Courts and Tribunals Judiciary

The Technology and Construction Court Guide

October 2022

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Section 1. Introduction

1.1 Purpose of Guide

1.1.1 The Technology and Construction Court ("TCC") Guide is intended to provide straightforward, practical guidance on the conduct of litigation in the TCC. Whilst it is intended to be comprehensive, it does not cover all the procedural points that may arise in litigation and should be seen as providing guidance, which should be adopted flexibly and adapted as appropriate to the particular case. This Guide does not substitute or override the Civil Procedural Rules ("CPR") or the relevant practice directions. It is not the function of the Guide to provide legal advice.

1.1.2 The TCC Guide is designed to ensure effective management of proceedings in the TCC. The parties, their solicitors and counsel are expected to cooperate, and to follow both the letter and spirit of the Guide. If parties act unreasonably or fail to comply with these requirements, the court may impose sanctions including orders for costs.

1.1.3 The parties and their advisors are expected to familiarise themselves with the CPR and, in particular, to understand the importance of the "overriding objective" set out at CPR 1.1. The TCC endeavours to ensure that all its cases are dealt with justly and at proportionate cost. This includes ensuring that the parties are on an equal footing; taking all practicable steps to save expenditure; dealing with the dispute in ways which are proportionate to the size of the claim and cross-claim and the importance of the case to the parties; and managing the case throughout in a way that takes proper account of its complexity and the different financial positions of the parties. The court will also endeavour to ensure expedition, and to allot to each case an appropriate share of the court's resources.

1.1.4 The Court expects the parties to observe the overriding objective and to conduct litigation efficiently, at proportionate cost and without rancour or aggressive correspondence: see Gotch v Enelco [2015] EWHC 1802 (TCC). Litigating parties are expected to give serious consideration to alternative dispute resolution ("ADR"). The Court may, in its discretion, require parties to explain why ADR has not been attempted and, in appropriate cases, will issue directions to facilitate dispute resolution.

1.1.5 The TCC Guide is published with the approval of the President of King's Bench Division. The TCC Guide has been prepared in consultation with the judges of the TCC in London, Cardiff, Birmingham, Manchester and Leeds, and with the advice and support of TECBAR, TeCSA, the Society for Construction Law, the Society for Computers and Law and the TCC Users' Committees in London, Cardiff, Birmingham, Manchester, Liverpool and Leeds.

1.1.6 Work has been done to seek to align the content of this Guide, the Commercial Court Guide and the Chancery Guide where practices in the TCC and those courts should be substantially the same, though there are many areas of practice that are different and where different guidance is appropriate.

1.1.7 The TCC Guide is published on the gov.uk website and the Judiciary website, and can also be found in the main procedural reference books. The Guide will be kept under review and amendments will be made from time to time as necessary. Suggestions for improvements to this Guide or the practice or procedure of the TCC are welcome, as are any corrections and comments on the text of the Guide. These should be addressed to the TCC Users' Committees.

1.2 The CPR

1.2.1 Proceedings in the TCC are governed by the CPR and the supplementary Practice Directions. CPR Part 60 and its associated Practice Direction deal specifically with the practice and procedure of the TCC.

1.2.2 Other parts of the CPR that frequently arise in TCC cases include:

Part 1 (Overriding Objective);

Part 3 (Case Management Powers);

Part 6 (Service of Documents);

Part 7 (How to Start Proceedings – the Claim Form);

Part 8 (Alternative Procedure for Claims);

Parts 12 and 13 (Default Judgment and Setting Aside);

Part 16 (Statements of Case);

Part 17 (Amendments);

Part 19 (Parties and Group Litigation);

Part 20 (Counterclaims and Other Additional Claims);

Part 24 (Summary Judgment);

Part 25 (Interim Remedies and Security for Costs);

Part 26 (Case Management);

Part 32 (Evidence);

Part 35 (Experts and Assessors);

Part 44 (Costs);

Practice Directions: Practice Direction 51O (the Electronic Working Pilot Scheme); Practice Direction 57AD (Disclosure); Part 57A (Business and Property Courts); Practice Direction 57AA (Business and Property Courts); Practice Direction 57AB (Shorter and Flexible Trials Scheme); Practice Direction 57AC (Trial Witness Statements in the Business and Property Courts); and

Part 62 (Arbitration Claims).

1.3 The TCC

1.3.1 TCC Claims

CPR 60.1 **(2)** and **(3)** provide that a TCC claim is a claim which (i) involves technically complex issues or questions (or for which trial by a TCC judge is desirable) and (ii) has been issued in or transferred into the TCC specialist list. The following are examples of the types of claim which it may be appropriate to bring as TCC claims –

a) building or other construction disputes, including claims for the enforcement of the decisions of adjudicators under the Housing Grants, Construction and Regeneration Act 1996;

b) engineering disputes;

c) energy disputes, including claims concerning oil & gas pipelines and facilities, onshore and offshore windfarms, waste to energy plants and other renewables;

d) public procurement claims;

e) claims by and against engineers, architects, surveyors, accountants and other specialised advisors relating to the services they provide;

f) claims by and against local authorities relating to their statutory duties concerning the development of land or the construction of buildings;

g) claims relating to the design, supply and installation of computer systems, computer software and related network systems, including BIM systems;

h) claims relating to the quality of goods sold or hired, and work done, materials supplied or services rendered;

i) claims between landlord and tenant for breach of a repairing covenant;

j) claims between neighbours, owners and occupiers of land in trespass, nuisance, etc.

k) claims relating to the environment (for example, pollution cases);

l) claims arising out of fires;

m) claims involving taking of accounts where these are complicated; and

n) challenges to decisions of arbitrators in construction and engineering disputes including applications for permission to appeal and appeals.

This list is not exhaustive and many other types of claim might well be appropriate for resolution in the TCC.

