



4 July 2011

Our ref: ICAEW Rep 65/11

Judith Evers
Ministry of Justice
Postpoint 4.12 102 Petty France
London SW1H 9AJ

By email: CivilTJ@justice.gsi.gov.uk

Dear Ms Evers

Solving disputes in the county courts: creating a simpler, quicker and more proportionate system

ICAEW is pleased to respond to your request for comments on *Solving disputes in the county courts: creating a simpler, quicker and more proportionate system*.

Please contact me should you wish to discuss any of the points raised in the attached response.

Yours sincerely

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ICAEW REPRESENTATION

SOLVING DISPUTES IN THE COUNTY COURTS: CREATING A SIMPLER, QUICKER AND MORE PROPORTIONATE SYSTEM

Memorandum of comment submitted in June 2011 by ICAEW, in response to Ministry of Justice consultation paper Solving disputes in the county courts: creating a simpler, quicker and more proportionate system published in March 2011

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INTRODUCTION

1. ICAEW welcomes the opportunity to comment on the consultation paper *Solving disputes in the county courts: creating a simpler, quicker and more proportionate system* published by the Ministry of Justice.

WHO WE ARE

2. ICAEW operates under a Royal Charter, working in the public interest. Its regulation of its members, in particular its responsibilities in respect of auditors, is overseen by the Financial Reporting Council. As a world leading professional accountancy body, we provide leadership and practical support to over 136,000 members in more than 160 countries, working with governments, regulators and industry in order to ensure the highest standards are maintained. We are a founding member of the Global Accounting Alliance with over 775,000 members worldwide.
3. Our members provide financial knowledge and guidance based on the highest technical and ethical standards. They are trained to challenge people and organisations to think and act differently, to provide clarity and rigour, and so help create and sustain prosperity. We ensure these skills are constantly developed, recognised and valued. Our ethical standards are set out in our Code of Ethics, a copy of which is available from [icaew.com/ethics](https://www.icaew.com/ethics). Among our fundamental ethical principles are requirements for both integrity and objectivity.
4. The involvement of a chartered accountant in the preparation of financial information or the provision of assurance services on it (including audit) can often avoid the disputes arising, or becoming serious. Besides the routine involvement of our members in such functions, we also have a number of mechanisms for the provision of assistance to the parties to a dispute through Alternative Dispute Resolution. The first of these is the President's Appointments Scheme under which any person may arrange for the appointment of an Independent Expert, Valuer or Arbitrator. Further information on this scheme can be obtained from [icaew.com/en/about-icaew/find-a-chartered-accountant/find-an-independent-expert](https://www.icaew.com/en/about-icaew/find-a-chartered-accountant/find-an-independent-expert). Our Professional Conduct Department have also developed a number of ADR schemes, growing from our concern to resolve those disputes which have arisen from complaints against our members which we did not feel justified to be referred to our disciplinary process, but where it is clearly important for the concerns of complainants to be addressed. Thirdly, we have also developed a formal Mediation Service, in partnership with ADRg, to use the professional skills of both lawyers and chartered accountants, in resolving difficult commercial disputes. Further information on this scheme can be obtained from www.icaew.com/en/about-icaew/find-a-chartered-accountant/resolving-commercial-disputes.

MAJOR POINTS

Support for the initiative

5. We welcome this initiative from the Ministry of Justice. The bulk of our response relates to issues of Alternative Dispute Resolution (ADR) and to those disputes arising for the Companies Act where the jurisdiction of the High Court is or is not, in our view, appropriate. The fact that our response is limited in this way to those issues where we have most experience to offer, does not in any way limit our approval of the fact that the use of the County Court and other methods for resolving disputes are under review, with a view to being kept up-to-date and fit for developing circumstances.
6. In our experience mediation and other forms of ADR work well as a means of extending access to justice in a flexible and cost effective way. We support the mandatory referral of small claims to a mediation in most circumstances, and claims of less than £100,000 to mediation information sessions. However, Government support for mediation should not be allowed to develop in a way that reduces opportunities for, and access to, alternative forms of ADR. In some cases, these can be more effective in resolving disputes without resort to the

Court, and they should not be allowed to decrease, through too emphatic support for mediation.

