court under s.10 of the Local Land Charges Act 1975 and s.10(4) of the Rentcharges Act 1977 and under the provisions of the Law of Property Act 1925 and the Land Charges Act 1972 in respect of which the jurisdiction of the County Court is at present limited by para 2(3)-(6) of the High Court and County Courts Jurisdiction Order 1991

<sup>440</sup> See Section 2.2.5.3 above.



530. Another very important development has been the creation of the Hart-Lloyd guidelines,<sup>441</sup> which tell the judges at outlying County Courts to send to the Chancery centres of excellence those cases that need real Chancery expertise.
531. Nobody felt that the County Court limit should stay where it is. Opinion was divided on the nature of the change that should be made. The Chief Chancery Master told me that he would be willing to envisage the equity jurisdiction of the County Court being raised to £100,000, or even £150,000, but that careful thought would have to be given as to which equity cases ought to be brought only in a County Court that had a Chancery District Registry. Thought would also need to be given to distinguishing (so far as money limits were concerned) between equity cases where the value was not dependent on the value of a house - where he believed that a limit of £100,000 or £150,000 would be about right - and equity cases where the value was dependent on the value of a house - when, given the current value of even a modest house, perhaps a higher limit would be appropriate.
532. The Chancellor favoured a change to £250,000, although he said he would be willing to link the new County Court limit to the Inheritance Tax threshold (currently £312,000). One of his concerns about any greater enlargement of the limit related to applications by consent for a variation of a trust, where parties were prone to agree to a variation which was wholly unsuitable. He feared that inexperienced judges might let such applications through “on the nod”.
533. Mr Justice Lewison, who has contemporary experience of the operation of Chancery jurisdiction in the Midlands, on the Western Circuit, and in Wales, believed that the “County Court limit” should be raised at least to the Inheritance Tax threshold, and he would not oppose its complete abolition. He said that outlying County Courts were quite good at transferring complex work to the local Chancery District Registry, and the judges at outlying courts were quite frightened of having to deal with the work themselves.<sup>442</sup>
534. Mr Justice Warren and Mr Justice Briggs told me that they would abolish the County Court limit altogether. What was important was that the right case should come before the right judge. This should be a matter for good arrangements for judicial deployment and not for artificial rules set out in legislation.
535. Judge Pelling QC did not favour giving the County Courts unlimited jurisdiction. As things now stood, the bigger cases were tried by s.9 judges and in practice the DJs at Manchester would transfer cases valued at up to £100,000 to the County Court list, usually with the consent of the parties. They will then give directions for trial, obtaining

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<sup>441</sup> See Section 2.2.5 above.

<sup>442</sup> I encountered similar concern on my visit to Preston, after a senior Chancery circuit judge at Manchester had recently sent a County Court Chancery case back to Preston on the ground that it raised no special features. The DJs told me that they did not possess the requisite expertise at Preston, and that it was very difficult to persuade Recorders to travel up from Manchester to handle such cases. There had recently been a case in which the Court of Appeal had been critical of a judge in Carlisle who was invited to hear a Chancery matter which he was not sufficiently experienced to hear.

the consent of the DCJ for trial by DJ when appropriate. He was concerned about what might be the random consequences of giving the County Courts unlimited jurisdiction. He was also worried because if the result of any change was that specialist SCJs would sit regularly in the County Court, they would no longer be able to give binding rulings on points of law or on the interpretation of statutory material which seldom attracted the attention of HCJs.

536. This is an issue on which there should be wide consultation before any decision is made. I am certainly not qualified to resolve it, although it would be consistent with my general approach that legislative limits should be abolished and that these matters should be left to the judges to arrange. An extension of the excellent Hart-Lloyd guidelines to include County Courts in London and the South-East, and an increase in the number of Chancery judges below High Court level, as a natural development of the arrangements whereby Chancery SCJs provide a new heavyweight judicial resource on the Chancery side should be all that is needed. At the same time the restrictive provisions in s.15 (2) (b) of the County Courts Act 1984 (see Section 5.1.2.4 below) could be repealed.
537. Similar issues relate to the rule which restricts a County Court's winding up jurisdiction to companies with a paid up share capital of less than £120,000. I was told that in this area, too, there are occasionally complex cases which are currently being handled by the wrong judges. This, too, might well be better dealt with by internal controls within the judiciary rather than with externally imposed legislative controls of a blanket nature.

#### *5.2.1.2 Increasing the financial limit above which claims may be commenced in the High Court*

538. Under Article 4A of the 1991 Order, subject to the provisions relating to personal injuries litigation, "a claim for money in which county courts have jurisdiction may only be commenced in the High Court if the financial value of the claim is more than £15,000."
539. This, too, is a matter on which I am not able to give definitive advice, because I do not have sufficient information. On the face of it, the present financial limit of £15,000 is far too low, and it is absurd that relatively low value debt and contract claims are being commenced in the High Court in London when there is no prospect that they would ever get anywhere near a High Court judge at the trial stage.
540. On the other hand, there may be relatively low value claims that would benefit from specialist case management, and before any final decision is taken, it would be desirable if the High Court Masters could retain a reliable record of the cases they handle.<sup>443</sup> A fine-tuned decision can be taken whether it would be better to raise the financial value to £50,000 or to a lower figure of, say, £25,000.

#### *5.2.1.3 Personal Injury claims*

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<sup>443</sup> If they are unable or unwilling to do so, a broad-brush decision will have to be taken which may not take into account sufficiently the niceties of the situation.

541. In my view, the time has come for all personal injury actions to start in the County Court, as the Civil Justice Review Body strongly recommended 20 years ago.<sup>444</sup> I am very hesitant about recommending any exceptions to this rule, because it will not be a popular one, but if it is not introduced the time of the High Court is likely to be taken up by solicitors issuing claims there that relate to personal injuries of some severity which do not require specialist case-management and will certainly not qualify for trial by a HCJ.
542. It must be remembered in this context that many experienced CJs have had far more experience in trying or handling heavy personal injury claims than most of the QB judges who are being appointed today.
543. History has shown that High Court Masters are reluctant to use their powers to transfer cases out of the High Court, and nothing short of an absolute rule barring all personal injury actions from automatic entry is likely to be successful. If a proper case can be made for transfer up to the High Court (for example, if the meaning or application of new legislation needs to be authoritatively decided) then an application to that effect can be made in writing to the County Court. If the case is strong enough,<sup>445</sup> transfer up should be readily granted, with a right of appeal if an applicant for transfer considers that the refusal is wrong in principle.
544. There should be at least two “class” exceptions to this absolute rule. They relate to two of the success stories of the QB Masters in recent years: the specialist case-management of (1) mesothelioma and other asbestos-related disease claims and (2) clinical negligence actions. In both these fields the Masters have established an enviable reputation as centres of specialist case-management excellence in recent years, and it would be quite wrong to break these up.<sup>446</sup>
545. This is the reason why I believe that in those cases direct entry to the High Court should be permitted because they are eminently suitable for specialist case-management. The Senior Master stressed this need persuasively to me when I saw him towards the end of my inquiry. The small sample of 303 2007-8 QB cases I inspected included 78 mesothelioma cases and 45 clinical negligence cases.<sup>447</sup> 17 of these were in the £50,000-£100,000 range in value, and 79 in the £100,000-£300,000 range, so that they

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<sup>444</sup> Report of the Review Body on Civil Justice (1988), para 155. Paras 149-155 of this report show why the Review Body felt so strongly that direct entry to the High Court for personal injury litigation should not be permitted, and experience since 1991 has shown how wise they were. The Review Body included a senior judge (Lord Griffiths) and a solicitor (Rodger Pannone) who both had immense practical experience of personal injuries litigation.

<sup>445</sup> The recent judgment of Swift J in *Thompstone v Tameside & Glossop Acute Services Trust* [2006] EWHC 2904 (QB) provides a good example of a case that would be suitable for the High Court, as does the earlier interlocutory decision of Sir Michael Turner in the High Court on 7<sup>th</sup> December 2005 in *Flora v Wakom (Heathrow) Ltd*. In these cases, both of which went on to the Court of Appeal, the High Court was concerned with issues arising out of the interpretation of a new amendment to the Damages Act 1994 which enabled a court to allow for future inflation when awarding damages in personal injury actions by means other than the Retail Price Index.

<sup>446</sup> See also Section 2.1.2 above. There is of course no reason why similar centres of excellence should not be established in other provincial centres if, indeed, they do not already exist.

<sup>447</sup> See Annex D below.

would not seem to qualify for retention in the High Court. Their case-management, however, requires specialist skills, and the vast majority of them settle before trial.<sup>448</sup> If they do not, they can be transferred to the County Court for trial by a Master, a CJ, or a Recorder.

546. I have recommended a blanket rule that all personal injury actions (other than those I have picked out for special mention) should be started in the County Court because this roughly approximates to what is now happening outside London except for claims worth £500,000 or more.
547. The Senior Master has told me, however, that he would be very anxious if the QB Masters were to be deprived of responsibility for managing what he described as “serious personal injury claims”. He said that it was easy to lose sight of the fact that there was a considerable minority of personal injury claims that are serious, complicated and valuable.<sup>449</sup>
548. There are two ways of dealing with this quite justified worry. The first is by setting a financial limit (say, £1 million) above which personal injury actions might be commenced in the High Court. The trouble with this expedient is that once a limit is fixed, it tends to remain in place despite the fact that it may rapidly get out of date. I would prefer the second expedient, whereby the Head of the Queen’s Bench Division gives directions similar to those contained in the Hart-Lloyd guidelines for Chancery business outside London, with the effect that all personal injury actions above a particular value (which can be varied from time to time) must be transferred to a major local centre (which in London and the South-East would be the RCJ, not the Central London Trial centre) or to the RCJ for case-management.

#### *5.2.1.4 Cases for the exclusive jurisdiction of the High Court*

549. In this Section I am not concerned with the exclusive jurisdiction of the High Court in cases that fall within the jurisdiction of the Administrative Court, in human rights cases, or in statutory appeals that do not lie to the Administrative Court. Nobody has suggested to me that these arrangements should be changed.
550. In Section 1.8 of my Report I described how a County Court has at present no jurisdiction to hear an action for libel or slander, or an action in which the title to any toll, fair, market or franchise is in question.
551. I spoke to Mr Justice Eady about the “libel or slander” exception. He satisfied me that this should remain in place. Both law and practice is complicated, there are often issues

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<sup>448</sup> The Senior Master told me that he lists six assessments of damages in mesothelioma cases every other Thursday. Each of them take about one day to try, but most of them settle, and it is seldom that he has to call on the assistance of another judge to help him with this list.

<sup>449</sup> He added: “Any idea that County Courts will altruistically send the serious case to [the QB Masters] is, from my detailed experience of similar problems with the asbestos work, ‘pie in the sky’. He added that if the QB Masters had set up a specialist list for catastrophic injury cases (comparable to their clinical negligence and mesothelioma lists) they would have drawn in work from all over the country.

arising out of the Human Rights Act to contend with, and case-management requires specialist expertise. He told me that two Recorders have recently been appointed who specialise in defamation cases,<sup>450</sup> and that as a general rule the requisite expertise is not available below the level of the High Court Bench.

552. The only arguments I received that pointed to the need to relax this rule related to relatively small claims, often brought by a litigant in person, which include a defamation claim with a number of other causes of action that arise from a general sense of grievance against the defendant. I do not consider that any changes should be made to make things more flexible. Such claims should be issued in the High Court, and the High Court should be ready to transfer them downwards if satisfied that appropriate arrangements can be made in the County Court for case-management and trial.
553. I did not canvass with anyone the question whether the High Court should retain exclusive jurisdiction in actions to which the title of any toll, fair, market or franchise is in question.<sup>451</sup> It is likely that the answer to this question is bound up with the question whether, and to what extent, the jurisdiction of the County Court in Chancery matters should be enlarged.<sup>452</sup>

#### *5.2.1.5 The enforcement of judgments by seizure of goods*

554. I have been told that questions relating to the enforcement of judgments are still under review, and I did not possess the expertise nor the resources to inquire very deeply into these questions. It is, however, legitimate to inquire whether it is really necessary for low value judgments to have to be transferred to the High Court for enforcement if the judgment creditor wishes to proceed by way of seizure of his debtor's goods.<sup>453</sup>
555. It is surely disproportionate for a creditor to have to transfer an action to the High Court for the execution of a very small money judgment, or to be able to do so as a matter of choice. If the matter is transferred to the High Court, and the debtor then makes an application to set aside the underlying judgment, it is equally disproportionate if a judge at whatever level of the High Court has to consider the application, and cumbersome to have to return the matter temporarily to the County Court.<sup>454</sup>
556. I am conscious of the links between the sheriffs (and now the High Court Enforcement Officers) and the High Court, but surely the time has come for there to be alternative procedures available for enforcing judgments in the County Court by way of seizure of

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<sup>450</sup> One of them, Richard Parkes QC, recently travelled to Birmingham, first to case-manage, and then to try, a defamation case at the request of the DCJ.

<sup>451</sup> See County Courts Act 1984, s.15 (2) (b).

<sup>452</sup> See Section 5.1.2.1 above.

<sup>453</sup> If a judgment is for less than £600 or arises out of a regulated consumer credit agreement, it must be enforced in the County Court. If the judgment is for £5,000 or more it must be enforced in the High Court. The creditor has the choice of County Court or High Court where the debt is less than £5,000 except where enforcement must be in the County Court.

<sup>454</sup> The chaos that is caused when inexperienced court staff have to decide how to enter High Court applications for fi fa into CASEMAN is very evident from my description in Annex J of some of the statistical difficulties I encountered.

goods. For very low value judgments the services of the bailiffs could be retained, and for judgments of a higher value a process similar to that currently available in the High Court could be introduced.

### 5.2.2 Transfers up or down for case-management purposes

557. Even if no great changes are made to the financial value above which claims may be commenced in the High Court, changes must be made, once the Central London Trial Centre has been relocated with adequate resources, to the guidance given to Masters and DJs on matters relating to transfer down and transfer up. The criteria set out in CPR 30.3(2)<sup>455</sup> and in the Queen's Bench and Chancery Guides<sup>456</sup> are now very seriously out of date. They result in work being retained in the High Court which does not properly belong there.
558. Although they were framed as guidance as to the level of judge who would be suitable to hear a case, the Jackson Committee's criteria<sup>457</sup> seem to be as good a starting point as any for setting criteria governing the retention of cases in the High Court for case-management purposes, with certain alterations (*italicised*):

In determining whether a *case warrants retention in the High Court, judges shall take into account the following criteria: (a) complexity, size and difficulty; (b) public impact and significance; (c) the nature and importance of any points of law or practice arising; (d) the severity of the remedy sought or the amount of money which is at stake.*

(a) Complexity, size and difficulty. The factors to consider here are the *likely* length of hearing, the *likely* volume of written and oral evidence, whether the subject matter is of a specialist nature, the *likely* complexity of the evidence (both factual and expert) and, in general terms, the *likely* difficulty of the case. It is appropriate for *cases to be retained in the High Court* which are particularly difficult *or warrant specialist case management*.

(b) Public impact and significance. The factors to consider here are the impact on society of the outcome, public interest in the case, and the nature of the case (e.g. does it seriously affect reputation?). If the case concerns the performance of a public duty or a challenge to the conduct of a public authority, this is a pointer towards the need for it *to be retained in the High Court*. In general terms, it is appropriate *for cases to be retained in the High Court* which are particularly significant.

(c) The nature and importance of any points of law or practice arising. Many civil cases raise questions of law on which there is no authority directly in point. It is necessary to consider whether the case in question is

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<sup>455</sup> See Annex F below.

<sup>456</sup> See Section 1.10 above.

<sup>457</sup> See Section 4.2 above. The Jackson Committee's criteria were concerned with allocating a case within the High Court to a HCJ (as opposed to a deputy) and not with the criteria for deciding whether to retain a case there or transfer it downwards.

likely to set a precedent, and how important the points of law are (i) in relation to that case and (ii) generally. Occasionally cases raise questions of practice or procedure which are of general importance and merit *being retained in the High Court* on that ground.

(d) The severity of the remedy sought or amount of money which is at stake. The severity of the remedy sought (e.g. a swingeing injunction or substantial interference with an individual's rights) is a relevant factor in some cases. The value of the claim, or the sum of money which is at stake, is generally a relevant factor, but not determinative unless the sums involved are very high. Financial value must always be considered in the context of the type of case. *If the value of the claim is the only factor that might warrant the claim being retained in the High Court, any claim below £2 million<sup>458</sup> is unlikely to justify retention in the High Court.*

559. The Senior Master and the Chief Chancery Master have persuaded me that certain case, or classes of case, should be retained in the High Court because they warrant specialist case-management. If these cases do not settle, it is likely that when the time comes for directions to be given for trial many of them will be directed for trial as first tier cases in the County Court (or Civil Court).<sup>459</sup> The experience of the provincial centres outside London shows how easily such a transfer can be made.

560. Similar provision may be made, *mutatis mutandis*, in the criteria to be applied when deciding whether to transfer a case up to the High Court at the case-management stage.

### **5.2.3 Better provision for trials in the No Man's Land<sup>460</sup>**

561. This is in many ways the most difficult issue that I encountered, although outside London it did not appear to present any difficulties serious enough to give rise to a need for significant reform. I have already recommended that all personal injury actions (apart from those that fall within classes where specialist case-management is justified) should be started in the County Court. This reform should remove many of the difficulties on the QB side. These actions can in future be case-managed in the County Court and tried by SCJs, CJs and Recorders in the County Court without any need to call upon s.9 deputies.

562. Such a change in itself would not remove the anomaly that within London the Chancery General List and the QB General List at the RCJ contain a significant number of cases

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<sup>458</sup> I have changed the Jackson Committee's figure of £500,000 to £2 million for those cases where the value of the claim alone is relied on. I received virtually unanimous evidence that value was not a particularly helpful criterion in this context.

<sup>459</sup> See my recommendations in Section 5.2.9 below.

<sup>460</sup> See Section 5.1.1 above. I have used this expression to refer to the territory that lies between the lower levels of the High Court and the higher levels of the County Court which is currently populated by HCJs, SCJs, DCJs, CJs s.991) Recorders and s.9 (4) deputies and s.9 (1) retired judges interchangeably (at High Court level), and by SCJs, CJs, DCJs, CJs, Recorders and deputy CJs at County Court level. Most of these are the same people, although fee-paid judges will be paid at markedly different rates depending on which side of the divide they are sitting.

which could just as well be heard in the equivalent lists at Central London and *vice versa*. My study of a representative sample of the contents of the QB Masters' 2007-8 caseload<sup>461</sup> revealed a large number of cases that could equally well have been heard at Central London if it was properly resourced. I have little doubt, from what some Chancery judges told me, that a comparable position would be uncovered on the Chancery side, where 25% of the current High Court workload is being handled by a large number of s.9 QCs, many of whom have not received any judicial training and most of whom sit for short periods at any one time.