1.3.2 Claim value guidance

With the exception of claims to enforce adjudicators' decisions or other claims with special features that justify a hearing before a High Court Judge, **the TCC at the Rolls Building in London** will not usually accept cases with a value of less than **£500,000** unless there is good reason for it to do so. A non-exhaustive list of special features which will usually justify listing the case in the High Court is:

a) Adjudication and arbitration cases of any value;

b) International cases of any value (international cases will generally involve one or more parties resident outside the UK and/or involve an overseas project or development);

c) Cases involving new or difficult points of law in TCC cases;

d) Any test case or case which will be joined with others which will be treated as test cases;

e) Public procurement cases;

f) Part 8 claims and other claims for declarations;

g) Complex nuisance claims brought by a number of parties, even where the sums claimed are small;

h) Claims which cannot readily be dealt with effectively in a County Court or Civil Justice centre by a designated TCC judge;

i) Claims for injunctions.

If a claimant issues lower value proceedings in the London High Court TCC, it should provide the court with an explanation of the reasons for doing so, whether falling within (a) to (i) above, or some other reason. For further guidance, see *West Country Renovations v McDowell* [2013] 1 WLR 416. It should be noted that the practice differs in the TCC courts outside London where the above claim valuation guidance does **not** apply.

1.3.3 TCC Judges

Both the High Court and the County Courts deal with TCC business. TCC business is conducted by TCC judges unless a TCC judge directs otherwise: see CPR 60.1(5)(ii).

TCC business in the High Court is conducted by TCC judges who are High Court judges, together with designated circuit judges, deputy high court judges and recorders who have been nominated by the Lord Chancellor pursuant to section 68(1)(a) of the Senior Courts Act 1981 or are authorised to sit in the TCC as High Court judges under section 9 of that Act.

TCC business in the County Court is conducted by TCC judges who include circuit judges, deputy High Court judges and recorders. TCC business may also be conducted by certain district judges ("TCC liaison district judges") provided that: (1) a TCC judge has so directed under CPR 60.1(5)(b)(ii); (2) the designated civil judge for the court has so directed in accordance with the Practice Direction at CPR 2BPD11.1(d).

It should be noted that those circuit judges who have been nominated pursuant to section 68(1)(a) of the Senior Courts Act 1981 fall into two categories: "full time" TCC judges and "part time" TCC judges. "Full

time" TCC judges spend most of their time dealing with TCC business, although they will do other work when there is no TCC business requiring their immediate attention. "Part time" TCC judges are circuit judges who are only available to sit in the TCC for part of their time. They have substantial responsibilities outside the TCC.

In respect of a court centre where there is no full time TCC judge, the term "principal TCC judge" is used in this Guide to denote the circuit judge who has principal responsibility for TCC work.

1.3.4 The Business & Property Courts

The Business & Property Courts ("BPCs") comprise the Chancery Division, the Commercial Court and Admiralty Court, and the TCC. The BPCs became operational on 2 October 2017. The Chancellor of the High Court (the 'Chancellor'), currently Sir Julian Flaux, has oversight of the day-to-day running of the BPCs in consultation with the President of the King's Bench Division.

The courts which deal with TCC claims are part of the King's Bench Division operating within the BPCs. When those courts are dealing with TCC business, CPR Part 60, **its accompanying Practice Direction and this Guide** govern the procedures of those courts.

The High Court judge in charge of the TCC ("the Judge in Charge"), although based principally in London, has overall responsibility for the judicial supervision of TCC business in those courts within and outside London.

1.3.5 The TCC in London

The principal centre for TCC High Court work in London is the Rolls Building, Fetter Lane, London, EC4 1NL. The Judge in Charge of the TCC sits principally at the Rolls Building together with other High Court judges who are TCC judges. Subject to paragraph 3.7.1 below, any communication or enquiry concerning a TCC case, which is proceeding at the Rolls Building, should be directed to the clerk of the judge who is assigned to that case and, if by email, copied to TCC Listing. The contact details for the judges' clerks are set out in Appendix D.

Where TCC proceedings are commenced in the High Court in London, statements of case and applications should be headed:

"In the High Court of Justice
Business and Property Courts of England and Wales
Technology and Construction Court (KBD)"

1.3.6 The TCC outside London

TCC claims can be brought in the High Court outside London in any District Registry. BPC District Registries have been established in **Birmingham, Bristol, Cardiff, Leeds, Liverpool, Manchester** and **Newcastle**, where full-time or part-time specialist TCC Judges sit. Contact details are set out in Appendix D. The TCC judges who are based at the Rolls Building will, when appropriate, sit in the BPCs outside London.

In a number of court centres outside London a "TCC liaison district judge" has been appointed. It is the function of the TCC liaison district judge:

a) to keep other district judges in that region well informed about the role and remit of the TCC (in order that appropriate cases may be transferred to the TCC at an early, rather than late, stage);

b) to deal with any queries from colleagues concerning the TCC or cases which might merit transfer to the TCC;

c) to deal with any subsidiary matter which a TCC judge directs should be determined by a district judge pursuant to CPR 60.1(5)(b)(ii);

d) to deal with urgent applications in TCC cases pursuant to paragraph 7.2 of the Practice Direction (i.e. no TCC judge is available and the matter is of a kind that falls within the district judge's jurisdiction); and

e) to hear TCC cases when a TCC judge has so directed under CPR 60.1(5)(b)(ii) and when the designated civil judge for the court has so directed in accordance with the Practice Direction at CPR 2BPD11.1(d).

Where TCC proceedings are commenced in a district registry BPC, statements of case and applications should be headed:

"In the High Court of Justice
Business and Property Courts in [city]
Technology and Construction Court List (KBD")

1.3.7 County Courts TCC County Court cases in London are brought in (or transferred to) the specialist Business and Property List sitting at the Central London Civil Justice Centre, now located in the Royal Courts of Justice. TCC claims may also be brought in those county courts which are specified in the **Part 60 Practice Direction**. Contact details are set out in Appendix D.

Where TCC proceedings are brought in a county court, statements of case and applications should be headed:

"In the County Court at [location]
Business and Property Courts list"

1.3.8 The division between High Court and County Court TCC cases

As a general rule TCC claims for more than £500,000 are brought in the High Court, whilst claims for lower sums are brought in the County Court. However, this is not a rigid dividing line (see paragraph 1.3.2 above). The monetary threshold for High Court TCC claims tends to be higher in London than in the other centres (as to which see below). Regard must also be had to the complexity of the case and all other circumstances.