7. We believe that the question of the jurisdiction of the High Court in cases of Company Law or the variation of trusts is potentially complex, and that more research is desirable before firm decisions are made on changes to the jurisdiction of the courts in these areas.
8. Whilst not the subject of this consultation, we note that it refers to the Government's policy decision to make Conditional Fee Agreement (CFA) success fees and After The Event (ATE) insurance premiums non-recoverable. We are concerned that in the specific area of claims made by insolvency practitioners (IPs) this may unnecessarily prejudice the position of creditors, in that IPs will be less likely to press claims against defaulting company directors or third parties (and returns to creditors will be reduced even if such claims are pursued). We regret that the implications of this policy for creditors (and in particular for HMRC) emerged late in the process, but we are calling for an amendment to the Legal Aid, Sentencing and Punishment of Offenders Bill currently before Parliament to permit recoverability of CFA success fees and ATE insurance premiums in insolvency litigation. If you would like to see a copy of our briefing note for Members of Parliament, please let us know.

RESPONSES TO SPECIFIC QUESTIONS

PREVENTING COST ESCALATION – PRE-ACTION BEHAVIOUR

Q1–Q11: These questions relate to the proposed application of modified versions of the Road Traffic Accident Personal Injury Scheme to other personal injury and clinical negligence claims

9. We are not aware of any reason why this scheme should not be adapted to the areas suggested.

Q12-Q15: These questions relate to proposals for a system of fixed recoverable costs for fast track personal injury claims

10. We have no comments to make on these matters.

Q16: Do you agree that mandatory pre-action directions should be developed? If not, please explain why.

11. Yes.

Q17: If your answer to Q16 is yes, should mandatory pre-action directions apply to all claims with a value up to (i) £100,000 or (ii) some other figure (please state with reasons)?

12. We would support mandatory pre-action directions for claims up to £100,000 which would enable a large range of disputes to be offered ADR at the beginning of the dispute rather than be presented with the option at a much later stage or indeed not at all. The proposals would empower the parties, rather than their advisors or the system, to take ownership of their dispute and resolve it in the way they think best. Any pre-action directions would help ensure this empowerment.

Q18: Do you agree that mandatory pre-action directions should include a compulsory settlement stage? If not, please explain why.

13. Yes.

Q19: If your answer to Q18 is yes, should a prescribed ADR process be specified? If so, what should that be?

14. Since Lord Woolf reforms mediation has become the main process to which parties and the lawyers will turn for resolution in the absence of any prescribed alternative such as a contractual provision for arbitration. It is recognised, however, that there are nevertheless other processes such as neutral evaluation, arbitration or expert determination which can have, depending on the circumstances of the case, an equal, if not better, opportunity to resolve the particular dispute.

15. It is suggested therefore that information should be provided on a range of the different processes, with an indication of where a particular dispute might be best resolved. This could be in court literature at the small claims stage or could be discussed at the 'Mediation Information Sessions' for fast and multi-track cases up to 100K.

Q20-Q24 These questions relate to proposals on fixed recoverable costs for dispute resolution regimes, pre-action protocols for rent and mortgage arrears and encouragement of the use of electronic channels to issue claims.

16. We have no comments to make on these matters.

Q25: Do you agree that the small claims financial threshold of £5,000 should be increased? If not, please explain why.

17. Yes.

Q26: If your answer to Q25 is yes, do you agree that the threshold should be increased to (i) £15,000 or (ii) some other figures (please state with reasons)?

18. We would strongly recommend increasing the small claims limit and would support a figure of £15,000 or more. That figure appears, from the consultation paper, to partly originate from representations made by the Federation of Small Business on the basis that 'any competent business person should be able to represent his firm and business up to that level'.

19. We feel that that is understating the ability of many successful businessmen who we would suggest enter into contracts far in excess of that figure. We see no reason why the small claims limit should not be raised further to £25,000.

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Q29: Do you agree that the fast track financial threshold of £25,000 should be increased? If not, please explain why.

20. Yes

Q30: If your answer to Q29 is yes, what should the new threshold be? Please give your reasons.

- 21.** Page 70 of the consultation paper notes that most cases valued at less than £100,000 would never be seen by a High Court judge. We would support £100,000 as the upper limit of the fast track which would help ensure that only the most appropriate, and complex, cases would be dealt with in the High Court.

ALTERNATIVE DISPUTE RESOLUTION

Q31: Do you consider that the CMC's accreditation scheme for mediation providers is sufficient?

Q32: If your answer to Q31 is no, what more should be done to regulate civil and commercial mediators?