563. I was impressed by what I saw outside London of the way in which a single diary manager was responsible for co-ordinating different judges' lists. While this should not be taken too far – the principal Chancery listing officer told me that he did not think it sensible to list for more than 40 judges at once – everyone told me that a joined-up operation of the Chancery General,<sup>462</sup> QB General and TCC lists at the RCJ or the Rolls Building and Central London would be easily manageable, so long as appropriate IT was in place and the courts were geographically close to one another, so that paper files could be readily transferred to and fro.
564. This leaves open the question whether this No Man's Land, in which HCJs, SCJs, CJs, Recorders, retired HCJs and QCs who have s.9 (4) appointments,<sup>463</sup> are all liable to sit, should continue to be described as the High Court (with an ever-increasing number of s.9 deputies) or the County Court, depending on where the proceedings may happen to have been started, and on whether or not a transfer order has been made.
565. Even if the situation is improved by a readjustment of the jurisdictional boundaries between the High Court and the County Court and even if tougher rules were introduced for transferring cases down to the County Court on arrival, there will continue to be awkwardnesses and anomalies at the trial stage, all of which would be swept away if at this level (at which trial by a HCJ is not very strongly indicated) directions were given for all these cases to be tried as first tier cases within a single court.<sup>464</sup>
566. Strong objection was taken by a number of senior judges to any comparison with the Crown Court, where first tier cases are heard by HCJs and suitably ticketed circuit judges, without any need for the latter to be described as deputy High Court judges. They said that the High Court was the home of the HCJs even if from time to time they heard heavy criminal cases in the Crown Court.
567. This objection would not hold good so long as a High Court continued to exist for the most weighty cases, even if HCJs sometimes heard cases that did not fall within the new

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<sup>461</sup> See Annex D below.

<sup>462</sup> I include in this phrase cases in the Chancery Interim Hearing list that are not of a specialist nature.

<sup>463</sup> And Masters and DJs for the assessment of damages, and sometimes, in the case of DJs, for multi-track trials.

<sup>464</sup> A good analogy might be taken from the arrangements for professional football, where below the Premier League (equivalent to the High Court) there were four Divisions (one for top tier No Man's Land multi-track cases, the next for less weighty Multi-Track cases, the third for Fast Track cases, and the lowest for Small Claims Track cases).



High Court boundary, so far as trial is concerned.<sup>465</sup> Any such arrangements would remove the need for s.9 deputies, except for case-management purposes<sup>466</sup> and for those cases that remain in the High Court for trial. The cases that remain in the High Court for trial should normally heard by a HCJ or a specialist SCJ.

## 5.2.4 The name of the new lower court(s)

568. Whether the cases heard in the No Man's Land were heard as first tier cases in a unified County Court known as "the County Court", or in a unified County Court known as "the Civil Court" (if that is politically acceptable) or by some other name, or in whatever happens to be the name of the local County Court would be a matter for careful consideration in the light of all the sensitivities that currently abound.
569. I did not hear much evidence about the benefits and disbenefits of retaining the current County Court boundaries, since my inquiry was launched on the hypothesis that there would be a single court in which these boundaries would no longer exist.
570. There is of course a strong case for retaining certain elements of local jurisdiction, so that possession claims should be handled in the local courthouse, and defended cases should be assigned in the first instance to the courthouse in the area where the defendant's home or place of business is located. These requirements can be met, however, without a proliferation of discrete County Courts, all with their particular geographical district, and in future a very large number of claims will be begun, processed and ended at a data centre to which the attachment of the name of a particular County Court is rather peculiar, to say the least.
571. Mr Justice Briggs told me how cases suitable for the County Court are frequently commenced in the High Court, where what matters is the obtaining of prompt interim relief from an experienced tribunal, which will often be decisive of the outcome of the proceedings. He cited as examples the applications by the Performing Rights Society against the owners of pubs and bars for playing recorded music without paying royalties. He said that on a typical applications day there may be anything up to a dozen PRS applications, all against pub owners who generally decline to appear, and all of which are dealt with extremely quickly<sup>467</sup> by experienced practitioners and an experienced judge.
572. If all those cases had to be brought separately in the local court nearest the pub in question, quite possibly by local solicitors without experience and before local judges without experience, the net result would be a very large reduction in the efficient conduct of that business, to the detriment of the copyright owners and the public interest. On the other hand if the Chancery SCJs at Central London sat in a single national court, they

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<sup>465</sup> Cases comparable in certain respects to the Category B cases (HCJ if available) in the High Court Master's shorthand.

<sup>466</sup> And if case-management by a part-time QC is appropriate, the case should probably have been transferred down a level in any event.

<sup>467</sup> And in his experience economically, with typical costs less than £1,500.

could readily hear applications of this kind without the necessity of transferring a lot of cases from one County Court to another.<sup>468</sup>

573. As a result of the limited amount of consideration I have been able to give to this issue I would favour the unification of the County Courts, whether or not the unified structure is called “the County Court” or by some other name. In the highest tier of the new court HCJs, retired HCJs, SCJs, CJs and Recorders would sit interchangeably,<sup>469</sup> if suitably ticketed to do so. Fee-paid judges should all be paid at the same rate for top tier work.<sup>470</sup>
574. If, by some error, work is listed in good faith before a judge who is not qualified to hear it, a simple amendment to the Supreme Court Act and the County Courts Act (and any other relevant legislation) should be made to the effect that the ensuing decision is not a nullity. This is much less likely to happen, however, if my recommendations about trials in the No Man’s Land are accepted and implemented.
575. Within any complex system mistakes may be made, by staff, practitioners and judges alike. The retention and case management of a greater volume of work in the County Court will make things easier. Colour coding court files could improve the position, and more easily intelligible case numbering on court files should supplement colour coding. The arrangements in Cardiff whereby a judge marks and signs the outside of a file with a felt-tip pen to indicate how the case should be managed thereafter are in my opinion worth introducing elsewhere.<sup>471</sup>

### **5.2.5 Miscellaneous problems over appeal routes**

576. Under my proposals CJs who do not possess s.9 tickets will be able to hear appeals from district judges in personal injury cases<sup>472</sup> and in the wider band of cases that will now be managed in the County Court. For genuine High Court cases I see no reason to alter the arrangements by which a CJ, usually the DCJ or a specialist SCJ, must have a s.9 ticket for hearing a case management appeal.
577. Although I did not inquire very deeply into the position, a number of people suggested to me that appeals from Registrars and DJs in High Court bankruptcy matters did not

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<sup>468</sup> Arrangements under s.5 (3) of the County Courts Act 1984 could also be made for those cases Judge Mackie QC described to me when a housing problem gives rise both to a complaint about the implementation of a local authority’s housing priorities (suitable for judicial review) and a complaint about a homelessness decision (for which a statutory appeal to the County Court is the remedy). If the Administrative Court judge is appointed to sit in the County Court, the way would be open for both cases to be listed before him simultaneously.

<sup>469</sup> As would Masters and DJs, where a matter is assigned for trial by a Master or a judge inter-changeably.

<sup>470</sup> And their pay should not be reduced if they have been retained to hear top tier work, and when this work is unavailable, kindly agree to the other County Court work instead.

<sup>471</sup> Easier coding arrangements must also be introduced when cases are transferred from the High Court to the County Court or *vice versa*, so that dependable statistics can be kept in future.

<sup>472</sup> Unless they are in a class which justifies specialist case management in the High Court, or are, exceptionally, transferred up to the High Court for handling.

always warrant a hearing by a HCJ. This seems to be an issue that warrants further examination.

578. I had sympathy with the problem described to me by Mr Justice MacDuff, whereby an application for permission to appeal from a CJ in a procedural matter (for example, a refusal to adjourn a trial fixed to start on the next working day) is filed at a court on a Friday afternoon when it may be very difficult to locate a HCJ to make an order which may have the effect of disposing of the appeal,<sup>473</sup> still less a HCJ with appropriate civil justice expertise.
579. The Diary Manager at Birmingham told me that they are usually able to track down a HCJ by one means or another, but it would be very much more satisfactory to empower a DCJ in an emergency to make interim orders of a type that may be dispositive of an appeal, so long, of course, as the appeal does not lie from a decision of his own.

### **5.2.6 A reduction in the number of QB District Registries**

580. If the boundary between the High Court and the County Court is changed, and all personal injury actions have to commence in the County Court, serious thought should be given to reducing the number of District Registries of the Queen's Bench Division, perhaps limiting them to those centres where a reduced number of DCJs will be based (for which see Section below). In an electronic age, in which most claims will be issued electronically through back offices, most CMCs are conducted by telephone, and video-conferencing is also much more readily available, the old arguments in favour of preserving local District Registries at which local solicitors can file their papers and attend for CMCs lose most of their force. I have heard nothing to suggest that the much smaller number of Chancery District Registries causes any significant problems, and if personal injury actions all start in the County Court (or at a centre where specialist case-management is available) the number of QB High Court claims issued outside the RCJ will be significantly reduced.

### **5.2.7 Remedies available in the County Court**

581. I received many comments to the effect that the arrangements whereby the jurisdiction to make pre-judgment freezing orders was confined to the High Court and the Mercantile Court had now outlived their usefulness. The jurisprudence is now well established, and it is absurd that estate agents suing for small amounts of unpaid commission have to deluge the Mercantile Courts with applications for pre-judgment freezing orders if they fear their clients are going to decamp, or that the Chancery Division of the High Court has to be the point of entry for comparatively low value claims simply because the claimant wishes to obtain a pre-judgment freezing order.<sup>474</sup> The decision of the Court of

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<sup>473</sup> By granting a stay of the impending trial while the appeal is pending.

<sup>474</sup> Judge Mackie QC, the London Mercantile judge, and Judge Hazel Marshall QC, the Chancery senior circuit judge at Central London, made these points to me forcibly, but I heard similar comments from DCJs at the provincial centres I visited..

Appeal in *Schmidt v Wong*<sup>475</sup> shows how unnecessarily convoluted the present arrangements are.

582. It would be unwise to make this jurisdiction too freely available to judges in the County Court, because a wrongly made order is a potential source of considerable injustice. I see no reason, however, why it should not be available to all SCJs who exercise civil jurisdiction, all DCJs, and such other judges as are appropriately “ticketed” from time to time to exercise this jurisdiction in the County Court. I originally considered that these powers should be limited to pre-judgment orders freezing assets within the jurisdiction, but Mr Justice Briggs and Mr Justice Warren both told me that they thought that such a limitation was undesirable since so many situations call for both intra-territorial and extra-territorial relief.
583. Nobody suggested to me that the jurisdiction to make search orders should be similarly relaxed beyond the High Court and the Mercantile Court.<sup>476</sup> No urgency is involved here, and the jurisdiction is a particularly delicate one.

### **5.2.8 Powers of District Judges and Registrars in insolvency cases**

584. At present DJs and Registrars have no power to grant injunctions in insolvency cases even though fairly trivial issues are at stake. For instance, on an application for an injunction to restrain the issue or publication of a winding up order, the only question may be whether there is an undisputed debt in excess of £750. Similarly, routine applications to extend the initial period of an administration order, perhaps because more work is involved than was originally envisaged, have to go before a judge. I recommend that DJs and Registrars should be given jurisdiction in such cases, and in any comparable cases that may appear on a review of the Insolvency Rules.

### **5.2.9 The powers of the County Court in relation to contempt**

585. The High Court has power to punish any contempt by up to two years imprisonment. That power is available in the County Court only for breach of an injunction or undertaking. In the County Court the maximum sentence for assaulting an officer of the court in the execution of his duty is three months<sup>477</sup> and for insulting (which includes threatening) a judge, juror or witness or for misbehaving in court is one month.<sup>478</sup> There is also a maximum sentence of one month for rescuing goods taken in execution.<sup>479</sup>

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<sup>475</sup> [2005] EWCA 1506; [2006] 1 WLR 561.

<sup>476</sup> I also received no suggestions that a County Court should be able to grant injunctions or declarations of the kind formerly obtainable under the obsolete writ of *quo warranto*! See Section 1.8 above and Supreme Court Act 1981, s.30 for the saving provision so far as the High Court is concerned.

<sup>477</sup> County Courts Act 1984 s.14.

<sup>478</sup> *Ibid*, s.118.

<sup>479</sup> *Ibid*, s.92. It has also been drawn to my attention that where proceedings for committal are in train pursuant to CPR 32.14(1) after a witness in a County Court action has made a false witness statement without an honest belief in its truth, CPR PD32 para 28 and the Contempt PD, para 2.1 give misleading advice as to the proper procedure. RSC Order 52 Rule 1(2) (still in force pursuant to Schedule 1 to the Civil Procedure Rules) makes it clear that the proper course to take is to make an application for committal in the Divisional Court.

586. Although any change would involve primary legislation, the time has surely come to straighten out these discrepancies, now that so many sensitive cases are being handled in the County Court, where feelings often run high.

## **5.2.10 Matters relating to the deployment of judges**

### *5.2.10.1 The future of the Divisions*

587. The three unequal Divisions of the High Court have been a feature of the judicial landscape for many years. When the plans for the Chancery Division and the Commercial Court were first mooted, an idea was evolved that a new Division could be created, called perhaps the “Property and Business Division”, but more generally known as the “X Division”, which would be the new home of the judges of the Commercial Court, the Chancery Division and the TCC, headed by a Chancellor who would not necessarily be a Chancery judge.

588. Those plans were shelved. One of the main reasons why they were shelved was because they included no proposal that the judges of the Chancery Division should sit in crime, and there was a fear that if the Queen’s Bench Division was dismembered, it would be more difficult to draw on sufficient HCJs to meet the increasing demands of the criminal courts, including criminal appeals.

589. It was also part of the philosophy underlying the Unified Civil Court proposals that judges would be “ticketed” for different specialisms and then grouped into Divisions of judges who did similar work. This idea encountered a lot of opposition from those who understood how the Divisional structure works, how it creates an esprit de corps among a cadre of judges who look to their Head of Division for leadership, and how the assignment of judges to cases is assisted because they are all cross-ticketed to do all the work of their Division,<sup>480</sup> rather than being individually ticketed for individual specialisms. Mr Justice Jackson told me how very helpful it had been when he was the lead judge in the TCC to be able to report to the President of his Division, rather than being just one lead judge in a rake structure dependent for support on the Lord Chief Justice.<sup>481</sup>

590. I have been told that there is now a greater willingness for Chancery judges to sit in crime, although it may take up to 25 years for this change of culture to create a world in which every Chancery judge, like every Commercial Court judge and every Administrative Court judge, regularly sits in crime for part of the legal year. If such a change takes place, it will of course place even greater strains on Chancery judge-power and increase the need to increase the number of specialist Chancery judges below the level of the High Court Bench.

591. I see no need to make any recommendations in this regard. It may well be that the move to the Rolls Building, and the way in which there is then likely to be much greater co-

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<sup>480</sup> The arrangements for the Patents Court are a notable exception to this rule.

<sup>481</sup> Or to a Deputy Chief Justice, a rather amorphous post (when it exists) that may contain a lot of the disadvantages inherent in a deputy leader’s job in other spheres of public life.

operation between the judges who will go there, may foster a desire to create a new Divisional grouping, but this should be an evolutionary, not an imposed, development, and it cannot take place unless and until the criminal justice questions have been satisfactorily resolved.<sup>482</sup>

592. Without creating any new Divisions, I believe that there would be value in assigning one or more Masters or DJs specifically to assist the work of specialist judges. Judge Mackie QC, the Mercantile judge in London, made this point to me, and I can see no reason why one of the QB Masters should not act as the Mercantile Master, in much the same way as one of them performs the role of the Admiralty Master. Similar arrangements could be made on the TCC side, too, if desired. In the Administrative Court a recent Practice Direction shows how more judicial work is now being entrusted to the Deputy Master of that Court.<sup>483</sup>
593. Outside London, Judge McCahill QC and Judge Havelock-Allan QC were very clear about the need to have a specialist DJ to whom they could assign work without always having to seek the permission of the DCJ on every occasion. Although the arrangements should not be too prescriptive, greater flexibility is likely to lead to a better use of judicial resources and a better service to the court user.

#### *5.2.10.2 Power of a High Court Judge to sit in the County Court*

594. Section 5(3) of the County Courts Act 1984 provides that every judge of the Court of Appeal, every judge of the High Court, and every Recorder shall, by virtue of his office, be capable of sitting as a judge for any County Court district in England and Wales and, if he consents to do so, shall sit as such a judge at such times and on such occasions as the Lord Chief Justice considers desirable after consulting the Lord Chancellor.
595. From time to time there are cases in which it is desirable for a HCJ to hear a case that falls within the exclusive jurisdiction of the County Court, whether in relation to Race Relations proceedings or mortgage possession claims or otherwise. Although the reason for the County Court's exclusive jurisdiction is well-founded, exceptional cases occur where it is desirable for a HCJ to become involved, even at the case-management stage.

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<sup>482</sup> If such a change takes place, those who set the boundary marks of any new Division should not be too prescriptive. I received a persuasive letter from the Chairman of the Association of Contentious Trust and Probate Specialists, Mr Henry Frydenson, which was inspired by a lecture by Mr Justice Briggs. He conveyed to me the concerns of his members that any new structure should retain within a new Division areas of Chancery-related work which did not naturally seem to fall within the prospective ambit of a Business and Property Division. Claims under the Inheritance (Provision for Family and Dependants) Act 1975, trust disputes arising in the context of matrimonial ancillary relief, Chancery-related litigation within the new Court of Protection, and litigation arising in the exercise of the Court's non-contentious probate jurisdiction, were, they said, much more expertly handled (on the whole) by Chancery judges and they would be concerned about any significant change to the current arrangements.

<sup>483</sup> It is difficult to see how the work of the Civil Appeals Office could be successfully without the help of the Deputy Masters performing a minor judicial role.

596. Mr Justice Briggs told me that he had had recent experience of two problems created by exclusive jurisdiction provisions. The first arose out of block applications for the substitution of claimants after one institutional lender had acquired a mortgage book from another.<sup>484</sup> The purchasing mortgage-lender sought a transfer of about 400 County Court claims to the High Court, a substitution of claimant, and then a re-transfer to the relevant County Courts under sections 41 and 40 of the County Courts Act 1984. Such a procedure had (in his view quite wrongly) been adopted by a QB Master in an earlier case, but on this second occasion the Master had had second thoughts and transferred it to the Chancery Division.
597. The solution, he said, lay not in a misuse of sections 40 and 41 of the County Courts Act, but in the proper use of section 5(3) of the same Act (for its text, see above). He has now been permanently appointed as the Chancery judge capable of sitting in all County Courts for the limited purpose of dealing with applications for the substitution of claimants in such cases.
598. The second example arose in a case in which mortgage possession proceedings within a non-London County Court's exclusive jurisdiction had included a claim for a declaration of incompatibility under the Human Rights Act. The same solution was devised. Mr Justice Briggs told me that delays in such cases were caused by the necessity of involving the Lord Chancellor in what is merely a matter of *ad hoc* judicial deployment, but I have been told that prospective legislative changes may remove this potential cause of delay.
599. If the relevance and potential applicability of Section 5(3) were better known, and the involvement of the Lord Chancellor in the process was removed, the arrangements for dealing effectively with jurisdictional difficulties like this would be streamlined.

#### 5.2.10.3 *Sittings by High Court judges outside London*

600. I described in Section 5.1.4 above the difficulties that are regularly confronted when efforts are made to make arrangements for HCJs to hear cases that will still represent genuine High Court business under any new regime. These difficulties arise from the fact that the convenience of lay witnesses, expert witnesses and even lawyers is not readily accommodated under the present arrangements in which HCJs visit centres for shortish periods at a time, and on the QB side at least, the identity of the trial judge may not be known nine months before the hearing, when the arrangements for the trial of these cases tend to be made.
601. In my view it is desirable for the current arrangements to be continued at any rate on the Chancery side, and on the QB side for the regular visits to Birmingham, Manchester, Liverpool & Chester, and Leeds. Although I did not hear any evidence from Nottingham or Newcastle I am sceptical about the value of regular visits for which

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<sup>484</sup> This was in fact not a High Court/County Court problem at all, but one that arose from the territorial scope of each separate County Court's jurisdiction.

genuine High Court work cannot be guaranteed.<sup>485</sup> I also take into account the hope that the Administrative Court judges outside London may be able to help with QB work, although the logistical arrangements needed for High Court trials really need longer lead times than they will be able to offer. It would, in my view, be very much better if arrangements could be made with the relevant listing authorities at RCJ and the Rolls Building so that they would be responsible for sending a judge to try such cases in the unlikely event that they do not settle. If, say, judges could be identified in each of the relevant London lists – QB General, Chancery General, Commercial and TCC – who knew in advance that they might be dispatched to a provincial centre outside London to hear cases that did not settle before the morning of trial, then this would provide a valuable and flexible resource which does not at present exist.

