Commercial Court Users Group Meeting

04 December 2018, Rolls Building

Attending:

Mr Justice Teare (Chair)

Mrs Justice Cockerill

Master Kay QC

Mr Justice Males

Mr Justice Popplewell

Mr Justice Waksman

Beverley Barton (Practical Law Dispute Resolution)

Edwin Cheyney (Hill Dickinson)

Michael Collett QC (20 Essex Street)

Ed Crosse (Simmons & Simmons)

Tom Dane (CMS)

Olivia Dhein (Lexis Nexis)

Nigel Durham (Refined Sugar Association)

James Farrell (HSF)

Ashmita Garrett (Freshfields)

Jacomijn van Haersolte-van Hof (LCIA)

Simon James (Clifford Chance)

Melissa Jones (Lexis Nexis)

John Kimbell QC (Quadrant Chambers)

Andrew King (Travers Smith)

Stuart Logan (FOSFA)

Duncan Matthews (20 Essex Street)

Hilton Mervis (Arnold & Partner)

Conall Patton (One Essex Court)

Rosalind Phelps QC (Fountain Court)

Daniel Saoul (4 New Square)

Audley Sheppard QC (Clifford Chance)

Joe Smouha QC (Essex Court Chambers)

Michael Tame (Senior Commercial Court List Officer)

Robert Weekes (Blackstone Chambers)

Brian Williamson (LMAA)

Aaron Taylor (Judicial Assistant) took minutes.

Teare J opened the meeting at 16:45, and thanked participants for attending.

1. Commercial Court statistics

Teare J gave a summary of statistics for the court year 2017-18. In that year:

- 864 claim forms were issued;
- c.1100 hearings (both trials and applications) were listed, of which some 600 were settled;
- c.160 trials were listed, of which some 60% settled; of the 57 trials that went ahead, about a half lasted less than a week, and 5% of trials lasted more than four weeks;
- nearly 70% of cases involved international parties
- more than 25% of claims issued related to the supervision of arbitration

Teare J also set out current lead times for Commercial Court hearings. As at early December 2018, 1-2 day hearings can be accommodated for February 2019; hearing of 3 days to a week in April 2019; 1-3 week hearings can be heard in October 2019; trials of 4 weeks or more can be listed from June 2020. He added that the court strives to fit in a number of urgent applications, and noted that these often require judges to sacrifice reading and/or judgment writing time.

Popplewell J asked whether statistics were available for paper applications. He indicated that in the previous court year some 4000 paper applications were dealt with, and noted that this takes a considerable amount of judicial time. Teare J added that there is a rota according to which two judges of the Court determine paper applications in any given week, and that a judge on the rota can see up to 20 paper applications per day.

2. Disclosure Pilot

Teare J indicated that the pilot disclosure scheme is due to begin in January 2019, for two years. He invited Mr Crosse to give an overview of the pilot scheme.

Mr Cross noted that the pilot scheme follows the recommendations of a working group established in June 2016. That group took feedback on disclosure, initially largely from the FTSE100 GC, and then from the wider profession. That feedback indicated a concern amongst court users, especially in relation to mid-value cases, that that the existing disclosure process did not sufficiently engage parties, may not use technology as efficiently as possible, and can distract from the principal issues in a case. The feedback also indicated some desire amongst court users for more robust case management. A draft of the new rules was approved in July 2018 by the CPRC. The rules seek to balance the need for wide disclosure in appropriate cases with the desire to reduce the production of irrelevant and peripheral documentation.

Mr Crosse noted that the rules will not have retrospective effect, but that CMCs in Jan-Feb 2019 will be conducted against the background of the pilot scheme. In response to this issue, Knowles J and Chief Master Marsh encourage parties to have an eye on the rules during this period, in particular by providing the Court with information that would have to be provided under the Scheme. Mr Crosse also noted that a Practice Direction has been drafted, which contains substantial guidance as to the new rules, including as to its underlying principles, and the duties placed on parties by the rules. Parties are encouraged to adopt a principled and common-sense approach. Prof Rachel Mulheron (of QMUL) will be monitoring the pilot scheme closely. It is hoped that in this way the scheme can develop during the two-year pilot.

Mr Crosse then set out the aim of the new rules, which is not to abolish the disclosure regime, but to create duties (a) not to dump large volumes of material on other parties, (b) to co-operate with other parties in the lead-up to a CMC, (c) to use appropriate technology in the disclosure process. The new rules create a two-stage process:

1. Initial Disclosure (not dissimilar from arbitration), which involves giving disclosure of the documents on which the party relies. As to this stage, Mr Crosse noted that some feedback has suggested it may not be necessary. The rules allow for the parties to opt-out of the stage; if parties are doing so habitually, it will be reviewed during the scheme.
2. Extended disclosure, if and only if ordered by court. In order to get extended disclosure, the parties must identify 'issues for disclosure', which provide the basis for subsequent discussions as to the scope of disclosure, the appropriate technology to be adopted, etc. The 'issues for disclosure' and other discussions are to go into a modified EDQ. Extended disclosure is broad in scope, and the Court has available a menu of options. At one end of the spectrum, the Court can order that nothing more than the documents on which each party relies be disclosed; at the other, the Court can order full disclosure (on the whole case or only on certain issues).

The rules also provide for sanctions for non-compliance. These do not extend to strike-out, but include not getting a disclosure order, having CMC adjourned, and costs orders.