- 22.** We agree that the Civil Mediation Council (CMC) provides a well recognised and authoritative accreditation scheme for mediators, and we have no reason to suppose that it would not be appropriate for the Ministry of Justice and the Courts to continue to consider it as an appropriate mark of quality. However, it must be recognised that as an independent, private sector entity, it does not have the democratic oversight, nor the checks and balances that a public sector body would have. We do not think that it would be appropriate to allow the CMC an effective monopoly in the accreditation of mediators, without leaving the opportunity for other entrants to the market in accreditation for court referred mediation work.
- 23.** Elsewhere in this response, we refer to the desirability of also offering parties the opportunity to access alternate forms of ADR, such as arbitration and expert litigation. It may be necessary to also consider whether, or to what extent, providers of these forms of ADR should also be accredited.

Q33: Do you agree with the proposal to introduce automatic referral to mediation in small claims cases? If not, please explain why.

- 24.** Yes, unless the parties to a dispute agree to an alternate ADR process, when automatic referral should not be necessary. Automatic referral to a mediation service will provide a cheap and simple entry to the ADR process, where the parties to a dispute do not have pre-existing views on the most appropriate means of ADR in their case. As is noted in paragraph 154 of the consultation, a mediator will also be in a good position to recognise when a dispute is not suitable for mediation, and make recommendations to the parties – however, we do not agree that the recommendation should necessarily be that the case should proceed to a hearing. Mediators should also be prepared to refer cases to alternative ADR processes, where appropriate.

Q34: If the small claims financial threshold is raised (see Q25), do you consider automatic referral to mediation should apply to all cases up to (i) £15,000, (ii) the old threshold of £5,000 or (iii) some other figure? Please give reasons.

- 25.** We consider that all small claims cases should be referred to ADR up to the new threshold. In this size range, we are not aware of anything which suggests that the higher the claim, the more complex, or that this makes mediation unsuitable.

Q35: How should small claims mediation be provided? Please explain with reasons.

- 26.** Ideally, a system similar to the current small claims mediation service, with automatic referral to a single point of contact, should be retained, for simplicity and cost savings for all parties. If private suppliers are used, accreditation or other due diligence over the quality of the service they supply will be needed.

Q36: Do you consider that any cases should be exempt from the automatic referral to mediation process?

27. Yes.

Q37: If your answer to Q36 is yes, what should those exemptions be and why?

28. Cases where both parties have opted for an alternative form of ADR should be exempted from automatic referral to mediation.

29. We note the Ministry of Justice's proposals suggest that, paragraph 55, disputes between tax payers and the government over tax liabilities and debts should be excluded, but suggest that instead referral to an HMRC mediation scheme should be built in as part of the overall process. ICAEW has been working closely with HMRC on their own pilot mediation schemes and we believe the outcome to have been very positive.

30. We are not aware of any other circumstances where exemptions should be allowed. Parties should not be able to avoid ADR processes, because of a lack of understanding of what is involved, or an unwillingness to try.

Q38: Do you agree that parties should be given the opportunity to choose whether their small claims hearing is conducted by telephone or determined on paper? Please give reasons.

31. ICAEW has no particular views one way or the other.

Q39: Do you agree with the proposal to introduce compulsory mediation information sessions for cases up to a value of £100,000? If not, please explain why.

32. Yes.

Q40: If your answer to Q39 is yes, please state what might be covered in these sessions and how they might be delivered (for example by electronic means)?

33. The mediator should endeavour to contact each party either by phone or in person having perhaps obtained from each of them via email or access to a website, background information as to the dispute. The mediator should then take each party through the mechanics of the process, the advantages, as well as the disadvantages; look at the issues, negotiations and any settlement offers; discuss with the parties the costs and the risks as to winning or losing and thereafter any enforcement, publicity and delay. The overriding purpose would be for mediators to satisfy for themselves that there is a commitment from the parties to want to find a settlement that the parties voluntarily want to enter into the process and are satisfied that it is a process they want to try.

Q41: Do you consider that there should be exemptions from the compulsory mediation information sessions?

34. Our answer remains the same as Q36.

Q42: If your answer to Q41 is yes, what should those exemptions be and why?

35. Our answer remains the same as Q37.

Q43: Do you agree that provisions required by the EU Mediation Directive should be similarly provided for domestic cases? If not, please explain why.

36. Yes.

Q44: If your answer to Q43 is yes, what provisions should be provided and why?

37. The UK should implement the Directive for domestic legislation in the same way as Germany, Italy and Ireland have done. This would put mediation on a full legislative basis and create a proper structure for parties, mediators and lawyers to work in, providing protection not only to the mediators, by way of preventing them from being called to give evidence, but also the enforcement of any mediation agreement to give certainty to the end of the process which is often a criticism.