#### *5.2.10.4 A reduction in the number of Designated Civil Judges*

602. In Section 5.1.2 above I explained why I believed that the time has come to reduce the number of DCJs and to elevate their status. If, as I recommend, all personal injury actions start in future in the County Court (apart from those that fall in a class that warrants specialist case-management) and the boundary line between the High Court and the County Courts is altered, their jurisdiction and authority will become even more important, and it is essential that these posts should be filled by civil justice specialists who also have leadership and management skills. Thought must be given to making their job as attractive as possible, so that candidates with the requisite ability will come forward when vacancies arise. I envisage that any change could take place gradually, as the current terms of office of the DCJs who sit outside the main provincial centres come to an end.
603. The situation in the south-east outside London is so different from the situation on all the other circuits that I would not want to be prescriptive about the optimum solution there. Outside the south-east, I would envisage DCJs, all with SCJ status, based at Birmingham, Nottingham, Manchester, Liverpool, Leeds, Newcastle, Bristol, Winchester and Cardiff. If the number of HCJs is to be kept at the present level, it will be essential to attract experienced civil practitioners to these important jobs that fall just below High Court level, where a diet of heavy civil work will be available. The other areas where DCJs are currently in post should have resident judges who have oversight responsibilities of a pastoral nature for all the CJs and DJs exercising civil jurisdiction on his or her “patch”. Once the economic climate improves, their responsibilities would almost certainly warrant the payment of a special allowance (but no special status) while they are discharging them.

#### *5.2.10.5 Judicial appointments and support*

604. Although the creation of ten new Chancery SCJ posts in recent years has alleviated some of the pressures on the Chancery Division in London, there is a very clear need to increase their number. The Table in Annex B2 which shows the number of s.9 deputies who sit for short periods in the High Court to mask the absence of adequate full-time

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<sup>485</sup> The difficulties in providing High Court work for a visiting HCJ at Nottingham speak for themselves, and the routine visit to Newcastle is so short that it is virtually impossible to make effective use of it because so many cases settle and there is no adequate back-up work.



Chancery judge-power speaks for itself. Where these new judges should sit must depend on a study of where the business needs are. The more the strength of Chancery judge-power in the major provincial centres can be enhanced, the greater the prospect of returning to those centres judicial business that has only come to London because this is where almost all the judges have been based. The enthusiasm of all the Chancery SCJs in the cities I visited was one of the most encouraging features of my inquiry. That enthusiasm needs to be built upon now.<sup>486</sup>

605. I have also referred in my report to the need to create in some of the major centres a small cadre of district judges who are selected for their ability to handle heavy civil business. I was very impressed by the arrangements in Manchester, where a Chancery judge may invite a Chancery DJ to undertake a multi-track trial with up to £100,000 in issue, but this cannot be done unless there are DJs in these centres who can be entrusted with work of that weight. Specialist case-management of heavy multi-track work requires specialist skills, as Master Fontaine impressed on me when I interviewed her.
606. During my inquiry I interviewed a number of specialist SCJs, Masters and specialist DJs. A number of them expressed to me a wish that annual meetings should be arranged at which specialist SCJs on the one hand, and Masters and specialist DJs on the other, could meet and discuss issues of common interest. I also heard concerns about the adequacy of library provision and of bespoke JSB training for these judges whose needs are different from the main run of CJs and DJs. A review should be conducted into their needs, as their skills and expertise are central to the efficient running of civil justice at a high level.

### **5.3 Could those problems be remedied or alleviated by the introduction of a Single Civil Court?<sup>487</sup>**

#### **5.3.1 A possible structure for a Unified Court**

607. When I embarked on my inquiry in February 2008 I set out to devise a structure for a unified court which I then discussed with many of those I interviewed. I adopted the four categories of cases identified by the Judicial Resources Review, calling them A1, A, B and C. For my own internal purposes I described the upper reaches of a unified court as the “Premier” level, the area which I have described elsewhere as No Man’s Land as the Upper Level, and the larger area of multi-track work not suitable for HCJs as the General Level. Fast Track business and Small Claims business would belong to the Lower Level... The structure, in its final form, looked like this:

Level		Category	[General]	Chancery	Patents & IP	Companies/ Insolvency	Commercial/ Mercantile	TCC

<sup>486</sup> The enthusiasm and commitment of the Mercantile and TCC SCJs at the great provincial centres I visited were equally impressive.

<sup>487</sup> I was asked, in particular to consider how a Single Civil Court would work in the vital area of case allocation; whether it would require additional resources, and if so, whether one could rely upon these additional resources being provided; and whether a Single Civil Court system is practicable and would achieve the desired remedies.

“Premier”	HCJ	A1					
	HCJ/SCJ/ DHCJ	A					
Upper	HCJ/SCJ/CJ/ Recorder	B					
General	CJ/Recorder/DJ	C					
Lower	DJ/DDJ						

608. I omitted the Administrative Court from this Table because I believed that as the home of public law litigation, as opposed to private law litigation, it should be a free-standing court in its own right in a unified court structure, alongside a Civil Court, a Family Court and a Crown Court. It rapidly became obvious, however, that it would create unwelcome demarcation problems if one attempted to corral all public law business into a freestanding court.

609. It was clear to me that no case had been made out for relegating the Patents Court, the Commercial Court and the Admiralty Court, all of which have international recognition, from their current status in primary legislation. There was also a strong case for elevating the Administrative Court into primary legislation, too. But if this occurred, it was invidious to omit the Chancery Division whose omission formed another irritant within the general unease displayed by Chancery judges and practitioners towards the unification proposals.

610. I came to recognise quite early in my inquiry that “Premier” level cases at least, and probably most Upper Level cases as well, required specialist case management from the outset. It would therefore be better if there was direct entry to these levels rather than things being left to the chance that a DJ in a lower court would transfer them upwards. The abolition of the Divisions, and the introduction of a system of “ticketing” judges for different specialisms, seemed to me to create more problems than it was likely to resolve. At High Court level the existence of the Divisions is a convenient means of providing automatic cross-ticketing of all the work of the Division, and many of those who have been presiding judges on a circuit said that “ticketing” arrangements within the lower judiciary always created jealousies and were a constant cause of trouble. And the very great incidence of settlements before trial makes destructive inroads into any orderly system of providing “judicial horses for courses” in a General List.

611. So far as numbers are concerned, RCJ statistics show that the number of originating claims received at the High Court in 2006 and 2007 were as follows:

	2006	2007
QB General	3010	3379
High Court Appeals	559	590
Admiralty	80	60
Commercial	681	664
Mercantile	-	421
TCC	303	302
Chancery General	3210	2631
Patents	12	34
Administrative Court	11302	11320
Totals	19157	19401

612. It is only in the field of QB General and Chancery General that there might be scope for any significant part of this work to enter the court system at a lower level. Solicitors are usually adept at determining whether their cases are really fit for the specialist part of the High Court in which they are issued. If they are not, the High Court can transfer them down or ensure that they are handled by a judge at the appropriate level, as happens in the Commercial Court and the TCC.
613. It seemed to me that the problems in the QB General List and the Chancery General List stemmed from easily identifiable causes that could be addressed by means other than court unification. In the Chancery Division there was not, until very recently, an adequate judicial resource below High Court level to which cases could readily be transferred down. As I have already observed, there is still a need for a greater number of Chancery specialist judges, and the limits of the County Court's Chancery jurisdiction also need to be greatly enlarged.
614. On the QB side the serious administrative shortcomings at the Central London Civil Justice Centre have made the QB Masters understandably more reluctant to transfer cases downwards than their Chancery brethren.<sup>488</sup> As a result, the prevailing RCJ culture, in which West End and City solicitors treat the RCJ as their venue of choice, even for quite low value claims, cannot justifiably be disturbed until better arrangements are made for Central London business.
615. Outside London the courts are unified in all but name. In my recommendations I have set out to suggest remedies for the practical problems I identified within a non-unified system. People repeatedly told me that nobody would have invented the present arrangements, but they have been made to work. All that is needed now are repairs to the parts that do not work very well, and not a more fundamental and controversial upheaval.

### **5.3.2 How would a single Civil Court work in the vital area of case allocation?**

616. My answer to this question is that I do not believe that a single Civil Court would operate significantly better in this area. I have referred in my report to the concerns I received to the effect that DJs outside the major centres were holding on to heavy multi-track work for case management purposes rather than transferring them to the large local centre. A unified court might exacerbate this problem. Again and again people told me that the over-arching aim must be to bring the right case before the right judge. Today the phrase "judge" includes case-management judges as well. If, as the Civil Justice Review Body considered, the High Court should be the appropriate home for difficult and specialist litigation, it is better that cases start there, when appropriate, than that they are left to the chance of finding their way upwards within a unified system.

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<sup>488</sup> At Central London the Chancery judges have at least established the tradition that Chancery cases must be filed in stiff files!

### **5.3.3 Would a Single Civil Court require additional resources? If so, could one rely upon these additional resources being provided?**

617. No assessment of the likely cost of Civil Court unification was included in the original DCA Consultation Paper on this topic. Although I was invited to answer this question, I did not ask for any special study to be conducted of the likely cost involved in civil court unification because I reached the conclusion quite early on in my inquiries that if there were any spare money available, there are other issues in the civil justice field that deserve much greater priority.
618. I have heard the figure of £10 million mentioned for the possible cost of introducing all the new forms, staff training, rewriting IT systems etc that would be involved. If such a sum were available, it would be far better in my opinion to invest it in the IT systems for which the civil courts are crying out than to invest it in a unification scheme that has so many influential enemies and comparatively few very obvious merits.<sup>489</sup> If proper IT is not available for a unified court, it would be unlikely to achieve any worthwhile results that cannot be achieved through implementing the recommendations I have suggested.

### **5.3.4 Is a Single Civil Court system practicable and would it achieve the desired remedies?**

619. It would be difficult to say that a Single Civil Court system is not practicable. I have set out a possible structure in Section 5.3.1 above. However, for the reasons I have given I do not believe that it would achieve the desired remedies. In this context one needs to bear in mind the worries that I have summarised in Section 1.4 of this report, which are entitled to be given appropriate weight. There are very senior, very well-respected judges who are deeply concerned that the abolition of the High Court in its present form might damage the status and standing of our High Court judges, and lead to significant recruitment problems.<sup>490</sup> Although opinions differ about the existence or scale of this risk, it would not be worth taking it unless the advantages of unification were more obvious than in fact they are.

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<sup>489</sup> So long, that is, that the other changes recommended in this report are implemented.

<sup>490</sup> Of which there is no obvious sign at present. I have been told that the quality of newly appointed Chancery judges has probably never been so high, and Lord Justice Toulson, who is a Judicial Appointments Commissioner, has explained to me that early worries about the recruitment of Commercial Court judges under the new statutory arrangements were caused by a request made by the Lord Chancellor pursuant to s.94 of the Constitutional Reform Act 2005. Under that Section, which was not used for the 2007-8 High Court competition, an applicant for judicial office would be likely to receive no further work at the Bar once he told solicitors that he had been short-listed for a High Court appointment, and he might then not be appointed to the Bench after all. In her Foreword to the Second Annual Report of the Judicial Appointments Commission (TSO, July 2008), the Chairman of the Commission said that remaining on a list without any certainty of appointment was a major disincentive for applicants.

#### **5.4 Standing back, how great is the risk that a Single Civil Court system would end up reproducing the present system in a different guise without achieving worthwhile improvements?**

620. I believe there is a significant risk that this result might occur. There are a lot of important changes that need to be made now, but these are quite independent of unification. It is wise to conduct reviews like this every ten years or so, and I cannot foresee whether a similar conclusion would be reached in ten years' time. For the present, I have no hesitation in advising that plans for the unification of the High Court and the County Courts in relation to the conduct of civil business should not be pursued any further.

### **Part VI. My Conclusions**

621. For the reasons set out in Part V above, I do not recommend that the civil business of the High Court and the county courts should be unified. On the other hand I am satisfied that a large number of useful changes should be made, and I summarise these, and the problems that give rise to them, at the end of this Part.
622. I have listed these recommendations under three headings. Implementing the procedural recommendations should involve no significant public expenditure, other than that customarily undertaken when reforms are being considered and implemented. Similarly, the recommendations I have made for a review of HMCS's filing systems should not involve significant expenditure.
623. Because a decision has been made to limit the number of HCJs, I have recommended a small increase in the number of specialist SCJs (including DCJs) and a considerable reduction in the number of s.9 fee-paid judges. These changes are an inevitable concomitant of the increase in heavy court business
624. In Section 4.9 of this Report I have included a table which portrays the next five years of the civil justice system. At the end of this table I added that an essential ingredient of any coherent five-year strategy is the relocation of the Central London trial centre close to the RCJ and the development, piloting and roll-out of a modern heavy duty electronic diary system.
625. I understand that investment decisions on SUPS have already been taken, but investment decisions on EFDM (and on the two items I have mentioned above) lie in the future,
626. Since my inquiry started, the economic climate has deteriorated significantly. The time is not propitious for any hopes of hitherto unallocated taxpayers' funds. Civil justice, however, is different. The Treasury has ruled that any investment in civil justice must

come out of fees paid by litigants, and, sadly, an economic downturn not infrequently results in an upturn in claimants' resort to the courts to recover unpaid debts and to obtain possession orders, and also in an upturn in insolvency business.

627. The civil business of the courts has resulted in a surplus (which should have been available for investment on civil justice if it had not already been spent elsewhere) of over £44 million in 2005-6 and 2006-7. I do not know if it will show a surplus in the 2007-8 accounting year or in the 2008-9 accounting year. Over 2 million claims were started in the County Courts in 2007, and if a temporary surcharge of £10 was levied on each claim (and a similar surcharge on High Court claims) to pay for IT investment, over £20 million could be raised, for as long as is needed to pay for such urgently needed investment. The surcharge might be phased *pro rata* to the size of the fee for issue.
628. Ministers and those who advise Ministers on civil court fees are understandably concerned about the effect that any rises may have on litigants who cannot afford to pay significant court fees. On the other hand there is a swathe of court business that is not affected by these concerns, and where the litigants (and their advisers) would be only too happy if, at long last, electronic filing and document management systems were installed in the courts that were comparable to those in common use overseas. I recall one case when I was sitting in the Court of Appeal in which one side's fees for the appeal were £1.8 million, of which only £1,000 was attributable to the court fee. I am aware of litigation currently in progress where hundreds of millions of pounds are in issue in a single year-long trial, and again the court fee for the hearing is probably only £1,000.
629. Civil justice in this country has seen so many false dawns since 1988 and so many disappointed expectations that it would perhaps be silly to expect anything any better this time round. But the prospects of pulling it out of a morass have never been so promising, so long as a hard long look is taken of the likely future costs of implementing the five-year strategy I have suggested and of the prospect of meeting any additional expenditure out of increased court fees.
630. With these thoughts in mind I will end my report with these three central recommendations:
- (1) The Lord Chancellor and the Lord Chief Justice should agree upon a five-year strategy for reviving the civil justice system, to be implemented collaboratively by the judiciary, the Ministry of Justice and HM Courts Service.
  - (2) The strategy should include procedural reform, changes needed within the judiciary, adequate financing of the system on a long-term sustainable basis, the development and installation of the SUPS and EFD systems and an adequate heavy-duty listing system, and the relocation of the Central London Trial Centre.
  - (3) A critical path should be agreed for the delivery of the strategy, with agreed annual reports to report progress.

631. My detailed recommendations now follow:

*A Summary of Problems and Recommendations*

(1) Legislative and procedural reform

		Problem	Paras	Recommendation
1	MoJ	The limit to the equity jurisdiction of the County Court is only £30,000	528-537	Remove the jurisdictional limit (or raise the figure by a large amount) following consultation and ensure that proper ticketing and supervisory arrangements exist for circuit judges and district judges exercising Chancery jurisdiction in the County Court. An order can be made under the County Courts Act 1984, s 145, and the High Court and County Courts Jurisdiction Order 1991 should be amended.
2.	MoJ	The limit at which the County Court has jurisdiction over enforcing charging orders is only £30,000.	528-537	As 1 above.
3	MoJ	The contentious probate jurisdiction of the County Court is only £30,000	528-537	As 1 above.
4.	MoJ	The limits of the Companies jurisdiction of the County Courts should be reviewed.	537	As 1 above. An order can be made under the Insolvency Act 1996, s.117 (3).
5.	MoJ	The low figure of £15,000 is the current value above which cases may be started in the High Court.	538-540	Re-fix this figure following consultation, whether at £25,000, £50,000 or £100,000. Amend Article 4A of the 1991 Order.
6.	MoJ	Personal injury litigation over £50,000 is started interchangeably in the High Court and in the County Court	541-548	All personal injury actions must commence in the County Court (except for clinical negligence and mesothelioma and other asbestos-related disease cases). Amend Article 5 of the 1991 Order.
7.	MoJ	A review is needed of those cases for which the High Court has exclusive jurisdiction.	549-553	Defamation, public law matters and certain human rights cases should stay within the exclusive jurisdiction of the High Court. Other instances of exclusive jurisdiction should be reviewed. Amendment to CCA, s.15 would be needed.
8.	MoJ	A judgment creditor has to apply in the High Court if he wants to execute on his debtor's goods for debts over £5,000 and may do so if the debt is at least £600	554-556	Make it possible to exercise a remedy similar to fi fa in the County Court, as an alternative to using the bailiff. Amend the CPR (including RSC Order 45) and s.99 and Sch. 7 of the Courts Act 2003.
9.	CPRC	The criteria governing transfer to and from the High Court are out of date.	557-561	Revise the criteria, using the revised version of the Jackson Committee's criteria suggested in Section 5.2.2.
10.	MoJ	The current arrangements for the no Man's Land between the High Court and the County Court are chaotic. A proliferation of different types of judge, with different pay rates and different training requirements, hear cases at the border between the High Court and the County Court	562-567	Create a new top tier of the County Courts in which cases may be directed for trial by HCJs, retired HCJs, SCJs, CJs and Recorders without the need for DHCJs. Consider whether the County Courts should become a single national court, and whether it should be renamed the Civil Court Changes to the CPR required, and possibly primary legislation
11.	MoJ	A High Court judge cannot exercise jurisdiction which is within the exclusive jurisdiction of the County Court when authorised by the LCJ	568-575	Retain the exclusive jurisdiction, but abolish the need for the Lord Chancellor's concurrence by an amendment to CCA s.5.

		except with the concurrence of the Lord Chancellor.		
12.	CPRC	Problems arise over appeal routes, especially when a CJ cannot hear a High Court appeal from a DJ unless he has a s.9 ticket, or a HCJ is not available at short notice (particularly on a Friday afternoon). Appeals arise in insolvency matters that do not warrant the attention of a HCJ.	576-579	Altering the boundaries between the High Court and the County Court should alleviate these problems. A DCJ should be given authority to make an emergency decision on an appeal from a CJ in the absence of a HCJ (unless the appeal comes from him). Amend CPR Part 52. Review the provisions for appeals in insolvency matters. Amend rr.747(2) and 748(2) of the Insolvency Rules.
13.	MoJ Judiciary	District judges hold on to cases which ought to be transferred to a larger centre outside their area for specialist case management, or give inappropriate case management directions for a High Court trial which a more experienced DJ would not have done.	580	Reduce the number of QB District Registries and DCJs and broaden the authority of the DCJs based at the large centres. An order could be made under s.99 of the Supreme Court Act 1981.
14.	MoJ	A pre-judgment freezing order cannot be granted in the County Court except by a Mercantile judge	581-583	Enable senior circuit judges (with civil jurisdiction) and suitably ticketed circuit judges to grant pre-judgment freezing orders in the County Court. An amendment can be made to the County Court Remedies Regulations.
15.	MoJ	The Insolvency Rules reserve for judges low level business which can be readily entrusted to registrars and DJs. e.g. granting injunctions to restrain the issue or advertisement of a winding up petition or extending the period of an administration order. in trivial matters.	584	Grant them the requisite powers by amendment to the Insolvency Rules.
16.	MoJ	The Central London County Court has no insolvency jurisdiction.	293	The working party chaired by Mr Justice David Richards has identified the legislative changes that might be needed. This reform is dependent on suitable accommodation being available. An order can be made under s.374 of the Insolvency Act 1996, and amendments to rr.6.9(1) and 6.40(1) of the Insolvency Rules, and possibly an amendment to ss.373(3) or 373(4) of the Insolvency Act 1986, are needed.
17.	MoJ	Expense is caused to litigants when by mistake a case is listed before a judge who does not have requisite jurisdiction.	548	This problem may be alleviated by other reforms, but it can be fixed by a simple amendment to primary legislation preventing the decision being a nullity if the mistake was made in good faith.
18.	MoJ	The contempt jurisdiction of the County Court is out of kilter with the contempt jurisdiction of the High Court.	585-587	Make the requisite amendments to the CCA.