Enforcement of adjudicator's decisions should ordinarily be commenced in the County Court when the sum is issue is less than £100,000. Where an enforcement action concerns significant points of principle or allegations of fraud, it may be more appropriate to commence it in the High Court.

1.3.9 In the BPC TCC outside London where High Court and County Court claims can be brought, the full range of cases dealt with by the TCC is undertaken, including claims to enforce an adjudicator's decision. Since in these centres the case will normally be tried by the same TCC judge regardless of whether the case is in the High Court or in the County Court, the practice is that whilst claims under £100,000 ought normally to be issued in the County Court, claims above £100,000 may be issued in the High Court, although the TCC judge retains the discretion: (1) to transfer cases to the County Court which ought more appropriately to be case managed and tried there; (2) to transfer

cases out of the TCC in appropriate cases, such as where the claim value is under £50,000 and where there are no particular features which justify it proceeding in the TCC, such as arbitration claims, claims to enforce an adjudicator's decision or to obtain payment of an adjudicator's fees, and Party Wall Act appeals.

1.4 The TCC Users' Committees

1.4.1 The continuing ability of the TCC to meet the changing needs of all those involved in TCC litigation depends in large part upon a close working relationship between the TCC and its users.

1.4.2 London

The Judge in Charge chairs annual meetings of the London TCC Users' Committee. The judge's clerk acts as secretary to the Committee and takes the minutes of meetings. That Committee is made up of representatives of the London TCC judges together with two representatives of TECBAR, TECSA and the SCL. Approved Minutes will be published on the TeCSA, TECBAR and SCL websites.

1.4.3 Outside London

There are similar meetings of TCC Users' Committees in Birmingham, Manchester, Liverpool, Cardiff and Leeds. Each Users' Committee is chaired by the full time TCC judge or the principal TCC judge in that location.

1.4.4 The TCC regards these channels of communication as extremely important. Any suggestions or other correspondence raising matters for consideration by the Users' Committee should, in the first instance, be addressed to TECBAR/TECSA, or to the clerk to the Judge in Charge at the Rolls Building or to the clerk to the appropriate TCC judge outside London.

1.5 Specialist Associations

1.5.1 There are a number of associations of legal representatives which are represented on the Users' Committees and which also liaise closely with the Court. These contacts ensure that the Court remains responsive to the opinions and requirements of the professional users of the Court.

1.5.2 The relevant professional organisations are the TCC Bar Association ("TECBAR") and the TCC Solicitors Association ("TeCSA") and the Society of Construction Law (the "SCL"). Details of the relevant contacts at these organisations are set out on their respective websites, namely www.tecbar.org, www.tecsa.org.uk and www.scl.org.uk.

Section 2. Pre-Action Protocol and conduct

2.1 Introduction

2.1.1 There is a Pre-Action Protocol for Construction and Engineering Disputes ("the Protocol"). Paragraph 1.1 provides that the Protocol applies to all construction and engineering disputes including professional negligence claims against architects, engineers or quantity surveyors. In professional negligence claims against such professionals and similar construction professionals, this Protocol prevails over the Professional Negligence Pre-Action Protocol: see also paragraphs 1.1 and 1.4 of the Professional Negligence Pre-Action Protocol. The current version of the Construction and Engineering Pre-Action Protocol is set out in volume 1 of the White Book at **Section C5**.

2.1.2 The purpose of the Protocol is to encourage the frank and early exchange of information about the prospective claim and any defence to it; to enable parties to avoid litigation by agreeing a settlement of the claim before the commencement of proceedings; and to support the efficient management of proceedings where litigation cannot be avoided.

2.1.3 The overriding objective (CPR 1.1) applies to the pre-action period. The Protocol must not be used as a tactical device to secure advantage for one party or to generate unnecessary costs. In lower value TCC claims (such as those likely to proceed in the county court), the letter of claim and the response should be simple and the costs of both sides should be kept to a modest level. In all cases the costs incurred at the Protocol stage should be proportionate to the complexity of the case and the amount of money which is at stake. The Protocol does not impose a requirement on the parties to produce a detailed pleading as a letter of claim or response or to marshal and disclose all the supporting details and evidence or to provide witness statements or expert reports that may ultimately be required if the case proceeds to litigation. Where a party has serious concerns that the approach of the other party to the Pre-Action Protocol is not proportionate, then it is open for that party to issue a claim form and/or make an application (see paragraph 4.1.5 below) to seek the assistance of the Court.

2.2 Application of the Protocol

2.2.1 The Court will expect all parties to have complied in substance with the provisions of the Protocol in all construction and engineering disputes. The only exceptions to this are identified in paragraph 2.3 below.

2.2.2 The Court regards the Protocol as setting out normal and reasonable pre-action conduct. Accordingly, whilst the Protocol is not mandatory for a number of the claims noted by way of example in paragraph 1.3.1 above, such as computer cases or dilapidations claims, the Court would, in the absence of a specific reason to the contrary, expect the Protocol generally to be followed in such cases prior to the commencement of proceedings in the TCC.

2.3 Exceptions

2.3.1 A claimant does not have to comply with the Protocol if the claim:

a) is to enforce the decision of an adjudicator;

b) is to seek an urgent declaration or injunction in relation to adjudication (whether ongoing or concluded);

c) includes a claim for interim injunctive relief;

d) will be the subject of a claim for summary judgment pursuant to Part 24 of the CPR; or

e) relates to the same or substantially the same issues as have been the subject of a recent adjudication or some other formal alternative dispute resolution procedure; or

f) relates to a public procurement dispute (for which there is a separate pre-action process as set out in Appendix H).

2.3.2 In addition, a claimant need not comply with any part of the Protocol if, by so doing, the claim may become time-barred under the Limitation Act 1980. In those circumstances, a claimant should commence proceedings without complying with the Protocol and must, at the same time, apply for directions as to the timetable and form of procedure to be adopted. The Court may order a stay of those proceedings pending completion of the steps set out in the Protocol.