DEBT RECOVERY AND ENFORCEMENT

Q45-59: These questions relate to proposals to strengthen the speed and ease with which debts which are subject to a court order are recovered

38. We agree that it is desirable to improve the system for debt recovery and enforcement following a court order, are broadly supportive of the proposals made, but have no comments on the detail of the proposals.

STRUCTURAL REFORMS

Q60-69: These questions relate to jurisdictional issues for various courts and the judges who sit on them.

39. We have no comments to make in relation to these proposals, with the exception of Q65&66, concerning the jurisdiction in relation to jurisdiction in relation to certain claims under the Companies Act 2006 (CA06).

Q65: Do you agree that claims for variation of trusts and certain claims under the Companies Act and other specialist legislation, such as schemes of arrangement, reductions of capital, insurance transfer schemes and cross-border mergers, should come under the exclusive jurisdiction of the High Court? If not, please explain why.

Q66: If your answer to Q65 is yes, please provide examples of other claims under the Companies Act that you consider should fall within the exclusive jurisdiction of the High Court.

40. We have answered these two questions together. The consultation paper does not give any indication of the frequency and types of referrals from the county court to the High Court and we recommend that such an analysis is undertaken before any decisions are taken to adjust the jurisdiction of the courts on company law matters. However, subject to our foregoing recommendation, we have considered the possible claims that can be made, taking into account the following factors:

- (i) the rarity of the particular claim;**
- (ii) whether there is a likelihood of the claim being contested either because the law is complex or because it will impact on third party rights; and**
- (iii) whether the application to the court is likely to be for enforcement only with little likelihood of its being contested.**

41. Appendices 1 and 2 together comprise a list of CA06 sections that expressly provide for applications to be made to the court. We have segregated these into Appendix 1, which

contains our suggestions of applications that are so inherently complex as to warrant being heard only in the High Court, and thus should be so reserved to avoid wasting county court time, and Appendix 2 containing those that we believe need not be reserved for the High Court.

42. Appendix 3 then deals with a range of monetary civil claims and liabilities where the person who has the right to claim is set out in the relevant section. We note that there are more than 30 sections in CA06 that prescribe/allocate liability in this way, under which a court direction could be sought, but where the section contains no express right to make an application to court. For example, a person purporting to enter into a pre-incorporation contract is personally liable on such contract under 51(1) - there is no specific right to apply to the court, but a court direction could be sought to the effect that a person is so liable under that section.
43. As these claims/directions are not likely to be matters of straightforward default, and are likely to require specialist knowledge and to be contested, we recommend they come under the exclusive jurisdiction of the High Court. However, as we mention above, further research is needed to determine whether significant cost savings could be achieved by avoiding referrals from the County Court where a low monetary value has meant they could not begin in the High Court.
44. Furthermore, it is theoretically possible to apply to court under almost any of the 1300 sections in CA06. For example, s968(6) *Effect on contractual restrictions* provides that certain persons are entitled to compensation, and any such claims are reserved to the High Court under s968(7). Again, further research is needed as to whether there are other such claims that should be restricted to the High Court.

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APPENDIX 1

Applications that should be restricted to the High Court (even if below [£100,000]), due to inherent complexity

Appendices 1 and 2 together comprise a list of CA06 sections that expressly provide for applications to be made to the court. These have been segregated into suggestions of applications that are so inherently complex as to warrant being heard only in the High Court, and thus **should** be so reserved to avoid wasting county court time (Appendix 1), and those that **need not** be reserved for the High Court (Appendix 2).

PART 7 - RE-REGISTRATION AS A MEANS OF ALTERING A COMPANY'S STATUS

- s98(1) - application to court by members to cancel special resolution by PLC for re-registration as a private company

PART 10 - A COMPANY'S DIRECTORS

- s169(5) – application to the court for permission not to comply with a requirement for copies of representations from a director to be sent out to members and read out at the meeting of members if the director (who is possibly being removed from office) is abusing his right for such representations to be sent/heard
- s244(3) - application by (for example) a liquidator, creditor or member of the company for disclosure by the company or by the registrar of a director's 'protected information' if service of documents at a service address other than the director's usual residential address is not effective to bring them to the notice of the director

PART 11 - DERIVATIVE CLAIMS AND PROCEEDINGS BY MEMBERS

- s261(1) - application by member for permission to bring a derivative claim
- s262(2) – application by member for permission to continue a claim as a derivative claim, for example, if the company has failed to prosecute the claim diligently, or if the manner in which the company commenced or continued the claim amounts to an abuse of the process of the court

