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## Commercial and Chancery Bar: Benchmarking the bench

Author: Dominic Carman | 19 Feb 2009 | 02:30 |

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*Despite resistance from the bench, a group of City solicitors are set to press ahead with plans to assess senior judges. Dominic Carman hears the cases for and against*

It is now 18 months since the idea of judicial appraisals for senior commercial judges first hit the headlines. By the end of 2009, initial findings from the first round of appraisals should be complete.

The process is likely to cover all High Court judges in the Commercial Court and Chancery Division, plus masters. Based on the ratings and opinions of court users - litigants, solicitors and barristers - individual appraisals will be distributed exclusively to each judge with a copy sent to the head of the relevant division. It seems possible that judges' league tables will also be made publicly available.

A *Legal Week* survey conducted in 2007



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of more than 100 senior litigators showed strong support for the idea: 43% of respondents said they would definitely endorse the introduction of upward appraisals for judges, with a further 41% indicating they might do so.

According to SJ Berwin partner Hilton Mervis who is spearheading the scheme at the Commercial Litigators Forum (CLF), the appraisal process will go ahead despite sustained opposition since last July from a working group set up by the Judges' Council and overseen by Commercial Court head Mr Justice Andrew Smith.

Last week, a spokesman confirmed that the Judges' Council is "still looking in detail" at a possible system of judicial appraisal, "not confined to the Commercial Court". The spokesman emphasised that the council continues to "support the principle of judicial appraisal, but considers that the appraisal of any judge should be carried out by a judge of the same or higher stature".

This echoes the findings of the 2001 review by Sir Robin Auld, who originally recommended performance appraisals be carried out by judges of the same or higher rank.

### A divided profession

The CLF proposal - to judge the judges from below - was primarily kickstarted by the proliferation of partner appraisals in City law firms, where 360-degree or upward appraisals are now commonplace. "The upward appraisal system for City partners has worked despite initial reservations from all concerned," says Mervis.

A lesser contributory factor was the collapse of the long-running BCCI and Equitable Life cases at the end of 2005. Despite criticism and much spilt ink, the judges in both cases attract a mixture of sympathy and admiration from commentators.

However, the debacle of the "intemperate" commercial judge, Mr Justice Peter Smith, whose behaviour in court was labelled "wholly inappropriate" last year by the Court of Appeal, certainly provides further traction. Because a long list of people will not now hold cases before him, his continuation on the bench adds substance to the CLF argument of appraisals acting as a potential early warning system.



Mervis (*pictured left*) chairs a CLF sub-committee, which was formed last November, to produce a framework for the appraisals. Other committee members are: Neil Fagan at Lovells, Tim Parkes at Herbert Smith, Simon Willis at Mayer Brown and John Reynolds at White & Case.

One advocate for the appraisal scheme argues that "judges are completely impervious to any feedback or comment: they have no audience other than barristers and passing traffic".

Appraisals, he suggests, will help them focus and improve

themselves: "It will be a wonderful mechanism for giving the courts feedback on an ongoing basis - so that judges can see the results of what their orders have been."

Another says that "it will help them realise they are offering a service, while making court users feel that justice has been done", while Fagan adds: "I see no reason why judges should not be subject to the sort of appraisal system that the rest of the profession is subject to. You can unearth things you would not unearth in the normal course of events."

### The CLF proposal

Specific detail on the key questions surrounding the proposal on the table - who is going to do it, where is it going to go and who will pay for it - is hard to nail down. "We can only speculate as to the different routes of taking it forward," says Mervis.

The rough idea, as it stands, is for forms to be sent by and returned to the CLF. Clients and lawyers will be asked various questions: was the judge courteous; had he/she read the papers and so on.

Feedback will remain private, identifying how each judge has handled a trial, rather than focusing on his legal skills or the quality of his judgment. After "rude or random comments" have been weeded out, forms will then be distributed to each judge and to the head of the division. Whether forms are to be completed anonymously, or have names on them, has yet to be decided.