## (2) Judicial appointments and deployment etc

19.	Judiciary	Cases outside London that are fit for a HCJ do not get case-managed or tried by a HCJ unless they can be fitted into the small window when	600-601	In addition to the current arrangements, place the cases in the relevant London list, so that a HCJ will be assigned to travel out and hear them if they do not settle.
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		the HCJ will be paying a local visit.		
20.	MoJ Judiciary	s.9 deputies may not be qualified to sit in the County Court if the High Court list collapses and will then receive lower pay if they agree to do so.	537-547	Phase out s.9 (4) deputies and replace them by Recorders (civil only if necessary), and in any event ensure that they are ticketed to hear County Court cases. Fee-paid judges hearing cases in the first tier of the County Court should be paid at the same rate. Amend s.5 (3) of the CCA.
21.	Judiciary	Judicial responsibility for running the civil justice system outside London is undesirably diffused.	602-603	Gradually reduce the number of DCJs, give them all senior circuit judge status and give civil judges in smaller centres pastoral responsibility for the CJs and DJs on their patch, with a suitable financial allowance (but no special status)
22.	HMCS Judiciary	In London there is an overlap between the cases heard in the QB General List and the Chancery General List and the cases heard by CJs at the Central London Trial Centre.	483-487	Move the Trial Centre close to the RCJ, and place these lists (and the TCC list) under single diary managers.
23.	MoJ Judiciary	There are insufficient full-time judges to conduct heavy Chancery business below the level of the High Court. This need will be accentuated if Chancery HCJs undertake criminal cases.	604-606	Review the requirement, and enlarge the establishment of Chancery SCJs.
24.	MoJ Judiciary JAC	Heavy case-management at major Civil Justice Centres requires specialist DJs, who are accustomed to heavy civil litigation.	604-606	Review the requirement and recruit for these posts on the same recruitment basis as High Court Masters.
25.	Judiciary HMCS JSB	Specialist senior circuit judges exercising civil jurisdiction, and Masters and DJs handling heavy civil litigation have inadequate opportunities for discussing common problems and learning from each other.	604-606	Provide for annual conferences, and review their needs for bespoke judicial training and the provision of libraries.

### (3) HMCS: arrangements for filing etc

26.	HMCS	Mistakes are made by staff and practitioners and judges in operating a quite complicated system.	575	The retention and case management of a greater volume of work in the County Court will make things easier. Colour coding court files could improve the position, and more easily intelligible case numbering on court files should supplement colour coding. The arrangements in Cardiff whereby a judge marks and signs the outside of a file with a felt-tip pen to indicate how the case should be managed thereafter are worth introducing elsewhere. Easier coding arrangements should be introduced when cases are transferred from the High Court to the County Court or <i>vice versa</i> , so that dependable statistics can be kept in future.
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## Memorandum

From: John Sorabji (Ext 6852)

Legal Secretary to the Master of the Rolls

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### **The Constitutional Status of the Supreme Court of Justice of England and Wales and of the High Court Judiciary**

#### **Early Development to the Stuart Period**

1. The English and Welsh (English) civil court system is a product of the Norman Conquest in 1066. It is the direct descendant of the Curia or Aula Regis (the Curia), which supplanted the then extant Saxon justice system,<sup>491</sup> and which was established by William I as the means by which his sovereign power and duty to ‘(furnish) security and justice to all in the community’ was exercised.<sup>492</sup> The Curia was originally composed of, in addition to the sovereign, the great officers of state, such as the Lord High Constable, Lord Mareschal, Lord High Treasurer and Lord Chancellor. They were assisted in their judicial role by other members of the Curia Regis, known as King’s justiciars, who while perhaps not formally legally trained were well-versed in legal matters.<sup>493</sup> As Madox put it:

“We may consider the King as sovereign or chief Lord of this Realm, and the fountain of justice to his subjects . . . Their causes were heard and judged either before the King himself, or else (most usually) before his Chief Justiciar, or before him together with some others styled Justiciae or Justiciars.”<sup>494</sup>

2. Originally, the Curia dispensed justice according to both common law and equity, without a distinction being drawn between the two.<sup>495</sup> However as the King gradually ceased to

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<sup>491</sup> Hohfeld, *The Relations between Equity and Law*, (11) Michigan Law Review (1912 – 1913) 537 at 546 – 549; Adams, *The Origin of English Equity*, (16) Columbia Law Review (1916) 87 (Adams (1916)) at 89; Milsom, *Historical Foundations of the Common Law*, (1981) (2<sup>nd</sup> Edition) (Butterworths) (Milsom at 83 – 99); Adams, *The Continuity of English Equity*, (26) Yale Law Journal (1916 – 1917) 550 (Adams (1916 – 1917)) at 553.

<sup>492</sup> Adams (1916) at 91.

<sup>493</sup> Kerr, *An Action at Law: Being the outline of the Jurisdiction of the Superior Courts of Common Law, with an elementary view of the Proceedings in Personal Actions and in Ejectment*, (T & J Johnson) (1854) Kerr (1854) at 16ff.

<sup>494</sup> Marsh, *History of the Court of Chancery and of the Rise and Development of the Doctrine of Equity* (Carswell) (1890) (Marsh 1890) at 5 – 6 and at 10, cites Madox, *History of the Exchequer* at 84; Blackstone, *Commentaries on the Laws of England*, Vol. 3 (Chicago University Press) (1979) (Blackstone (1979)) Vol. 3 at 24; The Chief Justiciar was originally more than simply a judge, as he held and exercised all power in the State in the name of the King. He was in effect the principal secretary of state and regent when the King was out of the realm.

<sup>495</sup> Holdsworth, *The Relation of the Equity administered by the Common Law Judges to the Equity administered by the Chancellor*, (26) Yale Law Journal (1916 – 1917) 1 (Holdsworth (1916 – 1917)); Adams (1916 – 1917); Haskett, *The Medieval Court of Chancery*, 14 Law & History Review (1996) 245 (Haskett (1996)) at 251; Milsom (1981) at 84; Story, *Commentaries on Equity Jurisprudence as Administered in England and America*, (Little Brown & Co) (1886) (4<sup>th</sup> Edition) (Story (1886)) at 41.

play an active judicial role within the Curia and it dispensed justice on his behalf it began to evolve into a number of discrete entities, both judicial and non-judicial. Judicially, it evolved during the 11<sup>th</sup> to 13<sup>th</sup> Centuries, into the four superior common law courts: the Court of Common Pleas or Common Bench, the Court of King's Bench; the Court of Exchequer of Pleas; and the High Court of Chancery.<sup>496</sup> Each of the common law courts had both a first instance and appellate jurisdiction. A fifth superior court, the Court of Exchequer Chamber, existed but only had appellate jurisdiction and, unlike the other courts was a creature of statute.<sup>497</sup>

3. During this period the four superior courts which evolved out of the Curia Regis dispensed justice according both to the common law and equity. At this stage the two remained undifferentiated, although each of the courts had a different jurisdiction. By the 14<sup>th</sup> Century each of the courts was firmly established and, following reforms initiated by Edward I, had a clearly demarcated jurisdiction; a jurisdiction which saw the four superior courts solely exercise common law jurisdiction. Subject to one exception they had ceased to exercise an equity jurisdiction.<sup>498</sup> The ambit of their jurisdiction was as follows.
4. The High Court of Chancery exercised the common law jurisdiction to issue original writs, upon which the jurisdiction to try matters arising at common law was based.<sup>499</sup> The original writs thus formed the legal basis from which the other common law courts' jurisdiction arose.<sup>500</sup> This was more important for Common Pleas and Exchequer, which had no authority to hear cases absent the presentation of a writ. Theoretically, King's Bench needed no writ to obtain authority to hear cases as the King was always nominally in court to hear cases.<sup>501</sup> The High Court of Chancery did not simply exercise the common law jurisdiction to issue original writs, it also exercised a limited common law jurisdiction in respect of certain actions against the Crown and in respect of its own officers.<sup>502</sup> The Court of Common Pleas had jurisdiction over all causes arising at common law between private subjects. The Court of Exchequer of Pleas had jurisdiction over revenue cases involving the Crown and subjects. It should be noted however that this was not a common law jurisdiction. When Exchequer dealt with such matters it did so as a Court of Equity and not one of Common Law. It retained this jurisdiction until it was transferred to the High Court of Chancery in 1841<sup>503</sup> Exchequer's common law jurisdiction arose from the right of debtors or farmers of the Crown to sue and be sued before it in respect of personal actions that would otherwise fall within the jurisdiction of the Court of Common Pleas. By the use of a legal fiction where plaintiffs would plead that they were farmers or debtors of the Crown, any individual could bring such a claim

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<sup>496</sup> Adams (1916) at 91; Kerr (1854) at 22; Blackstone (1979) Vol. 3 at 37

<sup>497</sup> Blackstone (1979) Vol. 3 at 55; Kerr (1854) at 36; Baker, *An Introduction to English Legal History*, (Butterworths) (Fourth Edition) (2002) (Baker (2002)) at 137; It was established twice, first by Edward III with jurisdiction to hear error from the Court of Exchequer and then by Elizabeth I with jurisdiction to hear error from the Court of King's Bench (31 Edward III, c 12; 27 Eliz. C.8).

<sup>498</sup> Holdsworth (1916 – 1917) at 6; Adams (1916) at 89.

<sup>499</sup> Marsh (1890) at 16; Story (1886) at 35ff; Holdsworth, *A History of English Law*, (1966) (Sweet & Maxwell) (7<sup>th</sup> Edition) (Holdsworth (1966)) Vol. 12 at 395ff; By the reign of Edward II the Chancery Court was properly established as a common law court; Haskett (1996) at 249ff queries the extent to which the Chancery Court had been established by the reign of Edward III.

<sup>500</sup> Marsh (1890) at 16 & 30 – 34, my addition in brackets.

<sup>501</sup> Milsom (1981) at 34 – 35 & 55.

<sup>502</sup> Blackstone (1979) Vol. 3 at 46ff;

<sup>503</sup> Court of Chancery Act 1841

before the Exchequer Court.<sup>504</sup> The Court of King's Bench had jurisdiction over all other common law matters. It specifically retained a superintendent jurisdiction over inferior tribunals, the basis of modern day judicial review, a criminal jurisdiction on what was known as its 'Crown Side' and a civil common law jurisdiction, on what was known as its 'Plea Side' on matters arising between subject and subject which were similar in nature to criminal matters i.e., trespass to the person. Of the common law courts, it was the preeminent one.<sup>505</sup>

5. With the formalisation of the four superior courts as common law courts with common law jurisdiction equity, with the exception of the Court of Exchequer's specific equity jurisdiction, might be thought to have disappeared from the English justice system. This was however not correct. During the period when the four superior common law courts established themselves the sovereign retained and exercised a residuary jurisdiction to administer justice on a distinct basis from that exercised by the common law courts.<sup>506</sup> As Adams put it:

*"It [was] only as the Common Law became a hard and fast system, as men began to ask themselves about boundaries of action and limitations upon the new, that a new field must be found for the action of the royal prerogative in securing general justice not specially provided for in the ordinary way, for this duty and this function still remained to the king.*

*The seat of this action was found in a place where it had always existed, in an organ which had come to be more and more recognized, as definition and differentiation increased, as being the special organ of the king's prerogative, in the Council."*<sup>507</sup>

6. The Curia retained the power through the exercise of the royal prerogative, specifically the prerogative of grace, to exercise a supplementary jurisdiction in order to abate the rigour of the common law and provide justice where the common law courts could not.<sup>508</sup> In practice this jurisdiction was delegated to the Lord Chancellor to administer. It was delegated in either of two ways. Initially it was delegated through the issue of a writ under the Privy Seal to either the Lord Chancellor or the Master of the Rolls.<sup>509</sup> By the mid-14<sup>th</sup> Century however it was formally delegated to the Lord Chancellor by way of his custody of the Great Seal. From this point onwards he exercised, what became known as the High Court of Chancery's extraordinary or equity jurisdiction, as the sole judge of that court.<sup>510</sup>

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<sup>504</sup> Kerr (1854) at 26, by the use of a similar fiction King's Bench also extended its jurisdiction to encompass such actions.

<sup>505</sup> Kerr (1854) at 24; Milsom (1981) at 55.

<sup>506</sup> Adams (1916) at 98.

<sup>507</sup> Adams (1916) at 89.

<sup>508</sup> Odgers, *A Century of Law Reform* (MacMillan & Co) (1901) at 207; Story (1886) at 41ff; Tudsbery, *Equity and the Common Law*, (1913) 29 *Law Quarterly Review* 154 at 159 cites Lambarde's view that the Lord Chancellor ". . . in his Court of Equitie . . . doth . . . cancell and shut up the rigour of the generall law."; Adams (1916 – 1917) at 557 sees the growth of equity as a direct outgrowth of the use of prerogative powers by the sovereign from the reign of Henry II.

<sup>509</sup> Spence, *Select Essays in Anglo-American Legal History*, Vol. 2, (1907, 1992 Reprint) (Boston, Little Brown & Company) (Spence 1907) at 233 - 234

<sup>510</sup> Avery, *An Evaluation of the Effectiveness of the Court of Chancery under the Lancastrian Kings*, (86) *Law Quarterly Review* (1970) 84 at 89, points out that at least in respect of its common law jurisdiction the Lord Chancellor would sit with the common law judges. He also implies that prior to 1473 the common law judges

7. At the start of this early period the Courts were not presided over by a professional judiciary. The High Court of Chancery was presided over by the Lord Chancellor, a political and ecclesiastical figure. The common law courts were presided over by members of the court who gained judicial experience as a consequence of serving as judges.<sup>511</sup> It was not until Edward I's reign that a professional judiciary began to develop, as judges were appointed following a period of service as a clerk to a serving judge or as practice as a Serjeant-at Law.<sup>512</sup> Except for the Lord Chancellor who held his position as a judge solely whilst he continued in office and the Barons of Exchequer who held office *quamdiu se bene gesserint*, that is 'during good behaviour', the common law judiciary held their positions *durante bene placito*, that is to say 'during our [that is to say the sovereign's] pleasure'. While it was apparently unusual for members of the judiciary to be removed from office by the sovereign it was not entirely unknown. Edward I prosecuted his judiciary successfully for acting ultra vires the terms of the delegated authority; they had unlawfully amended the court records. This however resulted in a £70,000 fine rather than dismissal from office.<sup>513</sup> Danby CJ was dismissed by Henry VI.<sup>514</sup> Mary I removed Cholmeley CJ and from office for political reasons. She also demoted Saunders CJ from that position to that of Chief Baron of Exchequer and removed Hales J from office as a Justice of Common Pleas.<sup>515</sup> Elizabeth I removed a judge from office for political reasons. These instances were however far from the norm.<sup>516</sup>
8. One of the consequences of holding office *durante bene placito*, or as in the Lord Chancellor's case whilst holding the Great Seal, was that the judiciary were, as Baker puts it, simply 'servants of the king, appointed and paid by the king, and in theory removable at the pleasure of the king. On paper they were no more secure in office than government ministers.' He goes on to note that during the medieval period it was often the case that the judiciary would be required by writs issued under the privy seal to follow instructions issued by the Crown.<sup>517</sup> This is not to suggest that the judiciary were at this time wholly subservient to the sovereign's wishes. The judiciary did in general maintain their independence; albeit more so after the Fifteenth Century when the concept of constitutional monarchy began to develop and 'personal loyalty . . . owed to the king [was transformed] into a more objective form of loyalty to an impersonal Crown and to the King's common law.'<sup>518</sup>

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would also sit with, in order to assist, the Lord Chancellor in the exercise of the equity jurisdiction. Holmes (1885) at 169; Spence (1907) at 236, see 22 Edward III. See Adams (1916 – 1917) at 556 for a contrary view Story (1886) at 41ff: "Accordingly, in the 8<sup>th</sup> of the reign of Edward I. an ordinance passed by which petitions . . . were to be referred, according to their nature, to the chancellor and the justices; and in matters of grace to the chancellor."; Story (1886) at 42, also notes that a proclamation from the reign of Edward III 'referred matters of grace to the cognizance of the chancellor'; Marsh (1890) at 16 & 30 – 34; Spence, *The Equitable Jurisdiction of the Court of Chancery* Vol. 1 (1846) (Stevens & Norton) at 337 & 407; Adams, *The Doctrine of Equity being a Commentary on the Law as Administered by the Court of Chancery*, (T & JW Johnson & Co) (1850) at xxiii – xxiv; the Lord Chancellor's authority stemmed from his custody of the Great Seal.

<sup>511</sup> Brand, *The Origins of the English Legal Profession*, (Blackwell) (1991) (Brand (1991) at 9ff.

<sup>512</sup> Brand (1991) at 28 – 29.

<sup>513</sup> Kerr (1854) at 29 – 32.

<sup>514</sup> Baker (2002) at 167.

<sup>515</sup> Holdsworth (1966) Vol. 5 at 348; Oxford Dictionary of National Biography (ONDB)

<sup>516</sup> Baker (2002) at 167.

<sup>517</sup> Baker (2002) at 166.

<sup>518</sup> Baker (2002) at 166 – 167.

9. It would appear therefore that during this initial period of development the constitutional status of the superior courts and the judiciary was that the four superior common law courts, within which I include the High Court of Chancery, were emanations of the Royal Court, the Curia Regis.; they were the formal bodies to which, as Gascoigne CJ put it in *Chedder v Savage*, “the king [had] committed all his judicial powers”.<sup>519</sup> Insofar as the superior judiciary were concerned they had the status of Crown servants, who with the exception of Barons of Exchequer, could be dismissed at any time albeit this occurred only rarely. Equally, they did not as yet have immunity from civil or criminal liability for actions done while acting as a judge, as demonstrated by Edward I’s prosecution of his judiciary.

