

Commercial Court User Committee Meeting

November 2021 Meeting Minutes

Remote Meeting via Microsoft Teams Wednesday 24 November 2021 at 1645

Introduction and lead times update: Cockerill J

Cockerill J began by welcoming all attendees.

Cockerill J announced that Fraser J had become the newest Commercial Court Judge and will begin sitting in late November before becoming a more regular feature next term.

Cockerill J commented that with the Commercial Court in its 126th year, she was not sure that the Court had ever been busier. The court managed to operate business as usual throughout lockdown albeit with most hearings being remote. However live hearings are now back – almost as before, except for Fridays which remain default remote.

It was noted that lead times for applications had gone out further than the Court would have liked, especially for one day hearings. At one point, there had been a 35 week wait time for one day hearings, but this has now been reduced, largely by taking the unusual measure of increasing the number of one day hearings that are listed each week. The reason for the increase appears to be a significant increase in the numbers of one day hearings sought by users. The number of one day hearings has increased by 32% since 2017-18 and the rate of settlements has decreased, with only 30-40% of one day hearings settling.

To explain why more one day hearings were being sought by users, Cockerill J explained that there appear to be at least three factors. In part there is a knock-on effect from a stricter approach to half day hearings. Secondly cases presently have a tendency to take more points than would have been done a few years ago: so two issues may be resolved in half a day but three requires a longer listing. Thirdly, cases appear to be becoming even more hard-fought, leading to more interlocutory disputes requiring resolution reaching the court.

The hard-fought approach is becoming an increasingly prevalent attitude in the work heard by the Commercial Court. Cockerill J stressed that she wanted users to reflect on the sense of urgency which comes across from many Commercial Court users, and noted that this was something which would also be apparent from the contribution of Michael Tame, the senior Listing Officer.

Listing Update: Michael Tame

Mr. Tame turned to the issue of one day hearings. Mr. Tame explained that he, with the assistance of Daniel Hull, had been through the calendar to see where available gaps were due to hearings coming out of the calendar and had also listed more hearings than was usual. They were able to adjust the published lead times.

Presentation of lead times: It was confirmed that the dates material published by Mr. Hull is now more detailed. Listings prefer this approach as it gives users more detail. Mr. Tame asked for feedback from users and whether it is giving them what they need.

Mr. Tame issued a call for help in terms of how we operate across the entire spectrum of the court. The main issue is that there are **too many instances of Listings being contacted with enquiries when**

users know the answer already. He raised three examples of situations which waste time of the Listing Office:

- The first was users double checking the Website by calling or emailing Listing. The website is regularly updated. Calling the Listing office will not produce a different answer. **He noted however that if users have issues with the information on the website the Court is happy to hear about this.** It is keen to get information to users in a way which takes some pressure off of listings, but also makes the process more user friendly for all.
- The second was Friday hearings. These are **nearly all being heard remotely and the default position is to provide electronic bundles.** This information has been out there for a long time (including on the website), but people are still ringing to check. He emphasised that the Commercial Court is still keen to use electronic bundles as this is the way things are moving. It will ask for hard copies when they are required.
- The third was Urgent applications. Users are repeatedly asking for information on when an urgent application can be heard. Mr. Tame reminded users that while the court is keen to know about possible urgents in advance, the Guide makes clear that **before an urgent application is listed in almost all cases it will be necessary to provide a skeleton argument, an electronic bundle, guidance on how much reading time is required and how urgent it is.** The question is then referred to a judge. Calling the listing office cannot short circuit this process.

Mr. Tame then turned to expedition requests and noted the very high volume of these which the court has been seeing. He issued a reminder that an application for expedition is not an application which is lodged through CE file, but instead is done through correspondence with the Listings Office. Mr. Tame asked users making such applications to be clear about how much expedition is sought - i.e. when users need the application to be heard before.

Mr. Tame remarked that listings appointments continue to be held remotely via MS Teams, stressing that these provide greater professionalism and preparation, as well as email confirmation of when dates are fixed. Mr. Tame did raise that a downside of this approach is that solicitors are making unnecessary correspondence with the Listings office.

Mr. Tame closed by giving thanks to the whole of the Listings team.

Commercial Court Guide Update: Andrew Baker J

Andrew Baker J circulated the draft of the 11th Edition of the Commercial Court Guide prior to the meeting and thanked users for their contributions and thoughts regarding the draft. **It was noted that the comments submitted suggested that the changes to the Guide are welcome.** Whilst feedback was limited pre-meeting, it was encouraging and Andrew Baker J has asked for all comments to be in by 5pm on 1 December, not matter how big or small the comment so that the guide is current from January 2022. The process of approval is already in process.

Andrew Baker J commented that the Commercial Court was keen to encourage practices which promoted the importance of quality oral advocacy particularly at trial. Andrew Baker J also reminded users that witness evidence is not to be used as a vehicle of ensuring the Judge has seen all the documents.