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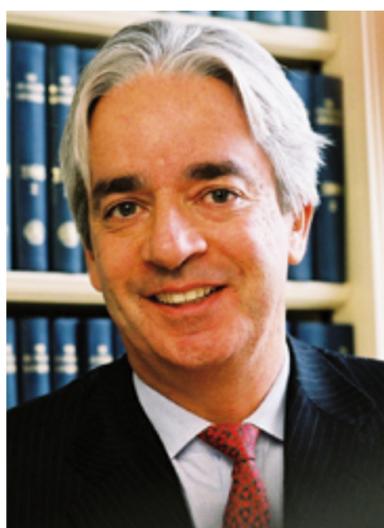
The possibility exists that judges will be banded into league tables, rating them according to their performance, and that this information will be published and released to the public. This is, however, "subject to a consensus among users". And that is far from given.

One supporter of the appraisal process is violently opposed to league tables. "They are terribly dangerous," he says. "You do not want anyone appearing as second division."

Another appraisal fan argues that in order for the whole thing to work effectively "we need to get certain key people on side, like Mr Justice Andrew Smith, maybe even the Lord Chief Justice".

Although the possibility of league tables appears somewhat remote, Mervis cheerfully indicates that there are judges who support the scheme. He is keen to reiterate a point that he made last year: "I have spoken to some senior judges who are supportive. One said to me: 'I would not like the first time I received feedback to be at my retirement party.'" However, no judge has yet committed to it publicly.

### Reactions from the Bar



The Bar is distinctly less taciturn. "I am not aware of anyone at the commercial Bar who thinks it is a good idea," says Ali Malek QC (*pictured left*), chairman of the Commercial Bar Association (COMBAR) and a deputy High Court judge.

"Everyone I have spoken to is against it. The overall impression is very negative indeed."

Malek suggests that many City lawyers are in favour of upward appraisals "because of political correctness - it sounds good. It's a good soundbite".

Malek and the commercial barristers he represents are strongly opposed to upward appraisals because they believe it challenges judicial independence, puts unfair pressure on judges and creates a further disincentive to people becoming judges.

Recent research by Professor Hazel Genn, on behalf of the Judges' Council, found that senior barristers have significant financial commitments. Accordingly, they are often not keen on becoming High Court judges, whose earnings are much lower.

Malek also points to the UK's prominent role as the leading jurisdiction of choice for resolving international disputes. "Foreign clients coming to London will be bemused at the idea of filling in questionnaires like you do when you stay in a hotel," he says. "It suggests a concern about the quality of our judges or the fairness of the hearings which is simply not there."

Perhaps the closest rival to London in international commercial disputes is New York. There, judges are evaluated and rated informally, mostly by lawyers.

A widely read book, used by lawyers and litigants alike, is *New York Judge Reviews*. The reviews of each judge are based upon the collective interviews of at least eight lawyers who have appeared before them. It claims to provide "attorneys' candid comments about the rules, preferences and idiosyncrasies of more than 300 sitting State Supreme Court Justices compiled from interviews with hundreds of litigators".

Might the upward appraisal culture ultimately produce such a book in London? Desmond Browne QC (*pictured right*), chairman of the Bar, certainly hopes not.

Echoing Malek's sentiments, he is particularly concerned by the anonymous feedback aspect of upward appraisals: "I am not enamoured of the idea at all. It is conspicuously non-transparent and it doesn't help anyone. It doesn't help the judges who have already expressed suspicions."

Browne predicts that it will carry no weight at all with judges, adding: "It undermines judicial independence and judicial confidence and is precisely what was objectionable about appointing judges in the old days. It is not the way to



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appraise people."

In the pro-camp, Fagan sounds a note of caution: "I would not want relations between commercial solicitors, the Commercial Bar and commercial judges to be tarnished by anything that may happen. If introducing this appraisal scheme had that effect, I would be against it."

Malek points to the role of the Judicial Studies Board in the continuing education of judges: "The judiciary are a lot more aware of how they should behave." Besides, he suggests, if there are genuine concerns, someone can always write to the Commercial Courts Users Committee.