### **The Stuart Period to the Act of Settlement**

10. During the Stuart period judicial security of tenure became more precarious. While the constitutional status of the courts appears to have remained as it was, the judiciary came into conflict with the monarchy with greater regularity than had previously been the case; as perhaps was inevitable given the Stuart King’s belief in divine right. The highpoint of this dispute was James I’s attempt in 1607 to exercise the sovereign judicial power which had since early medieval times been delegated to the judiciary. By unanimous decision the common law judiciary decided that the King could not now personally exercise judiciary power. Coke CJ put it this way in the *Prohibitions del Roi*:

“ . . . the King in his own person cannot adjudge any case, either criminal, as treason, felony, etc., or betwixt party and party, concerning his inheritance, chattels, or goods etc., but this ought to be determined and adjudged in some Court of Justice, according to the law and custom of England . . . ”<sup>520</sup>

While there are arguments as to whether Coke CJ was justified in holding that this was the case, given for instance the possible view that as the courts and judiciary exercised merely a delegated power it always remained possible in principle to revoke or amend the nature of the delegation, his statement was in effect one of constitutional principle: that the superior courts were the sole means through which justice could be done.<sup>521</sup>

11. While Coke CJ may have set out for the first time a clear statement that the administration of justice was something solely within the province of the courts and the judiciary, this did not as yet entail that the courts were entirely independent and free from interference. Coke CJ’s conflict with James I saw his removal from office, as it did his successors Crew and Heath CJs: all of whom were removed for political reasons.<sup>522</sup> Walter CB was effectively removed from office by James I for similar reasons; albeit as he was appointed *quamdiu se bene gesserint* he was simply suspended and thus barred from sitting as a judge.<sup>523</sup> Bacon LC was also removed from office, although this was not for political reasons but a consequence of his being found guilty of corruption. During Charles II’s

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<sup>519</sup> (1406) YB Mich. 8 Hen IV, fo. 13. Pl. 13, cited by Baker (2002) at 95; also see the Statute of Northampton 1328, which established that justice should not be delayed or disturbed by royal command i.e., the courts were to carry out their judicial function independently of the Crown.

<sup>520</sup> (1607) 12 Co. Rep. 63.

<sup>521</sup> Dicey, *An Introduction to the Study of the Law of the Constitution* (1885), (Macmillan Press, 10<sup>th</sup> Edition, 1959) (Dicey 1959)) at 18.

<sup>522</sup> Holdsworth (1966) Vol. 5 at 346 & 351; ONDB.

<sup>523</sup> Holdsworth (1966) Vol. 5 at 351; Archer J was also suspended from office during Charles II’s reign see Baker (2002) at 167.

reign a move towards judicial independence based on a move towards appointed the judges of the superior courts *quamdiu se bene gesserint* was undermined by the adoption of a practice of forcibly retiring judges. Charles II removed Rainsford CJ on this basis in 1678 in order to appoint a court favourite (Scroggs CJ). Baker notes that in the following year further judges were thus removed for political reasons. James II carried on the tradition by removing 12 judges from office, again for political reasons.<sup>524</sup>

12. It was not until the late 17<sup>th</sup> Century and early 18<sup>th</sup> Century that status of the superior courts and the judiciary properly took on the character that it would retain to the present day. In the first instance the Bill of Rights 1688 gave statutory force to Coke CJ's statement from the *Prohibitions del Roi*. It established that any attempt by the Sovereign to dispense justice directly and personally was contrary to law:

*“That the pretended Power of Dispensing with Laws or the Execution of Laws by Regall Authoritie as it hath beene assumed and exercised of late is illegal.”*<sup>525</sup>

This was followed in 1701 by the Act of Settlement which gave the judiciary of the superior courts, except for the Lord Chancellor, security of tenure. It established that judicial offices were held *quamdiu se bene gesserint*, subject to removal upon an address to both Houses of Parliament.<sup>526</sup> Finally, in 1760 superior judges offices were held by statute not to determine on the death of the monarch. Previously all judicial offices had determined on the sovereign's death and the judiciary needed to be reappointed to their respective offices. This afforded the new sovereign the opportunity to refuse to reappoint a judge. Immediately following the Act of Settlement's enactment, Queen Anne on her accession to the throne exercised her power not to reappoint. This practice ended in 1760, from which point security of tenure has been absolute, subject to the terms of the Act of Settlement and its statutory successors. As a final point, which assisted in embedding into the constitutional framework judicial independence, immunity from suit, for judges of superior courts, for actions carried out whilst exercising their judicial function, even if they acted out of malice, was also firmly established during this period: *Hamond v Howell* (1677) 2 Mod. Rep. 218; *Sirros v Moore* [1975] QB 118.

### **Act of Settlement to the Judicature Acts 1873 – 1875**

13. The position reached by the Act of Settlement was one which saw the superior common law courts, and the High Court of Chancery, firmly established as independent bodies of the State. Their constitutional status as courts of justice was established as was the independence of their judiciary.
14. During the 19<sup>th</sup> Century the justice system was subject to a considerable degree of administrative reform. The need for reform arose primarily due to the changing needs of a society which had undergone rapid industrialisation, which as a consequence was no longer best served by a civil justice system which had developed its form and structure during the Middle Ages. The first relevant reform was the restructuring of the system of local justice before inferior civil courts. Following the Second Report of the Common

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<sup>524</sup> Baker (2002) at 167 – 169.

<sup>525</sup> 1688 c.2 1 Will and Mar. 2

<sup>526</sup> 1 W. & M. Sess. 2. c. 2. s.2, “*That after the said limitation shall take effect as aforesaid, judges commissions be made quamdiu se bene gesserint, and their salaries ascertained and established; but upon the address of both Houses of Parliament it may be lawful to remove them;*”

Law Commissioners (1830)<sup>527</sup> a new County Court system was introduced via the County Courts (England) Act 1846.<sup>528</sup> While judges of the new County Court (Circuit Judges) had security of tenure, it was of a weaker sort than that of judges of the superior common law courts, in that they could be removed from office by the Lord Chancellor ‘for inability or misbehaviour.’ They did not receive the protection of removal only through Address to Parliament.<sup>529</sup> It was also the case that their immunity from suit was not as extensive as that which protected the judges of the superior common law courts: they could be prosecuted for acts done outwith the scope of their jurisdiction. Thus a judge who was acting under a mistake of law as to his jurisdiction was held liable in damages: *Houlden v Smith* (1850) 14 QB 841.

15. Administrative and procedural reform was the order of the day during the 19<sup>th</sup> Century and both the common law courts and the High Court of Chancery were subject to almost continuous reform from 1820 to 1860.<sup>530</sup> Reform, in the shape of, for instance, the Process in Courts of Law at Westminster Act 1832 (the Uniformity of Process Act 1832), three Common Law Amendment Acts of 1852, 1854 and 1860 and four Chancery Amendment Acts of 1850, 1852, 1858 and 1860 did not impinge upon either the constitutional status of the courts or the judiciary. It did not because it was simply focused upon ensuring that the courts were better able to deliver justice economically and efficiently.

### **Creation of the Supreme Court of Judicature**

16. The failure of these reforms however to achieve their goal led in 1868 to the appointment of a further Royal Commission: the Judicature Commission. This Commission produced five reports: one in 1868 and 1872 respectively and three in 1874. They would make a number of proposals concerning the fundamental structure of the superior and inferior courts. In their First Report (1868) they proposed the fusion of all the superior courts into a single, omniscient court; omniscient because it was to have all the jurisdiction of its statutory predecessors.<sup>531</sup> They put it this way:

*“We are of the opinion that the defects above adverted to cannot be completely remedied by any mere transfer of jurisdiction between the Courts as at present constituted; and that the first step towards meeting and surmounting the evils complained of will be the consolidation of all the Superior Courts of Law and Equity, together with the Courts of Probate, Divorce, and Admiralty, into one Court, to be*

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<sup>527</sup> Second Report of the Common Law Commissioners into the Practice and Proceedings of the Superior Courts of Common Law (House of Commons) (1830)

<sup>528</sup> 9 & 10 Vict. C A P. XCV.

<sup>529</sup> Section 18 of the 1846 Act; now see section 11 of the County Court Act 1984.

<sup>530</sup> See variously the Report of the First Chancery Commission (1824); the Reports of the First Common Law Commission (1829); the Reports of the Second Common Law Commission (1850); the Reports of the Second Chancery Commission (195); and the report of the Chancery Evidence Commission (1860); Holdsworth, *Reforms in the Law*, Law Quarterly Review (56) 1940 at 340; Dillon *Select Essays in Anglo-American Legal History*, Vol. 1, (1907, 1992 Reprint) (Boston, Little Brown & Company) at 502ff.

<sup>531</sup> The Royal Commission to inquire into the Operation and Constitution of the High Court of Chancery, Courts of Common Law, Central Criminal Court, High Court of Admiralty, and other Courts in England, and into the Operation and Effect of the Present Separation and Division of Jurisdiction between the Courts (No 4130; 1868 – 1869) at 6 – 9.



*called “Her Majesty’s Supreme Court,” in which Court shall be vested all the jurisdiction which is now exercisable by each and all the Courts so consolidated.”*<sup>532</sup>

17. The Judicature Commissioners’ recommendation was enacted in section 3 of the Supreme Court of Judicature Act 1873, which read as follows:

*“From and after the time appointed for the commencement of this Act, the several Courts herein-after mentioned, (that is to say,) the High Court of Chancery of England, the Court of Queen’s Bench, the Court of Common Pleas at Westminster, the Court of Exchequer, the High Court of Admiralty, the Court of Probate, the Court for Divorce and Matrimonial Causes, and the London Court of Bankruptcy, shall be united and consolidated together, and shall constitute, under and subject to the provisions of this Act, one Supreme Court of Judicature in England.”*

18. The Act did not therefore abolish the superior courts; it simply merged them into a single court.<sup>533</sup> The Act then, in section 4 of the 1873 Act, divided that new court into two divisions:

*“The said Supreme Court shall consist of two permanent Divisions, one of which, under the name of “Her Majesty’s High Court of Justice,” shall have and exercise original jurisdiction, with such appellate jurisdiction from inferior Courts as is herein-after mentioned, and the other of which, under the name of “Her Majesty’s Court of Appeal,” shall have and exercise appellate jurisdiction, with such original jurisdiction as herein-after mentioned as may be incident to the determination of any appeal.”*

19. Both its permanent Divisions were to be superior courts of record i.e., ones of general jurisdiction except for where that jurisdiction was limited by statute.<sup>534</sup> In this the new Courts retained the status which had been conferred on the superior common law courts and the High Court of Chancery. In some ways the declaration in the 1873 Act as to their status was redundant given that the Supreme Court was the product of the union of those courts, which were all superior courts of record, and the High Court and Court of Appeal simply exercised such jurisdiction of those courts which the Act allotted to them.
20. Further subdivision of the High Court into Divisions, by section 31 of the 1873 Act was then made on what was anticipated at the time to be a temporary basis in order to ensure that litigants were not overly confused by the nature of the reforms. It was anticipated in time as litigants and the legal profession became used to the merger of the courts that the Divisions would be abolished: see section 32 of the 1873 Act and the 1868 Report at 9.
21. The reforms were just as careful to retain the constitutional status of the judiciary of the superior courts as they were to maintain the constitutional position of the new Supreme Court. The latter being maintained by the fact that as the statutory successor to the established superior courts it was simply the product of their consolidation rather than a new body whose authority was to be created by statute to replace them following their

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<sup>532</sup> The 1868 Report at 9.

<sup>533</sup> Also see section 25 of the 1873 Act which reiterates that there Act was one which effected a ‘*union of the several Courts . . .*’

<sup>534</sup> Section 16 & 18 of the 1873 Act; this is to be contrasted with the County Court which was a court of record only; *Halsbury’s Laws of England*, Vol. 10 (1) at 308 – 309.

abolition. The established courts were neither abolished nor replaced they were drawn together, united and renamed.

22. The status of the judiciary was maintained by section 9 of the 1873 Act, which re-enacted the guarantee of security of tenure set out within the Act of Settlement.<sup>535</sup> Section 5 of the 1873 Act ensured that their powers and jurisdiction was not diminished as it contained the following saving provision:

*“All the Judges of the said Court shall have in all respects, save as in this Act is otherwise expressly provided, equal power, authority, and jurisdiction; and shall be addressed in the manner which is now customary in addressing the Judges of the Superior Courts of Common Law.”*

23. The superior judiciary were then assigned to one of the two permanent Divisions i.e., the High Court or the Court of Appeal. A distinction needs to be made at this point. The 1868 Report makes it clear that the intention following consolidation of the superior courts into a single Supreme Court was that the judiciary of the superior courts should become judges of the new Supreme Court. The Report puts it this way (at 9):

*“From the consolidation of all the present Superior Courts into a Supreme Court, it follows, that all the Judges of those Courts will become Judges of the Supreme Court; and thus every Judge (with the exception of those who are to sit exclusively in the Appellate Court herein-after recommended), though belonging to a particular Division, will be competent to sit in any other Division of the Court, whenever it may be found convenient for the administration of justice.”*

24. Judges were to be judges of the Supreme Court and not of the Court of Appeal or High Court. It is not immediately obvious that this carried through into the 1873 Act. It is not obvious because both section 5 and 6 of the Act refer to the High Court and the Court of Appeal, respectively, being constituted of a number of judges:

*“(5) Her Majesty's High Court of Justice shall be constituted as follows:--The first Judges thereof shall be the Lord Chancellor, the Lord Chief Justice of England, the Master of the Rolls, the Lord Chief Justice of the Common Pleas, the Lord Chief Baron of the Exchequer, the several Vice-Chancellors of the High Court of Chancery, the Judge of the Court of Probate and of the Court for Divorce and Matrimonial Causes, the several Puisne Justices of the Courts of Queen's Bench and Common Pleas respectively, the several Junior Barons of the Court of Exchequer, and the Judge of the High Court of Admiralty, except such, if any, of the aforesaid Judges as shall be appointed ordinary Judges of the Court of Appeal.*

*(6) Her Majesty's Court of Appeal shall be constituted as follows:--There shall be five ex officio Judges thereof, and also so many ordinary Judges (not exceeding nine at any one time) as Her Majesty shall from time to time appoint. The ex officio Judges*

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<sup>535</sup>Section 9 reads: “All the Judges of the High Court of Justice, and of the Court of Appeal respectively, shall hold their offices for life, subject to a power of removal by Her Majesty, on an address presented to Her Majesty by both Houses of Parliament. No Judge of either of the said Courts shall be capable of being elected to or of sitting in the House of Commons. Every Judge of either of the said Courts (other than the Lord Chancellor) when he enters on the execution of his office, shall take, in the presence of the Lord Chancellor, the oath of allegiance, and judicial oath as defined by the Promissory Oaths Act, 1868. The oaths to be taken by the Lord Chancellor shall be the same as heretofore.”

*shall be the Lord Chancellor, the Lord Chief Justice of England, the Master of the Rolls, the Lord Chief Justice of the Common Pleas, and the Lord Chief Baron of the Exchequer. The first ordinary Judges of the said Court shall be the existing Lords Justices of Appeal in Chancery, the existing salaried Judges of the Judicial Committee of Her Majesty's Privy Council, appointed under the "Judicial Committee Act, 1871," and such three other persons as Her Majesty may be pleased to appoint by Letters Patent; such appointment may be made either within one month before or at any time after the day appointed for the commencement of this Act, but if made before shall take effect at the commencement of this Act."*<sup>536</sup>

25. These two sections may give rise to two misconceptions. First, that the High Court and Court of Appeal are in some way made up of, that is to say constituted, of their judiciary. In other words, they may in some way obtain their jurisdiction and constitutional status due to the nature of the judiciary or judicial office. Secondly, and a corollary of the first point, the judges who constitute them do so as judges of either the High Court or Court of Appeal.
26. It is clear however from the terms of section 6 of the 1873 Act that the Judicature Commissioner's recommendation that after merger of the superior courts the judiciary of the superior courts would become judges of the Supreme Court and not judges of the High Court or Court of Appeal was adopted. This is clear from the reference to who could be appointed a judge of the Court of Appeal: section 6 states as follows:

*"Besides the said ex officio Judges and ordinary Judges, it shall be lawful for Her Majesty (if she shall think fit) from time to time to appoint, under Her Royal Sign Manual, as additional Judges of the Court of Appeal, any persons who, **having held in England the office of a Judge of the Superior Courts of Westminster hereby united and consolidated, or of Her Majesty's Supreme Court hereby constituted, or in Scotland the office of Lord Justice General or Lord Justice Clerk, or in Ireland the office of Lord Chancellor or Lord Justice of Appeal, or in India the office of Chief Justice of the High Court of Judicature at Fort William in Bengal, or Madras, or Bombay, shall respectively signify in writing their willingness to serve as such additional Judges in the Court of Appeal.**"*<sup>537</sup>

27. This section makes clear that new judges of the Court of Appeal are capable of appointment out of the number who have previously been appointed as judges of the Supreme Court. This, of course, implies that judges of the High Court, a permanent Division of the Supreme Court, can be appointed as members of the Court of Appeal. But it makes clear that such appointment comes because they are judges of the Supreme Court who as a necessary corollary have been appointed to sit in and exercise the jurisdiction of the High Court. A corollary of this is that Court of Appeal judges were equally judges of the Supreme Court appointed to sit in and exercise the jurisdiction of that permanent Division of the Supreme Court.<sup>538</sup>
28. This is suggestive of the conclusion that the idea that the High Court obtains its status and its jurisdiction from the High Court judiciary is wrong because its judiciary are primarily judges of the Supreme Court who are appointed simply to sit in the High Court. The

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<sup>536</sup> Now see section 2 and 4 of the Supreme Court Act 1981

<sup>537</sup> My highlighting.

<sup>538</sup> See now sections 10 and 11 of the 1981 Act.

further elaboration which the 1873 Act gives to the powers and jurisdiction of the High Court and Court of Appeal within sections 16 – 18 of the 1873 Act reiterates the point that their jurisdiction was that which was previously exercisable by the various superior courts and not primarily by their judiciary. The new Supreme Court was to exercise the jurisdiction of its predecessors; it was not to be the new vehicle through which the judiciary exercised their jurisdiction.

### **Merger of Superior Courts with the County Courts**

29. The Judicature Commissioners went further than the proposal that the superior courts be merged. They also recommended in their 2<sup>nd</sup> Report of 1872 that the new Supreme Court should be merged with the County Courts. This was to occur through the unification of the County Courts with the new High Court.<sup>539</sup> The recommendation within the 2<sup>nd</sup> Report was not supported by all 24 Commissioners. 9 Commissioners recommended the proposal without qualification. 9 Commissioners recommended with qualifications, most of which reflected concerns with the Assize system. 6 Commissioners were unable to agree with the recommendation, of those: 2 did not concur because they had not attended a sufficient number of the Commission's proceedings; the remainder expressed doubts as to the efficacy and practicality of merger, which was recommended as a further means to improve the proper administration of justice.