PART 13 - RESOLUTIONS AND MEETINGS

- s295(1) - application by the company (or another person who claims to be aggrieved) to the court for permission not to circulate a members' statement if the rights conferred by section 292 (members' power to require circulation of written resolution) are being abused
- s306(2) – application by a director or member to the court for an order that a meeting of a company be called, held and conducted in any manner the court thinks fit
- s317(1) - application by the company (or another person who claims to be aggrieved) to the court for permission not to circulate a members' statement if the rights conferred by section 314 (members' power to require circulation of statements) are being abused

PART 15 - ACCOUNTS AND REPORTS

- *[s452(1)(b) – listed in Appendix 2 below as not to be restricted to High Court]*
- s456(1) - application to court by or on behalf of the Secretary of State in respect of defective accounts or reports, for an order requiring the directors of the company to prepare revised accounts or a revised report
- s459(4) - power of authorised person to apply to court for an order requiring documents, information and explanations to help determine whether accounts or reports are defective

PART 16 – AUDIT

- s511(6) – application to the court for permission not to comply with a requirement for copies of representations from an auditor to be sent out to members and read out at the meeting of members if the auditor (who is possibly being removed from office) is using his right for such representations to be sent/heard to secure needless publicity for defamatory matter.
- Equivalent provisions preventing needless publicity for defamatory matter in
 - s514(7) and s515(7) (*Failure to re-appoint auditor: special procedure required for written resolution*), and
 - s518(9) (*Rights of resigning auditor*)
 - s520(3) (*Company's duties in relation to auditor's resignation statement*)
- s527(5) – application to the court (by company or other aggrieved person) for permission not to comply with a requirement by members to publish on the company's website a statement from the auditor regarding circumstances connected with the auditor leaving office, if the members are abusing their right to require such website publication

PART 17 - A COMPANY'S SHARE CAPITAL

- s589(2) - application to court to be exempted from liability to a company under
 - s585(2) - liability of allottee in case of breach by public company of prohibition on accepting undertaking to do work or perform services
 - s587(2) or (4) - liability of allottee in case of breach by public company of prohibition on payment by long-term undertaking, or
 - s588 - liability of subsequent holders of shares
- s606(1)(b) – application to court to be exempted from liability to a company in relation to payment in respect of shares in the company under S593(3), s604(3) or s605(1) or (2) (in each case, where allottee liable to the company for nominal value and the whole of any premium if shares are allotted in contravention of the s593(1) requirements for independent valuation of non-cash consideration)
- s633(2) – application by holders of shares for court order to disallow a variation of rights attaching to their shares under section 630 eg if the variation would unfairly prejudice the shareholders of the class of shares [*and s634(2) - equivalent provisions in respect of companies without a share capital*]
- s645(1) - application to court for order of confirmation of capital reduction

PART 18 - ACQUISITION BY LIMITED COMPANY OF ITS OWN SHARES

- s661(4)(a) - application by director or subscriber for relief from joint and several liability with nominee (for paying up, or paying any premium on, shares), where the director/subscriber have acted honestly and reasonably, and having regard to all the circumstances of the case, ought fairly to be relieved from liability
- s721(1) – application by a member or creditor of the company to cancel resolution for payment out of capital for redemption or purchase of own shares

PART 20 - PRIVATE AND PUBLIC COMPANIES

- s757(1)(a) – application by a member or creditor (or SofS) to the court for enforcement of prohibition in s755 of on public offers by private company
- s758(1)(a) - application by a member or creditor (or SofS) to the court to issue an order to require the company to re-register as a public company, or a remedial order to put persons affected by anything done in contravention of section 755 (prohibition of public offers by private company) in the position he would have been in if it had not been done (and where such remedial order is made against the company it may provide for the reduction of the company's capital).

PART 22 - INFORMATION ABOUT INTERESTS IN A COMPANY'S SHARES

- s794(1) - application by a [public] company for a court order imposing restrictions on its shares where a notice requiring information about interests in those shares has been served on a person who is or was interested in those shares and they fail to comply with such notice
- s799(1) - application by the company (or by any aggrieved person) for the relaxation of restrictions eg if the order unfairly affects the rights of third parties in respect of the shares.
- s800(1) - application by the company (or by any aggrieved person) for the removal of restrictions eg if the order unfairly affects the rights of third parties in respect of the shares where the court is satisfied (a) that the relevant facts about the shares have been disclosed to the company and no unfair advantage has accrued to any person as a result of the earlier failure to make that disclosure, or (b) the shares are to be transferred for valuable consideration and the court approves the transfer.
- s801(2) - application by the company that the shares subject to restrictions be sold, and any application (eg by the company or any person interested in the shares) for a further order relating to the sale or transfer of the shares
- s802(2) - application by a person who is beneficially interested in any shares that are sold in pursuance of an order of the court under section 801 for the whole or part of those proceeds to be paid to him.
- *[s812(3), 817(4) and 818(3) – listed in Appendix 2 below as not to be restricted to High Court]*