On the question of whether the CLF will succeed in producing something of real value to the judges and to the judicial process, the jury seems likely to remain out for some time yet.

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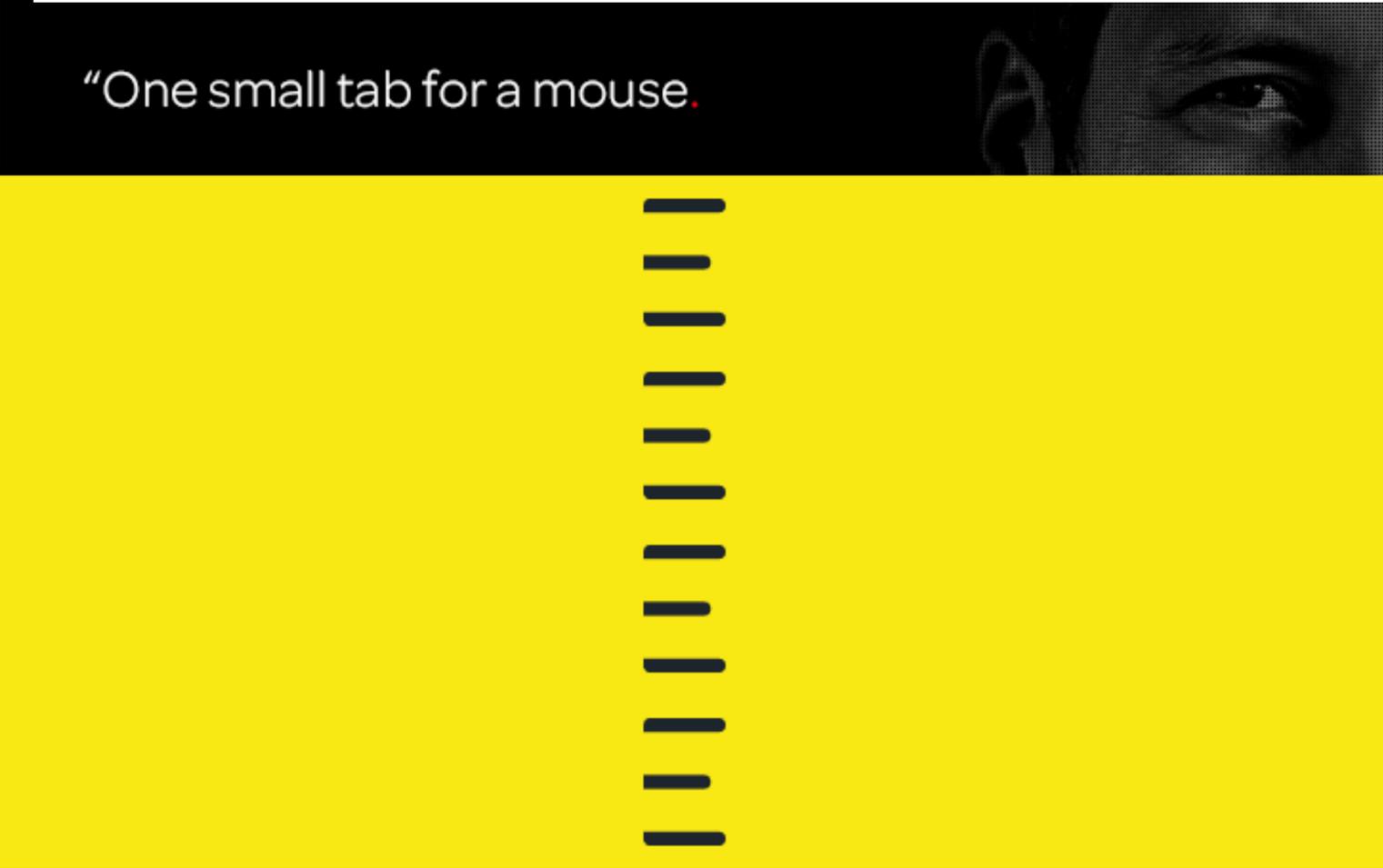
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