

Litigation Committee response to the Consultation Paper on the Rolls Building Financial List Initiative

The City of London Law Society (“CLLS”) represents approximately 15,000 City lawyers through individual and corporate membership including some of the largest international law firms in the world. These law firms advise a variety of clients, from multinational companies and financial institutions to Government departments, often in relation to complex, multi-jurisdictional legal issues.

The CLLS responds to consultations on issues of importance to its members through its 19 specialist committees. This response has been prepared by the CLLS Litigation Committee (the “Committee”) and addresses the Consultation Paper entitled *Rolls Building Financial List Initiative* (the “Consultation Paper”).

The Committee supports the creation of a Financial List within the Commercial Court and the Chancery Division, including the possibility of bringing market test cases where authoritative legal guidance is needed. The English courts face ever increasing competition from courts and other dispute resolution institutions across the world. It is important for the English courts to improve, and be seen to improve, the service they provide to international litigants rather than merely to rest on the courts’ historic laurels. In particular, litigants expect judges to be familiar with the subject matter of a case. The Financial List potentially offers litigants the assurance that cases will be heard by a judge with an understanding of the global financial markets, rather than a judge who happens to be available, and demonstrates the benefits that the English courts can bring to dispute resolution in those markets.

The Consultation Paper notes that, at paragraph 23, that the Financial List should be open to innovation. The Committee agrees, and considers that as soon as the Financial List is set up, further consideration should be given to whether the Commercial Court’s existing procedures, which the Financial List will use, are all genuinely appropriate for financial cases. The creation of a Financial List offers an opportunity to create procedures that meet the needs of this particular category of case rather than to impose on it the general procedures applicable to all litigation, as happens currently.

The Committee has the following more detailed comments on the draft Rules and Guide.

Rule X.1(2)

The Committee wonders whether a financial limit of £50 million is too high. The threshold over which costs budgeting does not apply automatically is £10 million, which might be more appropriate.

The definition in (a) includes “private equity deals”. The Committee agrees that the kind of transactions undertaken by private equity providers should generally fall within the Financial List. Those transactions are typically the sale and purchase of businesses, whether through a share or asset sale, together with accompanying financial arrangements (though some expressed the view that a warranty claim under a sale and purchase agreement might not be appropriate for the Financial List). However, it is the nature of the transactions that private equity undertakes that should lead to their inclusion in the Financial List, not the fact that they are undertaken by private equity providers. So, for example, the sale of a business between two corporates should fall within the Financial List even though no private equity firm is involved.

The definition of “Financial markets” should also include the loan markets.

Guide

Paragraph 8: The Guide proposes, rightly, the establishment of a Users’ Committee. Given that Combar and the Chancery Bar Association are expressly mentioned as providing representatives, the CLLS would welcome the opportunity to do likewise. The CLLS’s members are likely to be in the forefront of representing clients in Financial List cases, and its having a representative on the Users’ Committee would enhance the ability of solicitors to make known their views on the improvement of financial markets litigation, as set out in the last sentence of the paragraph.

Draft Practice Direction on Test Cases

Paragraph (2)(1): The Committee considers that it would be useful for there to be mandatory publicity for all test cases so that others who might be interested can find out about them. This might be through publication on a website, whether the judicial website or another website, and/or through mandatory notification to the Users’ Committee.

Paragraph 2(2)(a): This requires those bringing test cases to be “actively in business in the relevant market”. Paragraph 2(2)(c)(1) then contemplates that a trade body could be joined or otherwise represented in a test case to ensure that the arguments of all opposing interests will be properly put to the court. This suggests that a trade body cannot itself bring a market test case, though it can be joined to a test case brought by somebody else. The Committee considers that it would be useful if a trade body could actually commence a market test case, or be a defendant in such a

case, rather than merely being joined to a case in order to ensure that all arguments are properly put. In practice, it may be that few financial institutions will be prepared to bring test cases for the good of the market as a whole, whether through a dislike of publicity or because the costs will generally be irrecoverable. Trade bodies are ideally placed to bring test cases, both because of their market perspective and because they can spread the cost across the industry as a whole.

Some scepticism was expressed on the Committee as to whether the test case procedure would prove attractive or practicable (for example, because of the difficulties of dealing with hypothetical cases), but a pilot should flush out whether or not this is the case.

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**THE CITY OF LONDON LAW SOCIETY
Litigation Committee**

Individuals and firms represented on this Committee are as follows:

Simon James (Chairman)	Clifford Chance LLP
Jan-Jaap Baer	Travers Smith LLP
Duncan Black	Field Fisher Waterhouse LLP
Patrick Boylan	Simmons & Simmons LLP
Tom Coates	Lewis Silkin LLP
Jonathan Cotton	Slaughter & May LLP
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