PART 25 — COMPANY CHARGES

- s873(2) - where there has been a failure to register a charge before the end of the period allowed for registration (or an omission or mis-statement of any particular with respect to any such charge), application by a company or a person interested for a court order that the period allowed for registration shall be extended or, as the case may be, that the omission or mis-statement shall be rectified.
- *[Equivalent provisions for Scottish companies are contained in s888(2)]*

PART 26 - ARRANGEMENTS AND RECONSTRUCTIONS

- s896(1) – application by the company, or any creditor, member or administrator /liquidator of the company, for a court order for the holding of meeting of the creditors or class of creditors, or of the members of the company or class of members (as the case may be), to be summoned in such manner as the court directs.
- s899(1) - application by the company, or any creditor, member or administrator/liquidator of the company, to the court for the sanctioning of a compromise or arrangement
- s900 – *following application under s899, court may make an order facilitating the reconstruction or amalgamation where the compromise or arrangement involves the transfer of the whole or any part of the undertaking or the property of any company concerned (“a transferor company”) to another company (“the transferee company”), including:*
 - *the allotting or appropriation by the transferee company of any shares, debentures, policies or other like interests in that company which under the compromise or arrangement are to be allotted or appropriated by that company to or for any person;*
 - *the continuation by or against the transferee company of any legal proceedings pending by or against any transferor company;*
 - *the dissolution, without winding up, of any transferor company;*
 - *the provision to be made for any persons who, within such time and in such manner as the court directs, dissent from the compromise or arrangement;*

PART 27 — MERGERS AND DIVISIONS OF PUBLIC COMPANIES

- s909(3) - joint application of all the merging companies for the court to approve the appointment of a joint expert to draw up a single report on behalf of all those companies

- s924(3) - joint application of all the companies involved in the division for the court to approve the appointment of a joint expert to draw up a single report on behalf of all those companies
- s938(2) - application by the company, or any creditor, member or administrator/liquidator of the company, for a court order summoning a meeting of members or creditors of existing transferee company

[PART 28 – TAKEOVERS - already reserved to the High Court]

- [s955(1) – application by Takeover Panel for court order to ensure compliance with disclosure or rules-based requirement - *already reserved to the High Court*]
- [s986(1) - application by minority shareholder to the court for an order (a) that the offeror is not entitled and bound to acquire the shares to which a s979 notice relates, or (b) that the terms on which the offeror is entitled and bound to acquire the shares shall be such as the court thinks fit - *already reserved to the High Court*]
- [s986(3) - application by minority shareholder or by the offeror to the court for an order that the terms on which the offeror is entitled and bound to acquire the shares shall be such as the court thinks fit - *already reserved to the High Court*]
- [s986(9) - application by the offeror to the court for an order authorising him to give notices [under subsection (2) or (4) of section 979] if the court is satisfied that (a) the offeror has after reasonable enquiry been unable to trace one or more of the persons holding shares to which the offer relates, (b) the requirements of that subsection would have been met if the person, or all the persons, mentioned in paragraph (a) above had accepted the offer, and (c) the consideration offered is fair and reasonable - *already reserved to the High Court*]

PART 30 - PROTECTION OF MEMBERS AGAINST UNFAIR PREJUDICE

- s994(1) - petition by company member for an order [under s996 – see below] on the ground (a) that the company's affairs are being or have been conducted in a manner that is unfairly prejudicial to the interests of members generally or of some part of its members (including at least himself), or (b) that an actual or proposed act or omission of the company (including an act or omission on its behalf) is or would be so prejudicial.
- s996 - *the court may make such order as it thinks fit for giving relief in respect of the matters complained of, for example the court's order may—*
 - *regulate the conduct of the company's affairs in the future;*
 - *require the company—*
 - (i) *to refrain from doing or continuing an act complained of, or*
 - (ii) *to do an act that the petitioner has complained it has omitted to do;*
 - *authorise civil proceedings to be brought in the name and on behalf of the company by such person or persons and on such terms as the court may direct;*
 - *require the company not to make any, or any specified, alterations in its articles without the leave of the court;*
 - *provide for the purchase of the shares of any members of the company by other members or by the company itself and, in the case of a purchase by the company itself, the reduction of the company's capital accordingly.*

PART 37 - COMPANIES: SUPPLEMENTARY PROVISIONS

- s1157(2)(a) – application by an officer of a company who has reason to apprehend that a claim will or might be made against him in respect of negligence, default, breach of duty or breach of trust, for the court to relieve him either wholly or in part of his liability on the basis that he acted honestly and reasonably, and that having regard to all the circumstances of the case (including those connected with his appointment) he ought fairly to be excused, on such terms as the court thinks fit.