2.4 Essential Ingredients of the Protocol

2.4.1 The Letter of Claim

The letter of claim must comply with Section 3 of the Protocol. Amongst other things, it must contain a clear and concise summary of the facts on which each claim is based; the basis on which each claim is made; and details of the relief claimed, including a breakdown showing how any damages have been quantified. The claimant must also provide the names of experts already instructed and on whom reliance is intended.

2.4.2 The Defendant's Response

The defendant has 14 days to acknowledge the letter of claim and 28 days (from receipt of the letter of claim) either to take any jurisdictional objection or to respond in substance to the letter of claim. Paragraph 10.1 of the Protocol enables the parties to agree an extension of the 28 day period up to a maximum of 3 months. In any case of substance it is quite usual for an extension of time to be agreed for the defendant's response. The letter of response must comply with paragraph 8 of the Protocol. Amongst other things, it must state which claims are accepted, which claims are rejected and on what basis. It must set out any counterclaim to be advanced by the defendant. The defendant should also provide the names of experts who have been instructed and on whom reliance is intended. If the defendant fails either to acknowledge or to respond to the letter of claim in time, the claimant is entitled to commence proceedings.

2.4.3 Pre-action Meeting

The Construction and Engineering Protocol is the only Protocol under the CPR that generally requires the parties to meet, without prejudice, at least once, in order to identify the main issues and the root causes of their disagreement on those issues. The purpose of the meeting is to see whether, and if so how, those issues might be resolved without recourse to litigation or, if litigation is unavoidable, what steps should be taken to ensure that it is conducted in accordance with the overriding objective. At or as a result of the meeting, the parties should consider whether some form of alternative dispute resolution ("ADR") would be more suitable than litigation and if so, they should endeavour to agree which form of ADR to adopt. Although the meeting is "without prejudice", any party who attended the meeting is at liberty to disclose to the Court at a later stage that the meeting took place; who attended and who refused to attend, together

with the grounds for their refusal; and any agreements concluded between the parties.

2.4.4 Proportionality

The Protocol does not contemplate an extended process and it should not be used as a tool of oppression. Thus, the letter of claim should be concise and it is usually sufficient to explain the proposed claim(s), identifying key dates, so as to enable the potential defendant to understand and to investigate the allegations. Only essential documents need be supplied, and the period specified for a response should not be longer than one month without good reason. In particular, where a claim is brought by a litigant based outside the UK it will generally be appropriate to confine the steps to the time limits provided by the Protocol and, in many cases, to dispense with the meeting referred to in paragraph 5.1 of the Protocol. In any event, such a meeting is not mandatory and may be dispensed with if it would involve disproportionate time and cost or it is clear that it would be unlikely to serve any useful purpose.

2.5 Use of Material Generated by the Protocol

2.5.1 The letter of claim, the defendant's response, and the information relating to attendance (or otherwise) at the meeting are not confidential or 'without prejudice' and can therefore be referred to by the parties in any subsequent litigation. The detail of any discussion at the meeting(s) and/or any note of the meeting cannot be referred to the Court unless all parties agree.

2.5.2 Normally the parties should include in the bundle for the first case management conference: (a) the letter of claim, (b) the response, and (c) if the parties agree, any agreed note of the pre-action meeting: see Section 5 below. The documents attached to or enclosed with the letter and the response should not be included in the bundle.

2.6 Consequences of Non-Compliance with the Protocol

2.6.1 There can often be a complaint that one or other party has not complied with the Protocol. The Court will consider any such complaints once proceedings have been commenced. If the Court finds that the claimant has not complied with one part of the Protocol, then the Court may stay the proceedings until the steps set out in the Protocol have been taken or impose such other conditions as the court thinks appropriate pursuant to CPR 3.1(2).

2.6.2 **The Practice Direction in respect of Protocols** (section C of volume 1 of the White Book) makes plain that the Court may make adverse costs orders against a party who has failed to comply with the Protocol. The Court will exercise any sanctions available with the object of placing the innocent party in a position no worse than if there had been compliance with the Protocol.

2.6.3 The court is unlikely to be concerned with minor infringements of the Protocol or to engage in lengthy debates as to the precise quality of the information provided by one party to the other during the Protocol stages. The court will principally be concerned to ensure that, as a result of the Protocol stage, each party to any subsequent litigation has a clear understanding of the nature of the case that it has to meet at the commencement of those proceedings.

2.7 Costs of Compliance with the Protocol.

2.7.1 If compliance with the Protocol results in settlement, the costs incurred will not be recoverable from the paying party, unless this is specifically agreed.

2.7.2 If compliance with the Protocol does not result in settlement, then the costs of the exercise cannot be recovered as costs, unless:

a) those costs fall within the principles stated by Sir Robert Megarry V-C in *Re Gibson's Settlement Trusts* [1981] Ch 179; or

b) the steps taken in compliance with the Protocol can properly be attributable to the conduct of the action: see the judgment of Coulson J in Roundstone Nurseries v Stephenson [2009] EWHC 1431 (TCC) where he held at [48]: ". . . as a matter of principle, it seems to me that costs incurred during the Pre-Action Protocol process may, in principle, be recoverable as costs incidental to the litigation: see *McGlinn v. Waltham* (No. 1) [2005] 3 All ER 1126".

Section 3. Commencement and transfer

3.1 Claim Forms

3.1.1 All proceedings must be started using a claim form under CPR Part 7 or CPR Part 8 or an arbitration claim form under CPR Part 62: see Section 10 below. All claims allocated to the TCC are assigned to the Multi-Track: see CPR 60.6(1).

3.2 Part 7 Claims

3.2.1 The Part 7 claim form must be marked "Business and Property Courts of England and Wales, Technology and Construction Court (KBD)" as explained in paragraphs 1.3.5, 1.3.6 and 1.3.7 above.

3.2.2 Particulars of Claim may be served with the claim form, but this is not a mandatory requirement. If the Particulars of Claim are not contained in or served with the claim form, they must be served within **14 days** after service of the claim form (CPR 7.4). Guidance as to the form and content of Particulars of Claim and other Statements of Case is set out in Appendix I.

3.2.3 A claim form, including any amendment to a claim form, must be verified by a statement of truth unless the Court otherwise orders (CPR 22.1).