Teare J asked about monitoring of the pilot. Mr Crosse noted that it wasn't possible to monitor the costs of disclosure to provide a "then and now" analysis, but that feedback would be collected along the way from Court users. The Court can also generate statistics as to which types of Order are being made. Professor Mulheron will use all available data in compiling her report at the end of the scheme.

Waksman J noted that various forms of Technology-Assisted Review are being more widely used, and the associated costs are continually dropping. He suggested that law firms will need (for costs budgeting reasons, amongst others) to have regard to the appropriate form of TAR in each case. By way of example, where full (including issue-based) disclosure is ordered, a very large number of documents may need to be reviewed. For this, he noted, the now-prevailing method of keyword searching is increasingly outdated, being replaced by "TAR2", which uses machine learning to determine relevance. On this topic, the Institute of E-disclosure

providers is expert, and can be consulted. Waksman J also noted that a focused e-survey would be a helpful way of monitoring the scheme during the pilot phase.

Males J also stressed the importance of monitoring the scheme. He noted that this must be done at several levels: whereas the Court can monitor the Orders being made, only parties and their representatives can determine either the cost-effectiveness of the Orders or whether the Order has resulting in the provision of relevant documents.

It was suggested that judges should not hesitate to make Orders limiting the costs and scope of disclosure below the current norm, where necessary. It was further suggested that the real cost of disclosure does not relate to the volume of documents brought up by a search, but rather the extent to which more detailed review (for example, for privilege) is necessary.

3. Witness Statements

Waksman J handed round a document showing the results to date of the survey on witness statements which was sent round following the discussions of a working group set up by Popplewell J and Andrew Baker J.

Waksman J set out the results of that survey to date:

- 810 responses have been submitted so far. It is hoped that 1000 responses will be submitted by 14 December 2018, when the survey closes.
- Many people have added written comments, reflecting a broad spectrum of views.
- The working group will analyse the results of the survey when it has closed, and will then test some popular suggestions in focus groups of Court users. The feedback from those focus groups which will in turn inform the working group in drawing its conclusions.
- In suggesting why witness statements do not provide the best witness evidence possible, 70% of respondents said that witness statements are often too long. 73% thought they stray into making legal arguments. 30% said they are hard to follow. 67% said that witness statements often contain irrelevant matters.
- As to compliance, 60% of respondents said that the rules are not being followed; 79% think the existing rules should be more rigorously enforced.
- As to specific suggestions of reform:
    - 37% agreed that witness statements should have to contain a statement that they are in the witness' own words. 55% were in favour of including a statement as to how well the witness remembers the relevant events.
    - 65% agreed that there should be some provision for oral examination-in-chief, though only 12% thought that evidence-in-chief should be the predominant form of evidence. 12% thought

that oral evidence (in chief and cross-examination) should occur prior to trial. 24% favoured oral examination-in-chief with advance provision of the "gist" of the evidence.

- Less than 7% favoured lifting privilege over discussions leading up to the drafting of witness statements; just 6% thought that opposing parties should be permitted to be present during witness' interviews with their legal representatives.
- 43% thoughts that judges should be allowed to take a flexible approach to witness statements, with a menu of options for consideration at CMCs.
- 38% favoured limiting witness statements to allegations unprovable by documentary evidence.
- 45% thought that parties should be required to identify in their statements of case those allegations which they intend to prove by witness evidence. 55% agreed that witness statements of fact should be confined to issues determined at the CMC.
- 15% of respondents favoured a move to a pre-trial "memorial" of the facts.
- 88 people suggested further alternative solutions; 252 indicated willingness to participate in a focus group.

Mr Farrell asked whether the survey took account of representative responses (for example, from law firms). Waksman J replied that the survey is, at present, set up to take individual responses, but that it is intended that representative views be taken at a later stage in the consultation process.

Males J said that judges would surely be willing to enforce the rules more strictly more harshly if that is indeed the view taken by Court users. Teare J noted that judges are often asked not to allow in certain evidence, though this can seem a draconian approach. A difficulty also arises as to the appropriate time to consider these matters.

It was noted that there can sometimes be very little consequence for a witness who deliberately lies (or deliberately fails to disclosure relevant information) beyond being disbelieved in the judgment. Teare J asked Mr Crosse whether judicial enforcement of disclosure orders had been a topic of discussion within the disclosure committee. Mr Crosse said that it had been, and that some examples of judicial strictness might encourage greater compliance. However, in the content of disclosure, he noted that there is a difficulty in trying to create a new practice based on (in some cases) much narrower disclosure than at present, whist at the same time increasing sanctions for non-compliance. Popplewell J noted that stricter enforcement can present challenges for judges, and can require considerable judicial time at the pre-trial stage.

4. AOB

Mr Matthews raised two matters suggested by other Court users. First, he noted that the CPR do not defined the page margins for skeleton arguments, which appears to allow some counsel to adopt very small margins in order to get around the defined page limits.

Secondly, he noted that Rule 08.5 of the Commercial Court Guide (concerning s.68 arbitration challenges) did not provide for a time-frame in which the applicant can must apply to set aside a dismissal of the challenge on paper. A new provision that this be done within (for example) 14 days might add clarity. It may also help to make provision (a) for a reply to such application, (b) as to whether the same Judge who dealt with the application on paper is to hear the oral set-aside application, and (c) for an application to set aside only part of the dismissal on paper.

Cockerill J noted that hard copy of the Commercial Court Guide is available, as to which further information can be circulated.

Teare J closed the meeting at 17:40