[PART 42 — STATUTORY AUDITORS - already reserved to the High Court]

- [s1225(1) - application to the court by the SofS for an order requiring an RSB to take such steps as the court directs for securing that requirements in Schedules 10 or 11 are satisfied or that obligations under Part 42 are complied with (instead of revoking the relevant recognition order) - *already reserved to the High Court*]

[Equivalent provisions are contained in:

- *s1236(1) - Compliance orders - application by the Independent Supervisor for a court order requiring an Auditor General to take such steps as the court directs for securing that obligations imposed on him under Part 42 are complied with.*
- *s1245(1) - Compliance orders - application by the SofS for a court order requiring a registered third country auditor to take such steps as the court directs for securing that obligations imposed on him under Part 42 are complied with.]*

APPENDIX 2

Applications that should not be restricted to High Court (to be started in either County Court or High Court, depending on eg, value or complexity)

Appendices 1 and 2 together comprise a list of CA06 sections that expressly provide for applications to be made to the court. These have been segregated into suggestions of applications that are so inherently complex as to warrant being heard only in the High Court, and thus **should** be so reserved to avoid wasting county court time (Appendix 1), and those that **need not** be reserved for the High Court (Appendix 2).

PART 4 - A COMPANY'S CAPACITY AND RELATED MATTERS

- s41(6) - application by the company, or any party to a voidable transaction, for the court to make an order affirming, severing or setting aside the transaction on such terms as appear to the court to be just.

PART 5 - A COMPANY'S NAME

- s74(1) - appeal against decision of company names adjudicator
- s76(4) - application to the court to set aside direction from the Secretary of State for the company to change its name.
- s83 - proceedings brought by a company in breach of requirements to disclose company name etc to enforce a right arising out of a contract made in the course of a business

PART 8 - A COMPANY'S MEMBERS

- s117(1)(b) – application to the court for permission not to comply with a request to inspect Register of members
- s125(1) – application to the court by the company, member or any aggrieved person to rectify errors in the register of members

PART 14 — CONTROL OF POLITICAL DONATIONS AND EXPENDITURE

- s370(1) – application brought by an authorised group of members in the name of a company, or by a subsidiary company (against the director of holding company), for enforcement of directors' liability to indemnify a company in respect of unauthorised political donation or expenditure
- s371(2) – application by director that proceedings under s370 should not be brought if for example the unauthorised amount has been made good to the company or that the members proposing to bring proceedings do not constitute an authorised group.

PART 15 - ACCOUNTS AND REPORTS

- s452(1)(b) – application by a member or creditor of the company, or by the registrar, for the court to order that accounts and reports be filed
- *[s456(1) and s459(4) – listed in Appendix 1 above as to be restricted to High Court]*

PART 19 — DEBENTURES

- s745(1)(b) – application to the court for permission not to comply with a request to inspect or require a copy of the Register of debenture holders eg if the court is satisfied that the inspection or copy is not sought for a proper purpose
- s751(4) – application to the court for a direction as to the manner in which a trustee meeting should be held (where trust deed makes no provision for summoning meetings) to approve a resolution as to how a trustee still entitled to benefit from section 192 of the CA85 can pass such benefit either (a)

to all trustees of the deed, present and future, or (b) to any named trustees or proposed trustees of it.

PART 21 - CERTIFICATION AND TRANSFER OF SECURITIES

- s782(1) – application by person entitled to have certificates or debentures delivered to him for a court order that the company make good a default in complying with—
 - section 769(1) (duty of company as to issue of certificates etc on allotment),
 - section 776(1) (duty of company as to issue of certificates etc on transfer), or
 - section 780(1) (duty of company as to issue of certificates etc on surrender of share warrant)

