Commercial Court Users Group Meeting

20 November 2019, Rolls Building

1. Commercial Court statistics

Teare J gave a summary of statistics for the court year 2018-19:

- 830 claim forms were issued, compared with 864 in the previous year;
- 1450 hearings took place, down from 1788. A smaller number were not effective (416 compared with 600);
- There were 58 trials, down from 62 in the previous year. The settlement rate remains at around 60%;
- 178 judgments were handed down. This shows an increase from 111 judgments in 2016-17 and 165 judgments in 2017-18;
- The average length of trials increased from seven to nine days. Over one-third of trials last less than a week, one-third up to two weeks, and less than one-third are three weeks or more;
- Applications on CE file are holding steady at around 4000 per year. Teare J noted that this takes up much judicial time, with two judges dealing with CE file each week in addition to their ordinary workload;
- There was a drop in section 69 applications, from 87 to 39. Very few succeed: two did last year, and none this year;
- There was a dramatic fall in section 68 applications, from 71 to 19. Again, very few succeed. Teare J expressed hope that parties were hearing the message that the hurdle for these applications is high.

Teare J called for written submissions in relation to listing issues, to be concise, observing that many letters are excessively complex and detailed.

Teare J noted that there were previously 14 judges of the Commercial Court, of whom eight were sitting at any one time. There are now 12, two of whom will shortly go to the Court of Appeal and be replaced. Although HHJ Pelling QC assists in his capacity as Judge in charge of the London Circuit Commercial Court, it is increasingly difficult to have eight judges sitting. In the past year there have therefore been a small number of occasions where a listed matter

could not be heard. The Court recognises the inconvenience and expense that this can cause and will seek to avoid it happening again.

Teare J observed that the breadth of work and number of international parties in the Commercial Court continue to impress those from other jurisdictions. The Court is therefore hosting delegations from countries eager to replicate this success. In the past year the Court received delegations from China, the United States, Singapore, Africa, Europe and the former USSR.

Teare J thanked the Court users for their cooperation and expressed the judges' gratitude for the hard and dedicated work of the listing office, headed by Michael Tame.

2. Disclosure Pilot

Teare J invited Ed Crosse and Knowles J to give an update on the progress of the disclosure pilot.

Mr Crosse reported that feedback had been broadly positive, both anecdotally and from the APSL. Professor Rachel Mulheron has reviewed cases in the first six months, looking at the types of orders being made. Across the Business and Property Courts, in cases where a single model is order is made, 53% were for Model C. Where multiple orders were made 42% were for Model C and the rest either Model B or D. It seems that people are not defaulting to standard disclosure. In the Commercial Court 80% opt for Model C. Mr Crosse expressed concern that parties might be seeking multiple Model C orders and thereby overcomplicating the process. This will require investigation. In the Technology & Construction Court Model B has proved popular.

Mr Crosse noted the detailed and helpful feedback from APSL. In larger cases the disclosure pilot has led to a greater focus on narrowing he scope of disclosure. However, there is a concern that in lower value claims the process is increasing costs. Mr Crosse raised the possibility of imposing a financial threshold or providing more detailed guidance in the practice direction.

Mr Crosse observed that there was still a lot of game-playing in relation to disclosure. Parties were taking tactical positions on the completion of the Disclosure Review Document (DRD) and needed to be encouraged to adopt a cooperative approach.

Preservation notices have caused some issues with large corporates. Mr Crosse suggested that more guidance may be needed as to what is expected.

Initial disclosure has been positive and useful. Mr Crosse noted that some users have suggested that it should include known adverse documents. This was something that the working group had considered, but it had taken the view that this would create additional work.

As for DRDs, parties are taking different approaches and not necessarily focussing on the key issues, but that this might start to bed down with time.

Very few parties have taken the opportunity for disclosure guidance hearings. Mr Crosse suggested this may be because 30 minutes is seen as too short and there is a sense that judges will not have had the time to read in. Where hearings are used, parties are treating them as akin to CMCs.