30. The specific recommendation within the report was that the County Courts should '*be annexed to and form constituent parts or branches of the proposed High Court of Justice.*'<sup>540</sup> It made the recommendation because it was believed that it:

*"would at once put and end to many of the anomalies, inequalities, and division of jurisdictions . . . and to the uncertainty, expense, and delay to which litigants are now exposed from Courts acting under conflicting rules. All original jurisdiction being centred in, and exercised derivatively from the High Court, the extent and mode of its exercise would simply be a question of distribution."*<sup>541</sup>

31. The basis on which the Judicature Commissioners proceeded in carrying out their Commission was to solve the '*practical question*' as to '*how the judicial and administrative force of the Courts may be best disposed so as to do the largest quantity of work in the simplest, most expeditious, and most efficient manner.*'<sup>542</sup> In the circumstances it can reasonably be assumed that their recommendation for unification was predicated upon the belief that such action would provide a system capable of carrying out such work in such a manner. It went on to recommend that:

*"Upon the incorporation of the County Courts into the High Court of Justice, the Judges and officers of these Courts would necessarily be attached to and become*

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<sup>539</sup> The Second Report of the Royal Commission to inquire into the Operation and Constitution of the High Court of Chancery, Courts of Common Law, Central Criminal Court, High Court of Admiralty, and other Courts in England, and into the Operation and Effect of the Present Separation and Division of Jurisdiction between the Courts (C 631; 1872)

<sup>540</sup> The 1872 Report at 13, also see at 18: "*We are satisfied, that if the High Court, and its branches or dependencies, the County Courts, are properly constituted, with adequate machinery, and, if increased facilities be given for the disposal by Judges of the Superior branch of the Court of the more important causes in some of the large centres of business, these exceptional and intermediate courts [i.e., Lord Mayor's Court of London] will no longer be required.*"

<sup>541</sup> The (1872) at 13

<sup>542</sup> The 1872 Report at 10

*Judges and officers of the High Court, and would respectively exercise such functions and perform such duties as may be assigned to them by general rules or by special order of the High Court.”*<sup>543</sup>

32. It was however anticipated that there would remain a distinction between the two types of judge. It appears to have been anticipated that there would have been a judicial hierarchy within the new High Court. While it is not spelt out in any detail, the report refers to their being superior and inferior judges of the High Court and to it being constituted of a superior and inferior branch. The latter would deal with the more important cases, while the former would deal with the simpler, lower value cases. The report is silent on the constitutional status of the to-be-former County Court judges post-merger.<sup>544</sup> Given the nature of the report’s recommendations it is reasonable to assume that they would benefit from a change in security of tenure, so that they too as judges of the Supreme Court would be protected by the terms of guarantee of judicial independence per the Act of Settlement and then section 9 of the 1873 Act. None of the Commissioners expressed any concerns on the issue of merger on either the constitutional status of the judiciary or of the new Supreme Court.

33. The Report’s recommendations were not however acted upon. There were a number of calls for unification post-1873. Thomas Snow (the creator of the Annual Practice and the Jack Jacob of his day) noted that unification was supported in an article in the Times Newspaper in 1897.<sup>545</sup> He also noted that the reason why the 2<sup>nd</sup> Report was not implemented was due the malign influence of: “*The ‘Sons of Zeruah’ (‘the interests’ of that day) [who] . . . barred the way.*”<sup>546</sup>

34. Snow argued for the consolidation of the two courts. He argued that the existence of two such courts could no longer be justified on the basis that there was a material difference in the legal aptitude of High Court and County Court judges and that it was inefficient to have two parallel systems of justice.<sup>547</sup> He argued that the two systems could be combined usefully combined:

*“. . . although it is admitted that this dual system does good work, yet it is not unreasonable to suppose that if it were possible to reconstruct this machinery – by selecting from each system those parts which time has proved to be the most serviceable, and moulding the two into one – very considerable advantages in the saving of time, money, and work, might fairly be expected to result.”*<sup>548</sup>

35. He argued that consolidation of the two courts should result in:

*“. . . the Judges of the County Courts, Palatine Courts, Lord Mayors’ Courts, etc., would become (District) Judges of the High Court with the jurisdiction of the High Court (save certain limitations as to Probate and Divorce). Vacancies in the present*

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<sup>543</sup> The 1872 Report at 13

<sup>544</sup> The 1872 Report at 15

<sup>545</sup> Snow, *The Consolidation of the High Court and the County Courts*, (22) Law Quarterly Review (1906) 127 (Snow (1906)) at 128.

<sup>546</sup> Snow (1906) at 131

<sup>547</sup> Snow (1906) at 129 – 130

<sup>548</sup> Snow (1906) at 130

*staff of High Court Judges would be filled, as a general rule (subject to exception in special cases) from the staff of (District) Judges.”*<sup>549</sup>

36. He thus anticipated a judicial hierarchy with the new District Judges of the High Court forming a cadre of judges assigned to an inferior branch of the court, albeit ones who would form the pool from which the cadre of judges assigned to the superior branch would be chosen as and when necessary.

### **The Present Position**

37. While the superior common law courts and the High Court of Chancery had originally evolved as discrete and separate parts of the Curia Regis by the time of the Act of Settlement and thereafter they were firmly established as the judicial branch of the State, independent of the Executive and the Legislature. They each had a separate and distinct jurisdiction, albeit insofar as the common law courts were concerned this jurisdiction was often overlapping due to the development of legal fictions under the forms of action. Within the limits of their distinct jurisdictions they continued to dispense the sovereign power to dispense justice (see paragraph 13 above). That constitutional position remains in place today. It does so because the constitutional position of the Supreme Court and of the judges of the Supreme Court remains today as it was after the Act of Settlement. It does so because the 1873 reforms, the post-1873 settlement left the constitutional position of the superior courts unchanged albeit it merged them into one Supreme Court.<sup>550</sup> That constitutional settlement is maintained by the Supreme Court Act 1981.<sup>551</sup>

38. First, the jurisdiction of, inter alia, the superior common law courts and the High Court of Chancery, transferred to the High Court and the Court of Appeal is, subject to statutory intervention, maintained through sections 15 and 19 of the 1981 Act, as is their status as superior courts of record: *In re Mill's Estate* [1886] 34 ChD 24 at 33; *Bow, McLachlan & Co v Ship Camosun* (1909) 101 LT 167 at 170. Each of the superior common law courts and the High Court of Chancery were prior to 1873 understood to be superior courts of record.<sup>552</sup> The one significant change in jurisdiction since 1873 has however been the growth of judicial review in public law cases post-1945.<sup>553</sup> This change has however been one which has seen an existing jurisdiction expand into novel areas, rather than been the product of a new jurisdiction. The existing jurisdiction which expanded was the Court of King's Bench's supervisory jurisdiction over inferior tribunal and which was transferred to the High Court by section 16 of the 1873 Act.

39. Secondly, the High Court and Court of Appeal are now said to consist of, rather than to be constituted of, a specified number of ex officio and puisne or ordinary judges: see

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<sup>549</sup> Snow (1906) at 131; as recommended in the 1872 Report at 19

<sup>550</sup> If, for instance, the Supreme Court Act 1981 were simply to be repealed it is suggested that this would simply return the position to the status quo ante-1873. It would, arguably do so, because the union effected by the 1873 Act and maintained by its statutory successors would simply be reversed or unwound. What the 1873 Act joined together; its repeal would rend asunder.

<sup>551</sup> A question might be said to arise, however, through the change in name to the Supreme Court following implementation of the provisions of the CRA 2005 which rename it in the plural as the Senior Courts of England and Wales: what was a unitary Supreme Court is to become, through what was envisaged as no more than a change in nomenclature, three distinct courts: the High Court, the Crown Court and the Court of Appeal.

<sup>552</sup> Blackstone (1979) at 37ff. It should be noted that the High Court of Chancery was not originally a court of record as its proceedings were not originally recorded either on parchment or at all. See further *Halsbury's Laws of England*, Vol. 10 (1) at 308, footnote 3 and the cases there cited.

<sup>553</sup> *Halsbury's Laws of England*, Vol. 10 (1) at 308

sections 2 and 4 of the 1981 Act. Although these judges remain as before judges of the Supreme Court: see sections 10 – 12 of the 1981 Act.

40. Thirdly, judicial independence is retained insofar as judges of the Supreme Court are concerned through their immunity from suit and through the continuance of their security of tenure, which is now set out in section 11 of the 1981 Act. While their appointment process is now governed by the terms of the Constitutional Reform Act 2005, their actual appointment is still made by the Queen through an exercise of the Royal Prerogative and as such remains unreviewable.<sup>554</sup>

## Conclusion

41. The constitutional position of the Supreme Court and the judiciary appointed to sit in its two permanent Divisions had been a product, as with all else, of the organic growth of the UK and its constitutional framework since 1066. The Supreme Court of Justice for England and Wales is the ultimate statutory successor to the Curia Regis, which it effectively replicated in 1873 when it arose as the product of the merger of the three superior common law courts and the High Court of Chancery, amongst others, which were themselves the product of the Curia Regis. The Supreme Court it is correct to say reunited the common superior courts of record and the High Court of Chancery, which was also a superior court of record, once more into a single Curia Regis.<sup>555</sup> The merged courts can properly be said to continue to exist as constituent parts of the single, Supreme Court, the jurisdiction of which can thus be traced back to 1066.
42. While the 1873 Act put the Supreme Court on a statutory footing it did not alter the constitutional status which the superior courts had had previously. The 1873 Act was careful to ensure that jurisdiction and status was maintained through ensuring that the Act was one which consolidated and merged the existing courts to constitute a new and singular body; albeit one which as Cockburn CJ described it did not practically exist but was rather simply a name, that is to say its jurisdiction was exercising by its permanent Divisions.<sup>556</sup> The Supreme Court did not abolish the existing courts and replace them with a new entity as it could have done, but simply fused them as constituent elements of the new court. The pre-1873 courts do not therefore have any continuing independent existence: they exist through the Supreme Court.
43. Insofar as the judiciary is concerned their constitutional status appears to derive from two things. First, that they are appointed by the Royal Prerogative in order to dispense justice as delegates of the Crown: they act in the Supreme Court as they acted in the superior common law courts and the High Court of Chancery, just as previously they would have acted in the Curia Regis, in place of the sovereign in that they exercised on the sovereign's behalf his power and duty to do justice. The judiciary of the Supreme Court exercise that aspect of the sovereign power which is judicial in just the same way as Parliament exercises that part of the sovereign power which is legislative and the government exercises that part of the sovereign power which is executive. Secondly, they

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<sup>554</sup> Sections 63 – 94 of the Constitutional Reform Act 2005; Baker (2002) at 168. This is not to suggest that the appointment process itself could not be subject to review. It is to suggest that the position remains that once appointed a judge of the Supreme Court can only be removed through the mechanism set out in section 11 of the 1981 Act.

<sup>555</sup> Zane, *The Five Ages of the Bar and bench in England, Select Essays in Anglo-American Legal History*, Vol. 3, (1907, 1992 Reprint) (Boston, Little Brown & Company).

<sup>556</sup> Cockburn CJ, 60 LTNS 8, cited in Baxter, *Judicature Act & Rules 1873 – 1883*, (Butterworths) (1883) at 8.

gain their constitutional status through enjoying security of tenure and immunity from suit, which ensures that they are able to act as an independent limb of the constitutional framework of judiciary, legislature and executive consistently with the doctrine of the separation of powers as it ensures that the senior judiciary are able to exercise the jurisdiction of the Supreme Court free of external pressure that could if applied undermine the rule of law and the United Kingdom's constitutional settlement.

**23 July 2008**



## ANNEX A

### Staffing efficiency and staff morale in the County Courts in 2006-7

Extracts from the Reports of Designated Civil Judges, 2006-7

Birmingham	There is a limit to how much work can be induced out of an ever decreasing workforce without a complete breakdown of morale. The court is constantly short of staff. There is an appalling lack of knowledge in some areas of the court, which is reflected in mistakes which are regularly seen by judges.
Bradford	From the judicial perspective the pressure on court staff manifests itself in a number of ways: faxes and letters not placed on files in time for hearings; time taken up to draw up orders is still unacceptably long; time taken to place applications on file to be considered by District Judges is often delayed by up to 14 days; file management is still antiquated and inefficient in some of the larger courts and missing files occur too often.
Chelmsford North	Staff morale was undermined by a miserly pay award and the restructuring of some of the senior positions to the financial detriment of some managers.
Chelmsford South	The running of the business is akin to crisis management, to the extent that if there are holiday periods or periods of ill health the section affected is likely to remain uncovered due to the lack of adequately experienced staff.
Coventry & Walsall	As a result of staff cuts, there have been very serious delays which only began to be tackled when staff were allowed to do overtime working
Exeter	There were high staff turnover, long term staff sickness, and resulting shortages of experienced staff.
Greater Manchester	I detect that even the most dedicated of court staff are finding their morale sapped. This is not surprising given that staff numbers have been cut to the bone.
Hants 7 Dorset	Because staff salaries do not match those available in the private sector, more experienced staff are offered jobs at better rates of pay and leave. There is therefore a disproportionate number of new and inexperienced staff. Because of the low pay on offer, some of the positions in courts have been filled by staff who have difficulty in carrying out their duties efficiently and accurately.
Herts & Beds	Overall staffing is at a critical level. Headcount pressures are beginning to bite, and staff are feeling the pressure. One or two are already suffering from stress.
Hull	The court has seen unprecedented levels of staff turnover, and there is inexperience at both junior and management grades.
Leeds	The court runs as efficiently as is humanly possible by reason of a dedicated staff and a total reliance on overtime working at weekends. The substantial volume of work that is generated by the large local firms deserves a better resourced administration
London	All courts operate on a day to day basis below complement, sometimes very significantly indeed. Staff turnover across the group was 18%: 60.6% at Wandsworth, where the council had vacancies for less demanding work at a higher salary. Days lost through staff sickness were 8,833. 1,965 of these days were attributed to stress.
Manchester	Whatever the statistics show, the court's operations are creaking at the seams. Morale is low.
Northampton	Staff shortages have been so persistent that they are now chronic. Staff struggle to cope.
Nottingham	Living in straitened circumstances for a short time can be borne by anybody, but a sustained attack on the ability of civil courts to deliver justice in an effective way is what we are now seeing
Sheffield	Sheffield has suffered from headcount restrictions throughout the year, as staff have become disillusioned and find it very easy to find employment in other parts of the city. 75% of the staff have less than two years' experience.
Thames Valley & Oxford	Staff pay is lamentably low (lower than in other areas of the Civil Service) and is simply insufficient to enable good trained staff to be retained.
Tyneside & North Durham	There appears to be a high turnover of staff with frequent references to new staff requiring training and managers who are in post for a relatively short time before moving on elsewhere. Since the courts appear to carry the bare minimum of staff, any shortfall in their establishment immediately puts an impossible burden on those who remain.
Wales	The pressure on staff has increased unacceptably. The combination of inadequate numbers and lack of cover when staff are away for any reason, low pay and increasing workloads have seen accelerating staff turnover. In Cardiff at any one time a high percentage of staff are inexperienced. There have been signs of "meltdown" in some courts (particularly Swansea), where due to staff shortages and lack of staff experience, work output has from time to time become so delayed that the effectiveness of the system has been imperilled. As fees keep rising at well above inflation levels, it is becoming increasingly difficult for users to accept errors resulting from pressures on staff.

## ANNEX B1 (a)

### Deputies in QB General List at the RCJ (non-Defamation) (1<sup>st</sup> January 2006-31<sup>st</sup> May 2008)

Number	Category	Days sat
6	s.9(1) retired HCJs	73
7	s.9(1) SCJs	480
17	s.9(1) CJs	318
23	s.9(1) Recorders	224

### Days sat by different types of judge in court or chambers:

	2006	2007	Jan-May 2008	Total
<b>High Court Judges</b>	<b>1636</b>	<b>1688</b>	<b>761</b>	<b>3385</b>
<b>s.9(1) Retired HCJs</b>				
Sir R.Bell	6			6
Sir J.Blofeld	10	8		18
Sir D.Brown	11			11
Sir T.Morison		10		10
Sir M.Turner	18			18
Sir M.Wright		10		10
<b>Total</b>	<b>45</b>	<b>28</b>	<b>-</b>	<b>73</b>
<b>Senior Circuit Judges</b>				
HHJ Chambers QC			1	1
HHJ Grenfell		15		15
HHJ Havery QC	10			10
HHJ Hickinbottom		10		10
HHJ Mackie QC	6	34	14	54
HHJ Seymour QC	148	144	70	362
HHJ Toulmin QC	9	17	2	28
<b>Total</b>	<b>173</b>	<b>220</b>	<b>87</b>	<b>480</b>
<b>Circuit Judges</b>				
HHJ Altman		38		38
HHJ Bradbury	8			8
HHJ Brunning		19		19
HHJ Collender QC	2			2
HHJ Eccles QC	4			4
HHJ Foster QC	14	28	11	53
HHJ Michael Harris	13			13
HHJ Hawkesworth QC	14	12		26
HHJ Higgins			25	25
HHJ Marr-Johnson	2			2
HHJ McKenna	19		22	41
HHJ Mitchell		15		15
HHJ Philip Price QC	11			11
HHJ Reddihough	5	21		26
HHJ Saunders		2		2
HHJ Shaun Spencer QC	20			20
HHJ Thorn QC	13			13
<b>Totals</b>	<b>125</b>	<b>135</b>	<b>58</b>	<b>318</b>
<b>s.9(1) Recorders</b>				
Andrews QC	1			1
Baker QC	2	2		4
Simon Brown QC	2			2
Lord Carlile QC	5		4	9

Nicola Davies QC	7	7		14
Donaldson QC		8		8
Edis QC			5	5
Fenwick QC		6		6
Foskett QC	2	9		11
Harvey QC		8	7	15
Leighton Williams QC	5	35	17	57
Livesey QC	1	4		5
Maskrey QC			6	6
Moger QC			2	2
Mott QC		2	5	7
Moxon-Browne QC	2			2
Purchas QC	1	6	4	11
Elizabeth Slade QC	3	6	10	19
Slater QC	2			2
Strauss QC		3	1	4
Ter Haar QC	2			2
Walker QC			2	2
Wilkinson QC	5	22	3	30
<b>Total</b>	<b>40</b>	<b>118</b>	<b>66</b>	<b>224</b>

## ANNEX B1 (b)

### Deputies in General List (Defamation) (1<sup>st</sup> January 2006-31<sup>st</sup> May 2008)

Number	Category	Days sat
1	s.9(1) retired HCJ	14
1	s.9(1) CJ	4
3	s.9(1) Recorders	13

### Days sat by different types of judge in court or chambers:

	2006	2007	Jan-May 2008	Total
<b>Retired High Court Judge</b>				
Sir Charles Gray			14	14
<b>Circuit Judge</b>				
HHJ Preville QC	4			4
<b>s.9 Recorders</b>				
Moloney QC		1		1
Parkes QC		6	2	8
Victoria Sharp QC		2	2	4
<b>Totals</b>	<b>4</b>	<b>9</b>	<b>18</b>	<b>31</b>

## ANNEX B2

### Deputies in Chancery Division (1<sup>st</sup> January 2006-31<sup>st</sup> May 2008)

Number	Category	Days sat
3	s.9(1) retired HCJs	135
15	s.9(1) SCJs	434
34	s.9(1) Recorders	769
25	s.9(4) Deputies	404