PART 22 - INFORMATION ABOUT INTERESTS IN A COMPANY'S SHARES

- *[s794(1) to 802(2) – listed in Appendix 1 above as to be restricted to High Court]*
- s812(3) - application to the court to require company to comply with request to inspect or require a copy of the Register of interests disclosed, which should not be granted unless the court is satisfied that the inspection or copy is sought for a proper purpose
- s817(4) - application to the court by a third party for removal of an entry from the Register of interests disclosed, where an incorrect entry is made relating to that third party due to incorrect information being provided in response to a notice under section 793 (notice requiring information about interests in company's shares)
- s818(3) - where a person who was previously party to an agreement to which section 824 applies (certain share acquisition agreements) ceases to be a party to the agreement, he may apply to court to for an order directing the company to annotate the Register of interests disclosed accordingly

PART 31 - DISSOLUTION AND RESTORATION TO THE REGISTER

- s1017(1) - application by a person who claims an interest in disclaimed property, or is under a liability in respect of the disclaimed property that is not discharged by the disclaimer, for the court to make an order for the vesting of the disclaimed property in, or its delivery to— (a) a person entitled to it (or a trustee for such a person), or (b) a person subject to such a liability as is mentioned in subsection (1)(b), where it appears to the court that it would be just to do so for the purpose of compensating the person subject to the liability in respect of the disclaimer.
- s1028(4) – application to the court to make such directions and make such provision as seems just for placing the company and all other persons in the same position (as nearly as may be) as if the company had not been dissolved or struck off the register.
- s1029(1) - an application for restoration to the register of a company by any former director of the company, any person having an interest in land in which the company had a superior or derivative interest, any person having an interest in land or other property (i) that was subject to rights vested in the company, or (ii) that was benefited by obligations owed by the company, any person who but for the company's dissolution would have been in a contractual relationship with it, any person with a potential legal claim against the company, any manager or trustee of a pension fund established for the benefit of employees of the company, any former member of the company (or the personal representatives of such a person), any person who was a creditor of the company at the time of its striking off or dissolution, any former liquidator of the company, where the company was struck off the register under section 1003 (voluntary striking off), or the Secretary of State
- s1030(5)(c) - application to court where application to registrar for administrative restoration has been refused

PART 35 - THE REGISTRAR OF COMPANIES

- s1113(3) – application by the registrar, or any member or creditor of the company, for an order directing the company, and any specified officer of it, to make good a default in complying with any obligation under the Companies Acts to deliver a document to the registrar, or to give notice to the registrar of any matter.

PART 40 - COMPANY DIRECTORS: FOREIGN DISQUALIFICATION ETC

- s1184(5) – regulations issued by SofS may provide for applications to the court by persons disqualified under this Part for permission to act in a way which would otherwise be in breach of the disqualification.

APPENDIX 3

Other sections of CA06, for example, under which Court Directions may be sought or claims made

There are over 30 sections that prescribe/allocate liability under which a claim or court direction could be sought, but where there is no express right to make an application to court. For example, a person purporting to enter into a pre-incorporation contract is personally liable on such contract under 51(1) - there is no specific right to apply to the court, but a court direction could be sought to the effect that a person is so liable under that section.

The sections that prescribe liability include:

a) personal liability: 41(3), 51(1), 211(3), 463(2), 579(3), 580(2), 585(2), 586(3), 587(2)and(4), 588(1), 593(3), 604(3), 605(1)and(2), 653(2), 661(2), 847(2), 940(1), 986(6). (We note that s589(6) refers to proceedings for contributions in respect of liability under 580(2), 585(2), 586(3), 587(2)and(4), 588(1), 593(3), 604(3), 605(1)and(2), allowing contributions to be required if the court thinks just and equitable. However, there is no express right to apply to court.)

b) joint and several liability: 195(3), 213(3), 222, 369(2), 563(2), 568(4), 578(3), 588, 605, 661(2), 767(3)and(4), 940, 987, 1187(2).

As these claims/directions are not likely to be matters of straightforward default, and are likely to require specialist knowledge and to be contested, as mentioned in the body of the response above, we recommend they come under the exclusive jurisdiction of the High Court. However, as we mention above, further research is needed to determine whether significant cost savings could be achieved by avoiding referrals from the County Court where a low monetary value has meant they could not begin in the High Court.

Other sections

We note that it is theoretically possible for a person to apply to court for a direction under almost any of the 1300 sections of the Act.

For example, s968(6) *Effect on contractual restrictions* provides that a person who suffers loss as a result of any act or omission that would be a breach of an agreement to which that section applies, is entitled to compensation, of such amount as the court considers just and equitable, from any person who would (but for this section) be liable to him for committing or inducing the breach. Any such claims are reserved to the High Court under s968(7).

Again, further research is needed as to whether there are other such claims that should be restricted to the High Court.