3.3 Part 8 Claims

3.3.1 The Part 8 claim form must be marked "Business and Property Courts of England and Wales, Technology and Construction Court (KBD)" as explained in paragraphs 1.3.5, 1.3.6 and 1.3.7 above.

3.3.2 A Part 8 claim form will normally be used where there is no substantial dispute of fact, such as the situation where the dispute turns on the construction of the contract or the interpretation of statute. Claims challenging the jurisdiction of an adjudicator or the validity of his decision are sometimes brought under Part 8, where the relevant primary facts are not in dispute. Part 8 claims will generally be disposed of on written evidence and oral submissions.

3.3.3 It is important that, where a claimant uses the Part 8 procedure, the claim form states that Part 8 applies and that the claimant wishes the claim to proceed under Part 8.

3.3.4 A statement of truth is required on a Part 8 claim form (CPR 22.1).

3.4 Service

3.4.1 Claim forms issued in the TCC at the Rolls Building in London are to be served by the claimant, not by the Registry. In some other court centres claim forms are served by the court, unless the claimant specifically requests otherwise.

3.4.2 The different methods of service are set out in CPR Part 6 and the accompanying Practice Directions.

3.4.3 Applications for an extension of time in which to serve a claim form are governed by CPR 7.6 and there are only limited grounds on which such extensions of time are granted. The evidence required on an application for an extension of time is set out in paragraph 8.2 of Practice Direction A supplementing CPR Part 7 (7APD8.2).

3.4.4 Following service of the claim form, the claimant must file a certificate of service unless all defendants have filed acknowledgements of service: CPR 6.17(2). This is necessary if, for instance, the claimant wishes to obtain judgment in default (CPR Part 12).

3.4.5 Applications for permission to serve a claim form out of the jurisdiction are subject to CPR 6.30-6.47 inclusive. (Note that, following exit from the EU, changes have been effected to the regimes for service out of the jurisdiction). Further guidance can be found in Appendix 9 to the Commercial Court Guide.

3.5 Acknowledgment of Service

3.5.1 A defendant must file an acknowledgment of service in response to both Part 7 and Part 8 claims. Save in the special circumstances that arise when the claim form has been served out of the jurisdiction, or where the period is abridged for adjudication enforcement (see Section 9 below), the period for filing an acknowledgment of service is **14 days** after service of the claim form.

3.6 Transfer

3.6.1 Proceedings may be transferred from any Division of the High Court or from any specialist list to the TCC pursuant to CPR 30.5. The order made by the transferring court should be expressed as being subject to the approval of a TCC judge. The decision whether to accept such a transfer must be made by a TCC judge: see CPR 30.5 (3). Many of these applications are uncontested, and may conveniently be dealt with on paper. Transfers from the TCC to other Divisions of the High

Court or other specialist lists are also governed by CPR 30.5. In London there are sometimes transfers between the Chancery Division, the Commercial Court and the TCC, in order to ensure that cases are dealt with by the most appropriate judge. Outside London there are quite often transfers between the TCC and the circuit commercial list and chancery lists. It should be noted that transfers between Divisions may be subject to the permission of the material heads of Division.

3.6.2 A TCC claim may be transferred from the High Court to a County Court or a County Court hearing centre, and from any County Court or County Court hearing centre to the High Court, if the criteria stated in CPR 30.3 are satisfied. In ordinary circumstances, proceedings will be transferred from the TCC in the High Court to the TCC in an appropriate County Court if the amount of the claim does not exceed £500,000.

3.6.3 Where no TCC judge is available to deal with a TCC claim which has been issued in a district registry or one of the county courts noted above, the claim may be transferred to another district registry or county court or to the High Court TCC in London (depending upon which court is appropriate).

3.6.4 On an application to transfer the case to the TCC from another court or Division of the High Court, there are a number of relevant considerations:

a) Is the claim broadly one of the types of claim identified in paragraph 2.1 of the Part 60 Practice Direction?

b) Is the financial value of the claim and/or its complexity such that, in accordance with the overriding objective, the case should be transferred into the TCC?

c) What effect would transfer have on the likely costs, the speed with which the matter can be resolved, and any other broader questions of convenience for the parties?

3.6.5 On an application to transfer into the TCC, when considering the relative appropriateness of different courts or divisions, the judge will ascertain where and in what areas of judicial expertise and experience the bulk or preponderance of the issues may lie. If there was little significant difference between the appropriateness of the two venues, and the claimant, having started in one court or division, was anxious to remain there, then the application to transfer in by another party is likely to be unsuccessful.

3.6.6 Where a TCC Claim is proceeding in a BPC outside London and it becomes apparent that the case would merit case management or trial before a High Court judge, the matter should be raised with the TCC judge at the District Registry BPC who will consult the Judge in Charge: see paragraph 3.7.4 below. If the case does merit the involvement of a High Court judge it is not necessary for the case to be transferred to London but rather a High Court judge can in appropriate cases sit outside London to deal with the case in the District Registry BPC.

3.7 Assignment

3.7.1 Where a claim has been issued at or transferred to the TCC in London, the Judge in Charge of the TCC ("the Judge in Charge") shall assign it to a particular TCC judge.

3.7.2 In general the assigned TCC judge who case manages a case will also try that case. Although this continuity of judge is regarded as important, it is sometimes necessary for there to be a change of assigned judge to case manage or try a case because all High Court Judges in the King's Bench Division have other judicial duties.

3.7.3

a) When a TCC case has been assigned to a named High Court judge, all communications about case management should be made to the assigned High Court judge's clerk with email communications copied to the TCC Registry at tcc.issue@registry.justice.gov.uk.

b) All communications in respect of the issue of claims or applications and all communications about fees, however, should be sent to the TCC Registry.

c) All statements of case and applications should be marked with the name of the assigned judge.

3.7.4 There are currently full time TCC judges at Birmingham, Manchester and Leeds. There are principal TCC judges at other court centres outside London. TCC cases at these court centres are assigned to judges either (a) by direction of the full time or principal TCC judge or (b) by operation of a rota. It will not generally be appropriate for the Judge in Charge (who is based in London) to consider TCC cases which are commenced in, or transferred to, court centres outside London. Nevertheless, if any TCC case brought in a court centre outside London appears to require management and trial by a High Court judge, then the full time or principal TCC judge at that court

centre should refer the case to the Judge in Charge for a decision as to its future management and trial.