A question was raised from Nicole Gare (HWF) about the internal circulation of the draft for comment – Cockerill J commented that she was happy for a degree of discussion on a confidential basis but not for the draft to leave the firm or chambers.

Cockerill J also placed on record her thanks to Andrew Baker J, Francesca Girardot, Laura Feldman and Conall Patton, as well as the Commercial Court Judges, for their efforts on the Guide.

Website: Cockerill J

Cockerill J confirmed in response to a question that updates to the website are being considered.

There are presently two official places where users can find information on the court. There are the official websites at: Gov.uk; and www.Judiciary.uk.

It is the Judiciary Website which is under review. **Cockerill J issued a call for feedback on the website because changes to the website will be informed by what users both want and need. It is therefore important that users let the Court know what they do want to see on the website and what problems they have with the current arrangements.** The survey closes on 29 November, but **feedback can be sent via Cockerill J's clerk or the Listing Office.**

Sarah Garvey (Allen and Overy) noted that the improvement of the Commercial Court website and promoting the court more generally is caught up with the selection of English Law at the transactional stage. Issues with the website may impact on the number of transactions choosing English Law and hence have a broader impact. She noted that there does seem to be general commitment to changes at a high level. She had spoken to the Ministry of Justice on behalf of the Law Society and the message she was getting was that the Ministry of Justice are happy to make limited improvements to the site ahead of the larger upgrade. She highlighted the issue with the poor linkage between gov.uk and judiciary.uk - it was stressed that there should be a link to the Judiciary Site which is prominent and presently is not there. The point was also made that it currently takes eight clicks to get from the Judiciary Website front page to the Commercial Court website, and there is a keen desire for this to be changed.

Cockerill J concluded this section of the meeting by stressing the importance of providing feedback as change is currently under active consideration and all changes will be driven by the feedback provided.

Disclosure Pilot Update: Butcher J and Ed Crosse (Simmons and Simmons)

Mr. Crosse gave an update to the request for suggestions for improvement in five areas from the Chancellor back in February 2021. This was aimed specifically at professional associations to try and ensure the widest pool of resources. **The amendments which resulted were put before the CPR Rule Committee in July and approved in principle and approved by the Minister on 01/10/21, taking effect on 01/11/21.**

Mr. Crosse explained the pilot was extended to the end of 2022 to give amendments time to bed in and make further improvements through further feedback. Concerns have been raised suggesting a need to make the process more straightforward – Mr. Crosse stressed that the entire process was all about reducing complexity. However the amendments implemented for the more straightforward cases – no model C, limiting the issues parties have to agree and a much shorter DRD - really should achieve this. These have had a pretty good reception and apply to both existing and new cases.

Mr. Crosse acknowledged that this process is trickier in multi-party cases. There is a suggestion whether a protocol would help but no suggestions have been put forward. This, it was suggested, reflects the fact that all cases are different. Mr. Crosse stressed the importance of engaging with any docketed judge at an early stage to work out what needs to be done for the specific case.

Mr. Crosse also stressed that narrative documents were changed to take a softer approach, always with a view to make it less complex for the reviewer and to reduce the number of irrelevant documents produced on disclosure. It was noted that it is still the case that not many people are using the Disclosure Guidance Process and encouragement was given to parties to use this.

The next steps to be taken are continued consultation and feedback, with one specifically with the judiciary about to start.

Butcher J and Cockerill J highlighted that Commercial Court Judges strongly wish to recommend that parties should have advice regarding disclosure issues as early as possible with a view to ensuring that the process (including Disclosure Lists of Issues) is as streamlined as possible. It would be desirable for counsel to be involved in this early advisory process – and users will see this encouragement reflected in the new Guide.

Butcher J also said that there was a process of consultation about the pilot, but the nature, ambit and timing of this process has not been determined.

Andrew Baker J made the point that the concept of a less complex claim is that – namely a claim which, even though high valued or be factually or legally complexed but is less complex with disclosure - has been given consideration in the Guide and users are encouraged to actively ask if, for the purposes of disclosure, the case could be classified as less complex.

Covid Insurance Business Cases update: Butcher J

Butcher J told the meeting that the Commercial Court was attempting to manage the Covid BI cases in as efficient a manner as possible with a dedicated sub-list. Two cases have been expedited to enable the maximum number of outstanding issues to be clarified within this legal year.

There are four Commercial Court Judges who are able to try these cases. There is a specific Covid BI cases section on the website, which is largely up to date.

Butcher J raised three areas in relation to Covid BI cases:

- (1) Non-damage denial of access cover (NDDA). This was the subject of some argument in the test case but there was no relevant appeal. It has been argued that the Supreme Court decision bears on that type of cover and that first instance conclusions are unjustified. This issue will arise in the *Corbin and King* case being heard in January 2022.
- (2) Issues arising from the Marsh Resilience wording, particularly relating to issues of aggregation. An expedited trial of aggregation issues in *Stonegate* has been fixed for June 2022.
- (3) Until recently, a case fixed for trial in June 2022 (which is now settled) would have dealt with s.13(a) Insurance Act 2015 issues. It was noted that s.13(a) cases may be fact sensitive.