**Days sat by different types of judge in court or chambers:**

	<b>2006</b>	<b>2007</b>	<b>Jan-May 2008</b>	<b>Total</b>
<b>High Court Judges</b>	2760	2613	1194	6567
<b>Retired High Court Judges</b>				
Sir F.Ferris	14	14		28
Sir A.Park	14	34	17	65
Sir D.Rattee	2	40		42
<b>Total</b>	<b>30</b>	<b>88</b>	<b>17</b>	<b>135</b>
<b>Senior Circuit Judges</b>				
HHJ Behrens	14	23		37
HHJ Fysh QC	7	22	5	34
HHJ Havery QC	18			18
HHJ Hodge QC	26	27		53
HHJ Kaye QC	15	24	11	50
HHJ Kirkham	20			20
HHJ Mackie QC	20	20	3	43
HHJ McCahill QC			9	9
HHJ Norris QC	9	10		19
HHJ Pelling QC	22	26	8	56
HHJ Raynor QC	20	20		40
HHJ Toulmin QC	2		11	13
HHJ Waksman QC			5	5
HHJ Weeks QC	17			17
HHJ Wyn Williams QC	20			20
<b>Total</b>	<b>210</b>	<b>172</b>	<b>52</b>	<b>434</b>
<b>s.9(1) Recorders</b>				
Aldous QC	13			13
Bartley-Jones QC	13	7		20
Brindle QC			10	10
Cawson QC	5	5	12	22
Chaisty QC	12		12	24
Donaldson QC	10	20	29	59
Elleray QC		5		5
Englehart QC	14	17	7	38
Fenwick QC	8			8
Floyd QC		12		12
Freedman QC	6	8	3	17
Furness QC	15	6	10	31
Isaacs QC	10	5	5	20
Jarvis QC	13	9	13	35
Knowles QC	9	12	7	28
Leaver QC	4	31	4	39
Livesey QC	24	11	8	43
Mann QC	14	5	6	25
Morgan QC	12	2		14
Mowschenson QC	9	6	4	19
Nugee QC	11	6	4	21
Phillips QC		9		9
Powell QC	4	24	5	33
Susan Prevezer QC	15	10	5	30
Sonia Proudman QC		7	3	10
Randall QC	8	5	7	20
Sales QC	6	2	13	21
Sher QC	14		3	17
Smith QC	7	10	6	23

Strauss QC	21	16	14	51
Symons QC	6			6
Trower QC			7	7
Wyand QC	10	15	14	39
<b>Total</b>	<b>293</b>	<b>265</b>	<b>211</b>	<b>769</b>
<b>s.9(4) Deputies</b>				
Alexander QC		7	8	15
Arnold QC	15	9	9	33
Sarah Jane Asplin QC		7	17	24
Bompas QC	14			14
Briggs QC	4			4
Brisby QC	1			1
Carr QC			7	7
Crow QC		8		8
Croxford QC		3	1	4
Crystal QC	8			8
Gaunt QC	8	9	1	18
Girolami QC	4	13	11	28
Ham QC	1	8	2	11
Henderson QC	3			3
Herbert QC	15		10	25
Ivory QC	9	17	22	48
Miles QC		8	4	12
Moss QC	3	6	2	11
Newey QC	7			7
Pelling QC	5			5
Prescott QC	3	8	17	28
Sheldon QC	16	17	14	47
Simmonds QC	7	5	10	22
Steinfeld QC	6	5	5	16
Vos QC			5	5
<b>Total</b>	<b>129</b>	<b>130</b>	<b>145</b>	<b>404</b>
<b>Total days sat by Deputies</b>	<b>662</b>	<b>655</b>	<b>425</b>	<b>1742</b>

### ANNEX B3

#### Deputies in Commercial, Admiralty & Mercantile Courts (1<sup>st</sup> January 2006-31<sup>st</sup> May 2008)

Number	Category	Days sat
2	s.9(1) retired HCJs	7
4	s.9(1) SCJs	65
7	s.9(1) Recorders	60

#### Days sat by different types of judge in court or chambers:

##### Commercial & Admiralty

	2006	2007	Jan-May 2008	Total
<b>High Court Judges</b>	<b>1547</b>	<b>1507</b>	<b>546</b>	<b>3550</b>
<b>Retired High Court Judges</b>				
Sir A.Colman		6		6
Sir T.Walker	1			1
<b>Total</b>	<b>1</b>	<b>6</b>		<b>7</b>
<b>Senior Circuit Judges</b>				
HHJ Chambers QC	4	8	13	25
HHJ Knight QC		3		3

HHJ Mackie QC		17	20	37
<b>Total</b>	<b>4</b>	<b>28</b>	<b>33</b>	<b>62</b>
<b>s.9(1) Recorders</b>				
Brindle QC	3			3
Flaux QC		6		6
Hirst QC	12	16	1	29
Kealey QC			12	12
Siberry QC	8			8
Teare QC	2			2
<b>Total</b>	<b>25</b>	<b>22</b>	<b>13</b>	<b>60</b>
<b>Total Days sat by Deputies</b>	<b>30</b>	<b>56</b>	<b>46</b>	<b>132</b>

#### Mercantile

	2007	Jan-July 2008	Totals
<b>Senior Circuit Judges</b>			
HHJ Chambers QC	4		4
HHJ Knight QC	6		6
HHJ Mackie QC	42.5	34	76.5
HHJ Waksman QC		4	4
<b>Total</b>	<b>52.5</b>	<b>38</b>	<b>90.5</b>
<b>S.9(1) Recorders</b>			
Donaldson QC	2	7	9
Hirst QC	5		5
<b>Total</b>	<b>7</b>	<b>7</b>	<b>14</b>
<b>Total Days sat by Deputies</b>	<b>59.5</b>	<b>45</b>	<b>104.5</b>

#### ANNEX B4

##### Deputies in the Administrative Court (1<sup>st</sup> January 2006-31<sup>st</sup> May 2008)

Number	Category	Days sat
3	s.9(1) retired HCJs & LJ	185
4	s.9(1) SCJs	122
2	s.9(1) CJs	36
10	s.9(1) Recorders	256

##### Days sat by different types of judge in court or chambers:

	2006	2007	Jan-May 2008	Total
<b>High Court Judges</b>	<b>1690</b>	<b>1765</b>	<b>1054</b>	<b>4495</b>
<b>Retired Senior Judges</b>				
Sir R.Auld			5	5
Sir M.Harrison	57	58	24	139
Sir G.Newman		19	22	41
<b>Total</b>	<b>57</b>	<b>77</b>	<b>51</b>	<b>185</b>
<b>Senior Circuit Judges</b>				
HHJ Gilbart QC	19	15		34
HHJ Hickinbottom		12	28	40
HHJ Mackie QC		18	24	42
HHJ Wyn Williams QC	6			6
<b>Total</b>	<b>25</b>	<b>45</b>	<b>52</b>	<b>122</b>

<b>s.9(1) CJs</b>				
HHJ Hamilton	5	5		10
HHJ Mole QC	9	15	2	26
<b>Total</b>	<b>14</b>	<b>20</b>	<b>2</b>	<b>36</b>
<b>s.9 Recorders</b>				
Bartlett QC	7	12		19
Blake QC		11		11
Burnett QC			3	3
Goudie QC	12	14		26
Clare Montgomery QC	5			5
Nicol QC	30	16	5	51
Parker QC	34	31	19	84
Plender QC			2	2
Rabinder Singh QC	3	7		10
Supperstone QC	3	17	25	45
<b>Total</b>	<b>94</b>	<b>108</b>	<b>54</b>	<b>256</b>
<b>Total sat by Deputies</b>	<b>190</b>	<b>250</b>	<b>159</b>	<b>599</b>

This table includes judges who sat in the Administrative Court in Cardiff.

## ANNEX C1

### Deputies on Midland Circuit 2007-8 (April 2007-March 2008)

#### High Court sitting days

	QB Civil	Chancery	Mercantile <sup>557</sup>	TCC	Total
<b>High Court Judges</b>					
Cox J	12.5				12.5
Goldring J	13.5				13.5
Lewison J		23			23
Nelson J	16				16
Norris J		3			3
<b>Total</b>	<b>42</b>	<b>26</b>			<b>68</b>
<b>s.9 Senior Circuit Judges</b>					
HHJ Alton		19	56	13	88
HHJ Behrens		5			5
HHJ Brown QC		22	155	6	183
HHJ Kirkham		32		103	135
HHJ MacDuff QC	100				100
HHJ Norris QC		72		7	79
HHJ Purle QC		141			141
<b>Total</b>	<b>100</b>	<b>291</b>	<b>211</b>	<b>129</b>	<b>731</b>
<b>S.9 Circuit Judges</b>					
HHJ Brunning	2				2
HHJ Davies QC			4.5	25	29.5
HHJ Harris	1				1
HHJ McCahill QC		11	24		35
HHJ McKenna	30.5				30.5
HHJ Oliver-Jones QC	29				29
HHJ Pearce-Higgins QC	2				2
<b>Total</b>	<b>64.5</b>	<b>11</b>	<b>28.5</b>	<b>25</b>	<b>129</b>

<sup>557</sup> Because no separate statistics were kept for Mercantile sitting days, this column may include some QB General sitting days. The figures for s.9 sittings outside Birmingham are probably incomplete.

s.9 QCs					
Andrews QC		3			3
Bartley-Jones QC		6			6
Coulson QC		2			2
Cousins QC		1			1
Oliver QC		5			5
Parkes QC (Defamation)	8				8
Pymont QC		1			1
Sonia Proudman QC		5			5
Smith QC		4.5			4.5
Stephens				1	1
Tedd QC		4.5			4.5
Worcester QC		5			5
<b>Total</b>	<b>8</b>	<b>37</b>		<b>1</b>	<b>46</b>
<b>Consolidated Totals</b>	<b>155</b>	<b>365</b>	<b>239.5</b>	<b>172.5</b>	<b>974</b>

HJs also sat in the County Court General List at Leicester (9), Nottingham (18), and Lincoln (1).

High Court Judges	68
s.9 Deputies	906
% days sat by s.9 Deputies	93%

## ANNEX C2

### Deputies on Northern Circuit 2007-8 (April 2007-March 2008)

#### High Court sitting days

	QB Civil	Chancery	TCC	Mercantile	Total
<b>High Court Judges</b>					
Akenhead J	13				13
Irwin J	1				1
King J	29				29
McKinnon J	25				25
Patten J		26		15	41
Tugendhat J	28				28
<b>Total</b>	<b>96</b>	<b>26</b>		<b>15</b>	<b>137</b>
<b>s.9 Senior Circuit Judges</b>					
HHJ Davies QC		7	33		40
HHJ Gilliland QC			105.5		105.5
HHJ Hegarty QC		13		151	164
HHJ Hodge QC		149			149
HHJ Pelling QC		136		20	156
HHJ Raynor QC			163.5		163.5
HHJ Thornton QC			2		2
HHJ Waksman QC				134	134
<b>Total</b>		<b>305</b>	<b>304</b>	<b>305</b>	<b>914</b>
<b>s.9 CJ</b>					
<b>HHJ Mackay</b>			<b>16</b>		<b>16</b>
<b>QC deputies</b>					
Allen QC		3			3
Elleray QC		1			1
<b>Total</b>		<b>4</b>			<b>4</b>
<b>Consolidated Totals</b>	<b>96</b>	<b>335</b>	<b>320</b>	<b>320</b>	<b>1071</b>



High Court Judges	137
s.9 Deputies	918

This table does not contain any statistics for High Court sittings by s.9 (1) circuit judges (apart from the senior circuit judges). If those figures could be ascertained, the result would probably show that s.9 deputies undertake 85-90% of the High Court work.

### ANNEX C3

#### Deputies on North-Eastern Circuit 2007-8 (April 2007-March 2008)

##### High Court sitting days

	QB Civil	Chancery	TCC	Mercantile	Total
<b>High Court Judges</b>					
Butterfield J	8				8
Holland J	8				8
Irwin J	2				2
Jackson J			17		17
Patten J	1	14	1	1	17
Rafferty J			4		4
Simon J	15				15
Swift J	1				1
Wilkie J	19	6			25
<b>Total</b>	<b>54</b>	<b>20</b>	<b>22</b>	<b>1</b>	<b>97</b>
<b>s.9 Senior Circuit Judges</b>					
HHJ Behrens		132	1	20	153
HHJ Grenfell	18	5	11		34
HHJ Kaye QC		128	2	17	147
HHJ Langan QC	2	116.5	17	15	150.5
HHJ Thornton QC			1		1
<b>Total</b>	<b>20</b>	<b>381.5</b>	<b>32</b>	<b>52</b>	<b>485.5</b>
<b>s.9 Circuit Judges</b>					
HHJ Bowers	2				2
HHJ Bullimore	1				1
HHJ Cockroft	5		19		24
HHJ Hawkesworth QC	10		4		14
HHJ Mettyear	4				4
HHJ Reddihough	7				7
HHJ Shaun Spencer QC		13			13
HHJ Michael Taylor	1				1
HHJ Walton		7			7
<b>Total</b>	<b>30</b>	<b>20</b>	<b>23</b>		<b>73</b>
<b>QC deputies</b>					
Bethel QC		43			43
Brown QC		2			2
Cawson QC		1			1
Elleray QC		5			5
Machell QC	3				3
Morris QC		9			9
Sutcliffe QC		7			7
<b>Total</b>	<b>3</b>	<b>67</b>			<b>70</b>
<b>Consolidated Totals</b>	<b>107</b>	<b>488.5</b>	<b>77</b>	<b>53</b>	<b>725.5</b>

High Court Judges	97
s.9 Deputies	628.5
% days sat by s.9 Deputies	85.4%

#### ANNEX C4

#### Deputies on Western Circuit 2007-8 (April 2007-March 2008)

#### High Court sitting days

	QB Civil	Chancery	Mercantile	TCC	Total
<b>High Court Judges</b>					
Coleridge J	3.5				3.5
Lewison J		35			35
Silber J		3			3
David Steel J	4				4
<b>Total</b>	<b>7.5</b>	<b>38</b>			<b>45.5</b>
<b>Lord Justice of Appeal</b>					
Leveson LJ	<b>1</b>				<b>1</b>
<b>Retired High Court Judge</b>					
Sir R.Bell	<b>2</b>				<b>2</b>
<b>s.9 Senior Circuit Judges</b>					
HHJ Bursell QC	24				24
HHJ Havelock-Allan QC		43	77	16	136
HHJ McCahill QC	5	142	2		149
HHJ Wilcox QC		6			6
<b>Total</b>	<b>29</b>	<b>191</b>	<b>79</b>	<b>16</b>	<b>315</b>
<b>s.9 Circuit Judges</b>					
HHJ Griggs	5				5
HHJ Hughes QC	2				2
HHJ Rutherford	4				4
<b>Total</b>	<b>11</b>				<b>11</b>
<b>QC deputies</b>					
Jarvis QC		11			11
Randall QC		2			2
<b>Total</b>		<b>13</b>			<b>13</b>
<b>Consolidated Totals</b>	<b>50.5</b>	<b>242</b>	<b>79</b>	<b>16</b>	<b>387.5</b>

High Court Judges & LJ	46.5
s.9 Deputies	341
% days sat by s.9 Deputies	88%

## ANNEX C5

### Deputies on Welsh Circuit 2007-8 (April 2007-March 2008)

#### High Court sitting days

	QB Civil & Mercantile	Chancery	TCC	Total
<b>High Court Judges</b>				
Davis J	9			9
Lewison J	3	12		15
Lloyd-Jones J	9			9
Wyn Williams J	2	2		4
<b>Total</b>	<b>26</b>	<b>14</b>		<b>37</b>
<b>Senior Circuit Judges</b>				
HHJ Chambers QC	106.5	6.5	2.5	115.5
HHJ Hickinbottom	26	4		30
HHJ Jarman QC	3	29	8	40
HH Graham Jones	17.5	13	8.5	39
<b>Total</b>	<b>153</b>	<b>52.5</b>	<b>19</b>	<b>224.5</b>
<i>Circuit Judges</i>				
HHJ Masterman	<b>1</b>			<b>1</b>
<i>QC deputies</i>				
Phillips QC	<b>2</b>	<b>9</b>		<b>11</b>
<b>Consolidated Totals</b>	<b>179</b>	<b>75.5</b>	<b>19</b>	<b>273.5</b>

High Court Judges	37
s.9 Deputies	236.5
% days sat by s.9 Deputies	86%

*Note: There was a vacancy in the post of Chancery senior circuit judge for most of this year.*

## ANNEX D

### A representative sample of cases handled by Queen's Bench Masters in 2007-8

	Number of cases	£50-£100	£101-300	£301-£1m	Over £1m	Unknown
<b>Personal Injury Claims</b>						
Mesothelioma & Asbestos-related diseases	78	6	63	7		2
Clinical Negligence	45	11	16	6	10	2
Personal Injuries	39	6 <sup>1</sup>	9	8 <sup>1</sup>	13 <sup>1</sup>	3
Road Traffic Accidents	11	1	1	5	3	1
Fatal Accidents	6	3	2			1
<b>Total</b>	<b>179</b>	<b>27</b>	<b>91</b>	<b>26</b>	<b>26</b>	<b>9</b>
<b>Debt &amp; Contract claims</b>						
Money claims (incl. guarantees)	37	17	13	5	1	1
Breach of contract	17	2	9	2	3	1
Commercial	6	2	4			
Insurance claims	2		2			
Fraud	2	1		1 <sup>1</sup>		
Duty of confidence	4	1	1			2
<b>Total</b>	<b>68</b>	<b>23</b>	<b>29</b>	<b>8</b>	<b>4</b>	<b>4</b>
<b>Tort &amp; HRA claims</b>						
Defamation	10	3		3 <sup>1</sup>		4
Professional negligence	10	3	6		1	
Human Rights Act cases	18	10	3		1	4
False imprisonment	3	1		2		
Damage or return of goods	4		2			2
Death in custody	2				1	1
Malicious falsehood	1					1
Sex abuse	1	1				
<b>Total</b>	<b>49</b>	<b>18</b>	<b>11</b>	<b>5</b>	<b>3</b>	<b>12</b>
Miscellaneous	7	2			1	4
<b>Consolidated Total</b>	<b>303</b>	<b>70</b>	<b>131</b>	<b>39</b>	<b>34</b>	<b>29</b>

## ANNEX E

### ***Practice Direction to CPR Part 29***

#### **Case Management in the Royal Courts of Justice**

2.1 This part of the practice direction applies to claims begun by claim form issued in the Central Office or Chancery Chambers in the Royal Courts of Justice.

2.2 A claim with an estimated value of less than £50,000 will generally, unless –

- (a) it is required by an enactment to be tried in the High Court,
- (b) it falls within a specialist list, or
- (c) it falls within one of the categories specified in 2.6 below or is otherwise within the criteria of article 7.(5) of the High Court and County Courts Jurisdiction Order;

be transferred to a County Court.

2.3 Paragraph 2.2 is without prejudice to the power of the court in accordance with Part 30 to transfer to a County Court a claim with an estimated value that exceeds £50,000.

2.4 The decision to transfer may be made at any stage in the proceedings but should, subject to paragraph 2.5, be made as soon as possible and in any event not later than the date for the filing of pre-trial check lists (listing questionnaires).

2.5 If an application is made under rule 3.4 (striking out) or under Part 24 (summary judgment) or under part 25 (interim remedies), it will usually be convenient for the application to be dealt with before a decision to transfer is taken.

2.6 Each party should state in his allocation questionnaire whether he considers the claim should be managed and tried at the Royal Courts of Justice and if so, why. Claims suitable for trial in the Royal Courts of Justice include –

- (1) professional negligence claims;
- (2) Fatal Accidents Act claims;
- (3) fraud or undue influence claims;
- (4) defamation claims;
- (5) claims for malicious prosecution or false imprisonment;
- (6) claims against the police;
- (7) contentious probate claims.