3.7.5 When a TCC case has been assigned to a named circuit judge at a court centre other than in London, all communications to the court about the case (save for communications in respect of fees) shall be made to that judge's clerk. All communications in respect of fees should be sent to the relevant registry. All statements of case and applications should be marked with the name of the assigned judge.

3.8 Electronic Working

3.8.1 The TCC in and outside London uses the CE-filing system and PD 51O applies. For a party who is legally represented, Electronic Working must be used by that party to start and/or continue any relevant claims or applications. For a party who is not legally represented, Electronic Working may be used by that party to start and/or continue any relevant claims or applications.

3.8.2 Accordingly, applications can and should be made electronically and documents may be uploaded to CE-file. Users should be aware that, when an application or document is uploaded, further action is required by a member of the court staff before the document comes to the attention of a judge. For example, a member of court staff will allocate an application to a judge and place it before a judge by way of an electronic alert, identifying an indicative due date for the application to be dealt with. The CE-filing system does not have the functionality to alert the judge automatically to any updates to the electronic file. If a hearing is imminent and the document needs to be seen urgently, or before the hearing, the parties should contact the judge's clerk and provide the document by e-mail.

3.8.3 Where a party to proceedings files an application for an order or other relief using Electronic Working and a hearing is required, the party filing the application shall lodge an application bundle with the Court. The application bundle shall be lodged in electronic format in accordance with the **General Guidance on Electronic Court Bundles** (see Appendix J). Hard copy bundles should not be lodged unless they have been requested by the judge hearing the case. In a hearing involving substantial volumes of documentation, the parties should check with the assigned judge's clerk whether the bundle, or any part of the bundle, is required to be filed in paper format.

3.8.4 Where elsewhere in this Guide there is reference to the filing of skeleton arguments and submissions and statements of costs for hearings, these should be provided electronically to the judge's clerk (and, if requested by the judge's clerk, in hard copy) by the time directed for service and filing. Skeleton argument and submissions need not be filed on CE-file - the parties may wish to use this facility but it is not a substitute for provision to the judge's clerk. The parties should also note that skeleton submissions and statements of costs, if filed through CE file shortly before a hearing, are unlikely to be seen by the judge. Therefore, they should be sent by email or delivered in hard copy directly to the court. Further guidance on preparation of bundles for hearings is given Section 6 below.

Section 4. Access to the court

4.1 General Approach

4.1.1 There may be a number of stages during the case management phase when the parties will make applications to the court for particular orders: see Section 6 below. There will also be the need for the court to give or vary directions, so as to enable the case to progress to trial.

4.1.2 The court is acutely aware of the costs that may be incurred when both parties prepare for an oral hearing in respect of such interlocutory matters and is always prepared to consider alternative, and less expensive, ways in which the parties may seek the court's assistance.

4.1.3 There are certain stages in the case management phase when it will generally be better for the parties to appear before the assigned judge, by in person, remote or hybrid hearing. Those are identified at Section 4.2 below. But there are other stages, and/or particular applications which a party may wish to make, which could conveniently be dealt with by way of a telephone hearing (Section 4.4 below) or by way of an electronic application through CE-file (Section 4.5 below).

4.1.4 A party may need access to the Court prior to the issue of proceedings, for example, applications for pre-action disclosure, taking samples or injunctive relief. Where the intended claim is a TCC claim, paragraph 4.1 of the Practice Direction supplementing CPR Part 60 provides that any pre-action application must be issued in the TCC.

4.2 Hearings in Court

4.2.1 First Case Management Conference

The court will normally require the parties to attend an oral hearing for the purposes of the first Case Management Conference, whether in person, remotely or by hybrid hearing. This is because there may be matters which the judge would wish to raise with the parties arising out of the answers to the case management information sheets and the parties' proposed directions: see section 5.4 below. Even in circumstances where the directions and the case management timetable may be capable of being agreed by the parties and the court, the assigned judge may still wish to consider a range of case management matters with the parties, including cost budgeting

and ADR. For these reasons CPR 29.4 may be applied more sparingly in the TCC.

4.2.2 Pre-trial Review

It will normally be helpful for the parties to attend before the judge on a Pre-trial Review ("PTR"). It is always preferable for Counsel or other advocates who will be appearing at the trial to attend the PTR. Again, even if the parties can agree beforehand any outstanding directions and the detailed requirements for the management of the trial, it is still of assistance for the judge to raise matters of detailed trial management with the parties at an oral hearing. In appropriate cases, e.g. where the amount in issue is disproportionate to the costs of a full trial, the judge may wish to consider with the parties whether there are other ways in which the dispute might be resolved. See Section 14 below for detailed provisions relating to the PTR.

4.2.3 Interim Applications

Whether or not other interim applications require an oral hearing will depend on the nature and effect of the application being made. Disputed applications for interim payments, summary judgment and security for costs will almost always require an oral hearing. Likewise, the resolution of a contested application to enforce an adjudicator's decision will normally be heard orally. At the other end of the scale, applications for extensions of time for the service of pleadings or to comply with other orders of the court can almost always be dealt with by way of an electronic application in writing and, indeed, orders sometimes expressly provide for this.

4.3 Mode of Hearing

4.3.1 While the mode of hearing is ultimately a judicial decision, the default position for all hearings under half a day will be for such hearings to take place remotely. The Court will consider a live hearing in such cases only if there is a particular reason why an in-person hearing is more appropriate. Such remote hearings include:

a) the Friday applications lists; and

b) adjudication enforcement hearings.

4.3.2 The approach in relation to longer application hearings and trials will be a matter for decision by a judge on the facts of each case.

a) Parties will be asked by the Listing Office to express a preference (supported by reasons), with the final decision as to the appropriate mode of hearing being referred to a judge.

b) The decision on whether to make any such direction will always be a discretionary judicial decision. The overall criterion must be the interests of justice in all the circumstances of the case. This criterion will produce a range of different answers in different cases.

c) Remote and hybrid hearings may cover a full menu of options, from proceedings that are fully remote and accessible live to anyone who is in possession of a link, down to proceedings to which remote access is afforded to a single participant, everyone else being in court.