The parties are encouraged to communicate with listings where there can be identification of a case raising such issues for a prompt trial.

Statistics: Cockerill J

Cockerill J informed the meeting that the number of claims started this year has gone down to 802, (roughly equal to 2018-2019) but there has been a corresponding increase in the number of claims issued in the Circuit Commercial Court. The total number of claims issued across Commercial Court and London Circuit Commercial Court was therefore 1085 compared to last year's 1084. The shift to the Circuit Commercial Court may reflect parties taking on board what was said at the last meeting about smaller claims being better issued in the LCCC.

As regards Arbitration, figures were largely comparable to last year.

- There were 27 section 44 applications were brought this year, compared to 24 in the previous year.
- 34 section 69 applications were brought – the same as last year – with five granted permission and sixteen refused.
- 25 section 68 applications were brought (against 28 the previous year), with five dismissed, four without a hearing.
- As usual the figures for the year are incomplete because of the number of cases awaiting a hearing owing to service out and lead time to the longer hearings.

A review has been done on the completed figures for 2019:

- There were 37 section 69s were brought, with 18 refused, and 10 granted - of which four succeeded, giving an 11% success rate.
- Section 68 applications also had a 11% final success rate, with 28 applications brought, one succeeding and two partially succeeding.

Concerns (Time estimates and urgent applications): Cockerill J

Time Estimates

Cockerill J made the point that there are still too many cases which provide either inaccurate hearing or reading times (or both). It was stressed that cases which err badly in this regard will be stood out of the list and are likely to be relisted without any expedition and the costs of the second hearing disallowed.

Cockerill J urged users to think carefully about this and look carefully at any upcoming hearings.

Urgent Hearings

Cockerill J noted that the Commercial Court is becoming concerned that the question of urgency is not always being considered carefully. **She made the following points, which she urged users to heed carefully:**

- It is very rare that a judge cannot be found where there is a need. However the Court is not overflowing with Judges and as such the Court looks carefully at urgency. **Applications will go before a judge who will decide if it is urgent, and if so how urgent** – one hour, one day, a week or a month. If urgency is not properly explained there is a real risk that the judge will say that the case is not urgent.
- Having grounds to proceed without notice does not equal urgency.

- **Court 37 and Out of Hours are backstops to the Court's own urgent process. They are only designed to be used in real need.**
 - Both require users to justify urgency, perhaps even in greater detail than for a Commercial judge familiar with the types of applications which the court sees.
 - Court 37 should only be used by Commercial Court applicants when there is no judge on duty or in the rare event that the Court cannot accommodate a case – in which case it will generally actively refer the case to Court 37.
 - The Out of Hours process is to be used for extremely urgent cases – i.e.. when a case genuinely cannot wait until 10.30am the next day.
- Cockerill J emphasised that:
 - The Court 37 and OOH processes are under a lot of scrutiny and lawyers who go there when there is no valid reason for doing so risk a referral under the Hamid jurisdiction
 - **The Hamid jurisdiction is not one which is confined to Administrative Court proceedings** – it is of more general application.

A look to the future: Cockerill J

The Role of virtual and hybrid hearings

Cockerill J told the meeting that the current position is seen as a good operational position. It is the default position that anything on a Friday and anything half a day or less will be heard remotely, with anything else remaining a judicial decision. This allows for more flexibility in the process.

Cockerill J asked if users wanted more guidance, defaults, or more granular advice she would be grateful if they would let her know. She noted however that such further guidance tends to lessen flexibility.

It was noted that without feedback, the current shape is likely to continue for the foreseeable future.

Future CCUG Meeting Format

Cockerill J issued a call for feedback in relation to the format of the CCUG Meeting, with the options being staying remote, hybrid or going fully live. Both Cockerill J and Mr. Crosse expressed their preference for the meeting to continue to be held remotely, with the rationale that more people can participate.

Future business

Cockerill J told the meeting that she remains very interested to hear about foreseeability of business and what may come the court's way, in areas such as Brexit, Covid, ESG and others.

Cockerill J invited users to give early notification to the court so that judicial availability can be ensured.

Small Claims

Cockerill J raised one final point in relation to smaller claims. As noted at the previous meeting there has been a review of the court's book of business to check that small claims better suited to other for a can be moved out, freeing up resources. The process for reviewing slightly older claims has largely

been completed, and a number of claims have been transferred to County Courts, regional Circuit Commercial Courts and London Circuit Commercial Court.

Cockerill J indicated that there will be a move to a system whereby claims are reviewed before the CMC to see if they should remain in the Commercial Court.

Electronic Bundles – updated Guidance

Cockerill J noted that the guidance on preparation of electronic bundles has been updated: <https://www.judiciary.uk/announcements/general-guidance-on-electronic-court-bundles/>

Cockerill J stressed that bundles lodged with the Court should comply with this guidance. She noted the high volume of non-compliant bundles that the court receives.

The meeting was adjourned at 1800.