Knowles J expressed his thanks to Mr Crosse, Beverley Barton, Professor Mulheron, Chief Master Marsh and Flaux LJ for their work on the disclosure pilot. The Judge noted that the pilot remained a work in progress, but that it was bearing fruit. Knowles J observed that the world was looking on and the year ahead would provide continued opportunity. There was a need to vigilant about not overcomplicating the process, respecting the express duty of cooperation, and making sure that judges and lawyers alike keep hearing lengths under control.

Knowles J encouraged contributions to Professor Mulheron's questionnaire, the deadline for which has been extended to the end of November, as well as feedback to APSL.

Ms Barton observed that, having spoken to practitioners around the country, it is apparent that many have only used disclosure a little or not at all, and in some cases have only be involved in document preservation. Next year will therefore be key for getting feedback. Ms Barton also asked how the transition will work at the end of next year.

Knowles J noted that this was an important issue but that any answer was necessarily speculative. Given the length of the pilot, it would be desirable to set a permanent course after the disclosure pilot, with refinements to be made through the Commercial Court Guide and Rules.

Flaux LJ said that he had been keeping tabs on the pilot and feedback from Commercial Court judges had been consistent with that reported by Mr Crosse. Assuming feedback remains positive, there will not be a gap between the end of the pilot and the introduction of new rules. The Judge envisaged that towards the end of next year the Rules Committee and Master of the Rolls will be giving serious consideration to permanent changes to reflect the pilot.

3. 125th Anniversary of Commercial Court

Cockerill J said that the actual date for the anniversary of the first Commercial Court summons (at which the judge dealt with 33 summonses) was on 1 March 2020. Because 1 March is a Sunday, the celebrations will be opened on 2 March by the Lord Chief Justice and President of the Queen's Bench Division, followed by a lunch. A display will be put up in the Rolls Building to commemorate the Court's history.

In March the Court will also have joint billing at the Commercial Litigators' Forum reception in the RCJ. The theme for the event is access to justice, and there will emphasis on the Commercial Court's commitment to access to justice, for example through the development of more accessible and streamlined procedures.

In the summer there will be an event to encourage students to consider commercial law and a career in litigation, aimed at improving diversity. There will be a mock trial currently being organised by Junior COMBAR, followed by a garden party in one of the inns.

In the autumn, there will be a dinner similar to that for the 100th anniversary. A steering group led by Alex Gunning QC is organising this.

There will be a number of other events, and Knowles J will be on tour across the world, as might Flaux LJ.

Lord Hamblen will be giving the COMBAR lecture in the autumn/winter of 2020. There will be a *Festschrift* style book from Commercial Court alumni dealing with aspects of the Commercial Court, along with contributions from distinguished practitioners with tales from the Court to lighten the tone. All offers of support are gratefully received.

Master Kay QC noted that for the 100thh anniversary there was a regatta in which 7KBW narrowly beat QEB. Cockerill J expressed her hope for a Red Arrow fly-past.

Item 4: Standing International Forum of Commercial Courts (SIFOCC)

Knowles J gave an update on SIFOCC, now in its third year. It is the global forum for the world's commercial courts. Its three objectives are to: (1) share best practice; (2) promote the rule of law in commercial law by contributing to stability, confidence and stability; and (3) encourage well-established jurisdictions to help those less developed, in accordance with the World Bank's recommendation that jurisdictions develop their own dispute resolution infrastructure in order to encourage investment and prosperity.

Previous annual meetings have been in London and New York. The next will be in Singapore in March next year. There will be 18-monthly meetings thereafter.

SIFOCC consists of around 40 members. As well as the usual suspects, these include Dubai, Abu Dhabi and Qatar in the Middle East; offshore jurisdictions like Cayman; African countries including Gambia, Uganda and Kenya; and some major economies including Brazil and China. Japan also wishes to join. Jurisdictions are sending delegations of between two and four senior members of the judiciary.

Between the meetings there is important activity. By Singapore a set of generally accepted case management principles will have been prepared for agreement, straddling common and civil law systems. There is also a scheme for judges to spend time in another jurisdiction.