2.7 Attention is drawn to the practice direction on transfer (Part 30).

## ANNEX F

### ***CPR 30.3(2)***

#### **CRITERIA FOR TRANSFER**

The matters to which the court must have regard [when considering whether to make an order to transfer a claim to the County Court] include –

- (a) the financial value of the claim and the amount in dispute, if different;
- (b) whether it would be more convenient or fair for hearings (including the trial) to be held in some other court;
- (c) the availability of a judge specialising in the type of claim in question;
- (d) whether the facts, legal issues, remedies or procedures involved are simple or complex;
- (e) the importance of the outcome of the claim to the public in general;
- (f) the facilities available at the court where the claim is being dealt with and whether they may be inadequate because of any disabilities of a party or potential witness;
- (g) whether the making of a declaration of incompatibility under section 4 of the Human Rights Act 1998 has arisen or may arise;
- (h) in the case of civil proceedings by or against the Crown, as defined in rule 66.1(2), the location of the relevant government department or officers of the Crown and, where appropriate, any relevant public interest that the matter should be tried in London.

## ANNEX G

### ***Lists of Chancery-type cases***<sup>558</sup>

#### **1. Matters that ought normally to be transferred to a Chancery County Court**

- Proceedings under the Companies Acts;
- Other disputes among company shareholders;
- Corporate insolvency proceedings (except for winding up petitions);
- Personal insolvency proceedings (except for bankruptcy petitions, interim orders and applications to set aside statutory demands);
- Directors' disqualification proceedings;
- Claims within CPR Part 56 (Landlord and Tenant Claims and Miscellaneous Provisions about Land) other than applications under section 24 or section 38(4) of the Landlord and Tenant Act 1954 or under the Access to Neighbouring Land Act 1992;

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<sup>558</sup> These are the Lists mentioned in the Guidance given by Hart and Lloyd JJ in July 2004.

- Probate claims, or claims for the rectification of wills, substitution and removal of personal representatives within CPR Part 57 (probate claims ought not to be started outside a Chancery County Court in any event);
- Proceedings relating to the estate of a deceased person, to trusts or to charities within CPR Part 64; Proceedings under section 14 of the Trusts of Land and Appointment of Trustees Act 1996.
- Proceedings relating to intellectual property, including passing-off;
- Proceedings relating to land, easements, covenants or contracts relating to land where an injunction, specific performance or declaration is sought or where there are substantial or complex issues (though not all injunction cases are appropriate for transfer, e.g. housing disrepair cases and many neighbour disputes);
- Proceedings for breach of a restrictive covenant, breach of trust or breach of fiduciary duty where an injunction is sought or where there are substantial or complex issues;
- Claims for rescission on the grounds of undue influence or other equitable grounds, or for rectification of a document;
- Claims relating to membership of, exclusion from, or dissolution of, a club or other unincorporated association;
- Other claims – for instance for professional negligence or for breach of contract – which involve issues of trust, company, intellectual property, land or conveyancing law or procedure;
- Claims for the dissolution of partnerships or the taking of partnership accounts;
- Matters other than those listed above, where an account is one of the remedies sought and the issues likely to arise on the account are substantial or complex.

## **2. Matters which ought not normally to be transferred**

- Proceedings relating to residential tenancies;
- Proceedings relating to residential mortgages (unless a serious issue arises, for example, as to the occupation rights of a third party and as to whether the mortgagee's rights prevail over those of such a third party);
- Claims to enforce a charging order;
- Applications under section 24 of the Landlord and Tenant Act 1954;
- Applications under section 38(4) of the Landlord and Tenant Act 1954;
- Applications under the Access to Neighbouring Land Act 1992;
- Proceedings under the Inheritance (Provision for Family and Dependents) Act 1975.

## ANNEX H

### **County Courts Act 1984 s.23**

#### **Equity jurisdiction**

23. A County Court shall have all the jurisdiction of the High Court to hear and determine—

(a) proceedings for the administration of the estate of a deceased person, where the estate does not exceed in amount or value [£30,000]<sup>559</sup>;

(b) proceedings—

(i) for the execution of any trust, or

(ii) for a declaration that a trust subsists, or

(iii) under section 1 of the Variation of Trusts Act 1958, where the estate or fund subject, or alleged to be subject, to the trust does not exceed in amount or value [£30,000];

(c) proceedings for foreclosure or redemption of any mortgage or for enforcing any charge or lien, where the amount owing in respect of the mortgage, charge or lien does not exceed [£30,000];

(d) proceedings for the specific performance, or for the rectification, delivery up or cancellation, or any agreement for the sale, purchase or lease of any property, where, in the case of a sale or purchase, the purchase money, or in the case of a lease, the value of the property, does not exceed [£30,000];

(e) proceedings relating to the maintenance or advancement of a minor, where the property of the minor does not exceed in amount or value [£30,000];

(f) proceedings for the dissolution or winding-up of any partnership (whether or not the existence of the partnerships is in dispute), where the whole assets of the partnership do not exceed in amount or value [£30,000];

(g) proceedings for relief against fraud or mistake, where the damage sustained or the estate or fund in respect of which relief is sought does not exceed in amount or value [£30,000].

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<sup>559</sup> The text of the Act refers to “the County Court limit”. This has been set at £30,000 by the County Court Jurisdiction Order 1981. In contrast, the jurisdiction of the County Court to hear and determine any action founded in contract and tort (apart from actions for libel or slander, or actions in which the title to any toll, fair, market or franchise is in question) was limited to £5,000 before the High Court and County Courts Jurisdiction Order 1981 came into effect, and is now unlimited in amount (see County Courts Act 1984, s.15. By s.145 (1) of the County Courts Act 1984 the County Court limit may be increased at any time by Order in Council.



## ANNEX J

### The statistics for District Registry claims

During my inquiry I was shown a provisional list of all the claims issued in District Registries in 2007. These lists are generated automatically keyed in to CASEMAN by court staff. The quality of the data therefore depends on the quality of the staff who make the entries, and of those who train and supervise them. The relevant CASEMAN codes<sup>560</sup> are:

DR 001	Issue of claim: Queen's Bench Division
DR 002	Issue of claim: Chancery Division
DR 009	Issue of Part 8 claim and Pre-Issue Applications (Chancery & QB)
IS 9	Issue of Human Rights Claim in Chancery & QB
IS 10 & 11	Issue of Originating Application (Landlord & Tenant Act 1954) (Chancery & QB)

There are two other codes which are not normally drawn on when statistics for claims are generated:

DR 013	Issue of claim: Official Referee <sup>561</sup>
DR 026	Issue of claim: Mercantile

There is one other code which I need to mention:

DR 004	Issue writ of fi fa: QB & Chancery <sup>562</sup>
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The original provisional figures I was shown revealed the following picture<sup>563</sup>:

<i>Region</i>	<b>Queen's Bench</b>	<b>Chancery</b>	<b>Unknown<sup>564</sup></b>	<b>Total</b>
Midlands	941	672	23	1,636
North-West	2,283	733	29	3,045
North-East	2,635	874	28	3,537
London & SE	3,540	289	37	3,866
South-West	2,583	305	15	2,903
Wales	1,132	177	6	1,315
<b>Totals</b>	<b>13,114</b>	<b>3,050</b>	<b>138</b>	<b>16,302</b>

There were a number of oddities in the underlying figures. The lists, for instance, included High Court claims allegedly issued in 55 County Courts where there is no District Registry.

<sup>560</sup> These are the five Business Management Systems (BMS) codes which ought to be used by the courts when a claim is issued (CASEMAN Standard Event Code 1).

<sup>561</sup> The DR013 code was only used five times in 2007, at Leeds on each occasion. The code was not used for any of the other TCC claims issued at District Registries during the year.

<sup>562</sup> As I point out in my report, any creditor who has a County Court judgment in excess of £5,000 and wishes to execute on his debtor's goods is obliged to make an application in the High Court for a writ of fi fa. He also usually has the option of applying for this writ if his judgment exceeds £600.

<sup>563</sup> Comparable totals for 2006 appear on pp 34 and 44 of the Ministry of Justice's official publication *Judicial and Court Statistics 2006* (Cm 7273), November 2007.

<sup>564</sup> Because BMS codes DR009 and IS9-11 can be used for claims in either Division, these claims are described as "Unknown" in these statistics.

These mistakes inflated the total figure by 323, of which 189 represented Chancery claims, possibly because the relevant County Court claim forms were marked “Chancery business”.

More seriously, although there are only eight Chancery Registries in which High Court claims (or originating applications) can be issued, 142 other courts (in total) included a total of 777 Chancery claims on their returns.

These two errors inflated the total of QB claims by 134 and the total of Chancery claims by 777.

I found six of the figures for Queen’s Bench claims surprising, and asked for further inquiries to be made. These were:

Bournemouth	626
Northampton	233
Oxford	1,650
Peterborough	112
Reading	1,472
Yeovil	478
Total	4,571

These represented one third of the total QB figure of 13,114.

The court managers at Bournemouth, Northampton, Oxford and Reading all explained the figures by saying that bulk issuers in their area had issued a large number of writs of fi fa.

I therefore asked if manual counts could be conducted, so that the true figures for QB and Chancery Part 7 and Part 8 claims could be ascertained.

I was told that the North-West, North-East, South-West and Welsh regions were unable to carry out manual counts at short notice, because they did not have the resources to pay for the unscheduled overtime that the work would involve.

The South-West region, however, reported that staff at both Bournemouth and Yeovil had been mistakenly issuing the next sequential High Court number when issuing a writ of fi fa (DR004). This “issue” was then automatically included in DR 001. The adjusted “true” figures for these two courts between April 2007 and March 2008 appear to have been:

	Original	Adjusted
Bournemouth	626	17
Yeovil	428	0

Staff at the other four courts whose returns I had queried were able to carry out manual counts for the 2007-8 period. These revealed the following adjusted figures for the total number of High Court claims at these courts:

	Original	Adjusted
Oxford	1,650	8
Peterborough	112	2
Reading	1,472	7

The manual count at Northampton, on the other hand, revealed a figure even higher than the one I had queried (although it should be noted that the relevant 12-month period began in April, as opposed to January, 2007). The new figure of 292 was well over three times the figure for Nottingham, a much larger centre for heavy civil business (79) and higher by one third than the figure for Birmingham (214).<sup>565</sup>

I was then furnished with adjusted figures which eliminated the returns from County Courts where there is no District Registry. I therefore reduced the Chancery totals by 588 so as to remove all the figures from County Courts which possess no Chancery District Registry, and the Queen’s Bench totals by 4,304, so as to remove the wrongly entered writs of fi fa which have so far been identified. I added a column to my table which showed how many District Registry claims were allocated to the multi-track in each region.

After making these adjustments, the new totals were:

<i>Region</i>	<b>QB</b>	<b>Chancery</b>	<b>DR Unknown</b>	<b>Total</b>	<b>Allocation to multi-track</b>
Midlands	938 <sup>566</sup>	492	19	1,430	180
North-West	2,636	761	24	3,331	434
North-East	2,281	644	29	2,925	336
London	15	2		17	
South-East	238	-9	22	260	96
South-West	1,486	239	14	1,739	137
Wales	1,132	137	6	1,275	98
<b>Totals</b>	<b>8,746</b>	<b>2,275</b>	<b>114</b>	<b>11,035</b>	<b>1,281</b>

I had been assured by MoJ statisticians that the figures for “allocation to multi-track” were likely to be reliable. I noted that because all Part 8 claims are treated as allocated to the multi-track (see CPR 8.9(c)), the right hand column might not include all the defended cases that were proceeding to trial.

After claims are served, a significant number of them are settled or withdrawn before any allocation direction is given, but the difference between the figures in the last two columns was so enormous (except in the South-East, where a manual count was conducted) that the figures left a large number of questions unanswered.

MoJ statisticians then kindly prepared a further set of statistics. Their first new table showed the number of High Court claims to which the BMS codes DR001 or DR002 were attached. If one excludes 47 claims issued in the North-West and the South-East for “Delivery Writ”, this table produced the following figures:

<i>Region</i>	<b>DR001 (QB)</b>	<b>DR002 (Chancery)</b>
Midlands	600	229
North-East	1,982	333
North-West	2,007	357

<sup>565</sup> It may be that a very large number of personal injury claims, for instance, were issued in Northampton, but I asked if the figure should be counted again, to make sure that writs of fi fa have not been included in it.

<sup>566</sup> A manual count at all the District Registries on the Midland Circuit apart from Boston, Coventry, Dudley, Lincoln, Shrewsbury, Stafford, Walsall and Worcester (courts which recorded 78 QB claims on CASEMAN) produced a total figure for QB claims of 900 (including 214 QB civil, 87 TCC and 108 Mercantile)

London & South-East	3,239	14
South-West	1,911	118
Wales	1,065	65
<b>Total</b>	<b>10,802</b>	<b>1,108</b>

I was then provided with a breakdown of these figures into categories. Omitting “Delivery Writ” and categories which only produced single-figure totals nationwide, the following picture emerged:

QB 10,802 (including 15 in small categories)

<i>Region</i>	<b>QB Claim Spec Only</b>	<b>QB Claim Mult/Other</b>	<b>QB Claim Unspec</b>	<b>QB Personal Injury</b>
Midlands	380	2	181	37
North-East	1,650	29	263	30
North-West	1,165	550	208	82
London & SE	1,525	7	1,694	13
South-West	1,619	99	181	12
Wales	972	20	66	2
<b>Total</b>	<b>7,311</b>	<b>707</b>	<b>2,593</b>	<b>176</b>

Chancery 1,108 (including 15 in small categories):

<i>Region</i>	Ch Claim Spec Only	Ch Probate	Ch Claim Mult/Other	QB Claim Unspec	Ch Orig Appln
Midlands	52	22	9	132	1
North-East	65	25	59	143	38
North-West	66	16	109	153	10
London & SE	7		2	3	2
South-West	16	13	5	77	5
Wales	7	10	8	31	7
<b>Total</b>	<b>213</b>	<b>86</b>	<b>192</b>	<b>539</b>	<b>63</b>

The third new table showed the number of Part 8 claims<sup>567</sup> issued in District Registries (BMS Code DR009)

<i>Region</i>	<b>QB Part 8 Claim</b>	<b>Ch Part 8 Claim</b>
Midlands	18	246
North-East	65	288
North-West	32	257
London & SE	7	4
South-West	73	118
Wales	20	56
<b>Total</b>	<b>215</b>	<b>969</b>

The final new table showed the number of multi-track allocations (BMS Code DR043). I have found it more convenient to compare these figures with the figures for claims under the same category<sup>568</sup>:

<sup>567</sup> These figures include pre-issue applications.

<sup>568</sup> I have again omitted the smaller categories, and a category showing Part 8 allocations. All Part 8 claims are treated as allocated to the multi-track, so that that figure may not mean very much.

## Queens Bench

	QB Spec		QB Mult/Other		QB Unspec		QB PI	
	Issues	Allns	Issues	Allns	Issues	Allns	Issues	Allns
Midlands	380	-	2	-	181	-	37	24
North-East	1,650	8	29	14	263	30	30	13
North-West	1,165	17	550	19	208	44	82	45
London & SE	1,525	1	7	-	1,694	2	13	2
South-West	1,619		99	1	181	1	12	5
Wales	972		20	3	66	10	2	1
Total	7,311	26	707	37	2,593	87	176	91

## Chancery

	Ch Spec		Ch Probate		Ch Mult/Other		Ch Unspec	
	Issues	Allns	Issues	Allns	Issues	Allns	Issues	Allns
Midlands	52	8	22	8	9		132	
North-East	65	17	25	1	59	14	143	30
North-West	66	1	16		109	19	153	44
London & SE	7				2		3	2
South-West	16		13	1	5	1	77	1
Wales	7		10	5	8	3	31	10
Total	213	26	86	15	192	37	539	87

Apart from the statistics for QB personal injury claims (which must have been relatively easy to identify) these statistics once again raised far more questions than they answered.

Part of the answer was provided by the court managers at Oxford, Reading and Peterborough, where the manual counts had produced figures for District Registry claims far lower than those I was originally shown.

The enforcement manager at Oxford explained that the reason for the large number of DR 001 entries at that court was that many County Court judgments were certified at the Banbury County Court, and when applications for writs of fi fa were then made at Oxford (where there is a District Registry), the practice at Oxford was to use Event Code 1 when entering these new applications on CASEMAN. The enforcement manager said he had never heard of BMS Code DR 004.<sup>569</sup>

The relevant manager at Reading said that when applications for writs of fi fa were entered on CASEMAN, the only 'relevant' case code choices that were apparently available to them were 'QB claim specified only', 'QB claim - multiple/remedy' or 'QB claim unspecified only'. The staff at Reading were not sure which case type generated CASEMAN code DR 004.

The manager at Peterborough who conducted the manual count said that the difference between the manual count and the CASEMAN statistics was mainly attributable to applications for writs of fi fa. She said that staff at that court used the Case type 'QB claim

<sup>569</sup> In fact references to both DR001 and DR004 appear on the relevant paperwork, so that it is possible that court staff were entering Event Code 1 and then in some explanatory field were specifying that it was a fi fa application.

specified only'. She reported that there were also a few cases which had been entered into CASEMAN as High Court cases, whereas they were in fact County Court cases.

This investigation showed that the statistics for District Registry claims are not worth the paper they are written on. While the Chancery statistics present fewer problems, on the QB side, only the columns for personal injury claims, which I was told formed the bulk of QB High Court business (apart from TCC and Mercantile claims) outside London, are likely to show a true picture.

## ANNEX K

During my inquiry I conducted formal interviews with the following people:

The Master of the Rolls	HHJ Appleton	DJ Jordan
The President of the QB Division	HHJ Behrens	DJ Saffman
The President of the Family Division	HHJ Brown QC	DJ Sheldrake
The Chancellor	HHJ Bursell QC	DJ Smith
The Senior Presiding Judge	HHJ Chambers QC	DJ Walker CBE
Stanley Burnton LJ	HHJ Paul Collins CBE	
Carnwath LJ	HHJ Dight	David Thompson
Dyson LJ	HHJ Grenfell	Stephen Fash
Jacob LJ	HHJ Havelock-Allan QC	Keith Fairweather
Keene LJ	HHJ Hodge QC	Julie McGrory
May LJ	HHJ Holman	Lynne Knapman
Moore-Bick LJ	HHJ Jarman QC	Doug Bell
Richards LJ	HH Graham Jones	Tim Green
Smith LJ	HHJ Kaye QC	Linda Lennon
Thomas LJ	HHJ Kirkham	Helen Dickens
Toulson LJ	HHJ Langan QC	Andrea Lloyd
	HHJ McCahill QC	Sue Brooks
Beatson J	HHJ McKenna	Steve Guffogs
Briggs J	HHJ Mackie QC CBE	Jo Howard
Collins J	HHJ Marshall QC	Rose Shaw
Davis J	HHJ Mitchell	Fiona Quirk
Eady J	HHJ Pelling QC	David Eaton
Gloster J	HHJ Raynor QC	Carol Hardisty
Gross J		Helen Andrews
Jackson J	The Senior Master	Andy O'Brien
Lewison J	The Chief Chancery Master	Lisa Parsons
MacDuff J	Master Fontaine	Priya Patel
McCombe J	Master Leslie	Neil Pring
Norris J		Jane Windle
Owen J	DJ Ashton	Beverley Hemingway
Patten J	DJ Anson	Mike Burke
Ramsey J	DJ Davies	Michelle Bayley
Andrew Smith J	DJ George	
David Steel J	DJ Giles	
Warren J	DJ Harrison	

I also received great help from Andrew Frazer, Liz Catherall, Sally Langdale, Brian Barber, Aidan Mews, Darren Scates, Karen Wheeler at Selborne House, and I reported on my conclusions to Chris Mayer (Chief Executive, HMCS) just before I completed my report. I had discussions, telephone conversations and e-mail exchanges with a number of other judges.