4.3.3 The BPC protocol for remote and hybrid hearings applies to all such hearings (see Appendix K).

4.4 Telephone Hearings

4.4.1 Depending on the nature of the application and the extent of any dispute between the parties, the Court may be prepared to deal with short case management matters and other interlocutory applications by way of a telephone conference.

4.4.2 Whilst it is not possible to lay down mandatory rules as to what applications should be dealt with in this way (rather than by way of an in person, remote or hybrid hearing in court), it may be helpful to identify certain situations which commonly arise and which can conveniently be dealt with by way of a telephone conference.

If the parties are broadly agreed on the orders to be made by the court, but they are in dispute in respect of one or two particular matters, then a telephone hearing is a convenient way in which those outstanding matters can be dealt with by the parties and the assigned judge.

Similarly, specific arguments about costs, once a substantive application has been disposed of, or arguments consequential on a particular judgment or order having been handed down, may also conveniently be dealt with by way of telephone hearing.

4.4.3 Telephone hearings are not generally suitable for matters which are likely to last for more than an hour (although the judge may be

prepared, in an appropriate case, to list a longer application for a telephone hearing) or which require extensive reference to documents.

4.4.4 Telephone hearings can be listed at any time between 8.30 a.m. and 5.30 pm, subject to the convenience of the parties and the availability of the judge. It is not essential that all parties are on the telephone when those that are not find it more convenient to come to court. Any party, who wishes to have an application dealt with by telephone, should make such request by letter or e-mail to the judge's clerk, sending copies to all other parties. Except in cases of urgency, the judge will allow a period of two working days for the other parties to comment upon that request before deciding whether to deal with the application by telephone.

4.4.5 If permission is given for a telephone hearing, the court will normally indicate which party is to make all the necessary arrangements. In most cases, it will be the applicant. The procedure to be followed in setting up and holding a telephone hearing is generally that set out in section 6 of the Practice Direction 23A supplementing CPR Part 23 and the TCC in London and at Regional Centres are "telephone conference enabled courts" for the purposes of that section. The party making arrangements for the telephone hearing must ensure that all parties and the judge have a bundle for that hearing with identical pagination.

4.4.6 It is vital that the judge has all the necessary papers, in good time before the telephone conference, in order that it can be conducted efficiently and effectively. Save in very simple cases involving no or only minimal amounts of documentation, it is usually essential that any bundle provided be paginated for a telephone hearing, failing which the judge may cancel it.

4.5 Electronic Applications

4.5.1 CPR 23.8 and paragraphs 11.1-11.2 of Practice Direction 23A enable certain applications to be dealt with in writing through CE-file. Parties in a TCC case are encouraged to deal with applications in writing, whenever practicable. Applications for abridgments of time, extensions of time and to reduce the trial time estimate can generally be dealt with in writing, as well as all other variations to existing directions which are wholly or largely agreed. Disputes over particular aspects of disclosure and evidence may also be capable of being resolved in this way.

4.5.2 If a party wishes to make an application to the court, it should ask itself the question: "Can this application be conveniently dealt with in writing?" Save for urgent applications, before issuing an application:

a) The applicant should send a draft of the application to the other party/ parties, inviting a response within 3 days or other reasonable, specified time.

b) The responding party/parties should indicate whether they consent to the application; whether they agree to the application being dealt with on paper; and, if it is agreed that the application can be dealt with on paper, whether they wish to serve any evidence or submissions in response.

c) If the application is agreed, a draft consent order can be filed.

d) If the application is not opposed, the application can be filed as such.

e) If the application is opposed, the parties should discuss and, if possible, agree whether it is suitable for determination on paper or by hearing, the timetable for exchange of submissions and evidence, and an estimate for any hearing.

4.5.3 Only then should the application be filed and served. The party making the application should file its short written submissions and should include an explanation of the responding party's/ parties' position, the agreed procedure, or, if not agreed, what it submits the Court should do. The applicant must include a draft of the precise order sought.

4.5.4 There are some paper applications which can be made without notice to the other party or parties so that this guidance does not apply: see CPR 23.4(2), 23.9 and 23.10.

4.5.5 In default of any agreed procedure or further direction of the court, the party against whom the application is made, and any other interested party, should respond within **3 days** of service dealing both with the substantive application and the request for it to be dealt with in writing.

4.5.6 The court can then decide whether or not to deal with the application in writing. If the parties are agreed that the court should deal with it in writing, it will be rare for the court to take a different view. If the parties disagree as to whether or not the application should be dealt with in writing, the court can decide that issue and, if it decides to deal with

it in writing, can go on to resolve the substantive point on the basis of the parties' written submissions.

4.5.7 Further guidance in respect of electronic applications is set out in Section 6.7 below.

4.5.8 It is important for the parties to ensure that all documents provided to the court are also provided to all the other parties, so as to ensure that both the court and the parties are working on the basis of the same documentation. The pagination of any bundle which is provided to the court and the parties must be identical.

4.6 E-mail Communications

4.6.1 The judges' clerks all have e-mail addresses identified in Appendix D. They welcome communication from the parties electronically. In addition, it is also possible to provide documents to the Court electronically by e-mail to the judge's clerk. However, it should be noted that HM Court Service imposes a restriction on the size of any e-mail, including its attachments, so that other methods of delivering large electronic bundles may be appropriate.

4.6.2 Depending on the particular circumstances of an individual trial, the assigned judge may ask for an e-mail contact address for each of the parties and may send e-mail communications to that address. In addition, the judge may provide a direct contact e-mail address so that the parties can communicate directly with the judge out of court hours. In such circumstances, the judge and the parties should agree the times at which the respective e-mail addresses can be used.

4.6.3 Every e-mail communication to and from the Court or a judge must be copied simultaneously to all the other parties. The subject line of every e-mail should include the name of the case (abbreviated if necessary) and the claim number.