Perhaps most relevant is a SIFOCC document, available online, which is the first multilateral memo on the enforcement of commercial money judgments. Around 30 jurisdictions have provided a summary of how a judgment of the other jurisdictions can most easily be enforced in their country. It describes a procedure independent of any treaty or legislation. Knowles J noted how similar the approach in civil jurisdictions is to the approach in England & Wales.

Knowles J emphasised the utility, in the context of Brexit, of an explanation from countries like France, Germany and the Netherlands as to how an English Commercial Court money judgment will be enforced.

SIFOCC's secretariat is located in the Rolls Building. The Commercial Court has taken the lead, albeit in facilitative and collaborative way, and other countries have welcomed and accepted this.

It has been agreed that the issues for discussion at the meeting in Singapore will be enforcement, case management and the relationship between litigation, arbitration and mediation – unsurprisingly, given the Singapore convention on mediation. Also on the agenda is technology: both how best to use it, and how to deal with cases involving things like smart contracts and blockchain. Commercial litigation funding is also up for discussion. The discussion will be between the judges, but there will also be contributions from external agencies and businesses.

Any other business

Teare J invited HHJ Pelling QC to introduce the pilot London Circuit Commercial Court (LCCC) Pro Bono Pilot Scheme.

The Judge explained that the scheme, which will launch on 1 January 2020, is a joint venture between Advocate (formerly the Bar Pro Bono Unit) and COMBAR.

The scheme is designed to provide assistance from junior barristers at no cost to litigants, for applications of one day or less. Where an application has been listed before the LCCC involving a litigant in person, that person will be sent an explanatory note inviting them to contact Advocate. A barrister will then be available to take instructions and appear in the application. This will most likely be of benefit to respondents to enforcement of post-cessation covenants, freezing and search orders. It is hoped that this will help vulnerable litigants in person.

Teare J asked whether there was any suggestion that the scheme be extended to the Commercial Court. HHJ Pelling QC responded that he will make this recommendation if the pilot is a success.

Mr Smouha QC raised a point on published lead times for hearings, noting that these dates are often discussed with clients and affect the perception of the Court's efficiency. Mr Smouha noted that the most recent update showed that hearings of 30 minutes – ½ day could be listed for January 2020, hearings of one – two days for March 2020, and trials of two weeks or more for June 2020. Mr Smouha noted that although this gives the impression that hearings cannot be heard for several months, in practice the Court can accommodate short hearings at short notice. Mr Smouha expressed concern that the Court was underselling its efficiency.

Mr Smouha also observed that there may be a need one-day hearings in order to address an unexpected issue arising in the run-up to trial, in which a longer lead time might disrupt the

trial timetable. Arbitration appeals might also justify more urgent arrangements, for example where there is a challenge under s68: if the case is eventually to be remitted to the tribunal, this means that the resolution of the dispute is deferred for a very long time.

Teare J responded that the published dates are for those applications which are not said to be urgent. Where something is urgent, in practice time is made and a very early date is given. This might arise with freezing injunctions and the like. Teare J accepted that not publishing this might lead to some underselling and that it might be appropriate to include a note, but would not wish to encourage an increased number of applications.

Mr Smouha suggested that in this competitive climate it might be helpful to highlight the Court's efficiency, perhaps by way of commentary.

Picken J agreed that there may be some underselling, and noted that colleagues in Europe are amazed at the speed with which the Court can deal with things.

Flaux LJ gave an example of this speed, in which Teare J recently heard a trial where the claim form had been issued two weeks previously. Teare J gave judgment the following week, and Flaux LJ considered the application for permission to appeal the week after that.

Cockerill J noted that there is something in the Commercial Court Guide about dealing with urgent matters more quickly. Teare J referred to a decision of either Males J or Leggatt J which set out criteria for deciding whether something is sufficiently urgent to require an expedited hearing and suggested that it may be appropriate to refer to this guidance.

Finally, Teare J noted that the work on witness statements is to be considered by a meeting of the Commercial Court, TCC and Chancery Division soon.

Teare J closed the meeting at 17:45