4.7 Urgent Applications

4.7.1 If an application is urgent, the applicant should contact listings to discuss judicial availability and to fix a provisional date and time for the hearing. If an urgent application is on notice, the applicant should liaise with the respondent to agree the bundle, timing of skeletons and time estimate.

4.8 Contacting the court out of hours

4.8.1 Occasionally it is necessary to contact a TCC judge out of hours. For example, it may be necessary to apply for an injunction to prevent the commencement of building works which will damage adjoining property; or for an order to preserve evidence. A case may have settled and it may be necessary to inform the judge, before he/she spends an evening or a weekend reading the papers.

4.8.2 At the Rolls Building

RCJ Security has been provided with the telephone numbers and other contact information of all the clerks to the TCC judges based at the Rolls Building and of the court manager. If contact is required with a judge out of hours, the initial approach should be to RCJ Security on 020-7947-6000. Security will then contact the judge's clerk and/or the court manager and pass on the message or other information. If direct contact with the judge or court manager is sought, RCJ Security must be provided with an appropriate contact number. This number will then be passed to the judge's clerk and/or the court manager, who will seek directions from the judge as to whether it is appropriate for the judge to speak directly with the contacting party. Particularly where a matter settles the evening before a hearing or over a weekend, the parties should contact the judge's clerk by e-mail. That is a practical approach but the parties should be aware that the judge's clerks are not expected to access e-mails outside court hours and may not, in any case, have access. If the judge's clerk has not responded within half an hour, other steps as indicated should be taken to contact the judge.

4.8.3 At other court centres

At the Central London Civil Justice Centre and at all court centres outside London there is a court officer who deals with out of hours applications.

4.9 Litigants in Person

4.9.1 An individual who exercises their right to conduct legal proceedings on their own behalf is known as a 'litigant in person'. It is important for litigants in person to be aware that the CPR (the rules of procedure and practice) apply to them in the same way as to lawyers. The court will however have regard to the fact that a party is unrepresented, so that the party is treated fairly.

4.9.2 Neither the court staff nor the judges can provide advice or assistance in relation to the conduct of a claim or defence. Litigants in person are encouraged to seek pro bono or other voluntary assistance, such as Support Through Court. The Bar Council of England and Wales publishes online, free of charge, a "Guide to Representing Yourself in Court". The RCJ Advice Bureau publishes, free of charge, a series of "Going to Court" Guides available online through the "Advicenow" website (www.advicenow.org.uk).

4.9.3 Litigants in person are not required to file or provide documents electronically, although they may do so. Enquiry should be made to the Listing Office for convenient alternative arrangements for filing or providing documents.

4.9.4 Where a litigant in person is involved in a case the Court will expect solicitors and counsel for other parties to do what they reasonably can to ensure that the litigant in person has a fair opportunity to prepare and put her or his case. The Court will expect solicitors and counsel for other parties to have regard to the "Litigants in Person: Guidelines for Lawyers" published jointly by the Bar Council, the Law Society and the Chartered Institute of Legal Executives in June 2015.

4.9.5 The duty of an advocate to ensure that the Court is informed of all relevant decisions and legislative provisions of which they are aware (whether favourable to the case of their client or not) and to bring any procedural irregularity to the attention of the Court during the hearing is of particular importance in a case where a litigant in person is involved.

4.9.6 Further, the Court will expect solicitors and counsel appearing for other parties to ensure that all necessary bundles are prepared and provided to the Court in accordance with the Guide, even where the litigant in person is unwilling or unable to participate. If the claimant is a litigant in person the Judge at the Case Management Conference will normally direct which of the parties is to have responsibility for the preparation and upkeep of the case management bundle.

4.9.7 Although CPR 39.6 allows a company or other corporation with the permission of the Court to be represented at trial by an employee, the complexity of most cases in the TCC generally makes that unsuitable. Accordingly, permission is likely to be given only in unusual circumstances, and is likely to require, at a minimum, clear evidence that the company or other corporation reasonably could not have been legally represented and that the employee has both the ability and familiarity with the case to be able to assist the court and also unfettered and unqualified authority to represent and bind the company or other corporation in dealings with the other parties to the litigation or with the Court.

Section 5. Case management in the TCC

5.1 General

5.1.1 The general approach of the TCC to case management is to give directions at the outset for the conduct of the case up to trial and then as necessary throughout the proceedings to serve the overriding objective of dealing with cases justly and at proportionate cost. Since the introduction of the disclosure pilot and costs management the control of disclosure and of costs will be important factors in how cases are managed from the outset: the parties must read this section in conjunction with Section 11 (disclosure) and Section 16 (costs management). The judge to whom the case has been assigned has wide case management powers, which will be exercised to ensure that:

- the real issues are identified early on and remain the focus of the ongoing proceedings;
- a realistic timetable is ordered which will allow for the fair and prompt resolution of the action;
- appropriate steps are taken to ensure that there is in place a suitable protocol for conducting e-disclosure (this should have been discussed by the parties at an early stage in the litigation and in addition to complying with the disclosure pilot the parties may wish to use the TeCSA e-disclosure protocol (which can be found on its website).
- in document heavy cases the parties will be invited to consider the use of an electronic document management system; it is important that this is considered at an early stage because it will be closely linked to e-disclosure;
- costs are properly controlled and reflect the value of the issues to the parties and their respective financial positions. In claims below the value set by the relevant Practice Direction (£10 million), this will normally be done by way of Costs Management Orders and may be done, if the court considers it appropriate, in cases with a value of £10 million or above.

5.1.2 In order to assist the judge in the exercise of the court's costs and case management functions, the parties will be expected to co-operate with one another at all times - see CPR 1.3. Costs sanctions may be

applied, if the judge concludes that one party is not reasonably co-operating with the other parties.

5.1.3 A hearing at which the judge gives general procedural directions is a case management conference ("CMC"). CMCs are relatively informal and business-like occasions. The judge and counsel will be unrobed. Representatives may sit when addressing the judge.

5.1.4 The following procedures apply in order to facilitate effective case management:

- Upon commencement of a case in the TCC, it is allocated automatically to the multitrack. The provisions of CPR Part 29 apply to all TCC cases (but see paragraph 4.2.1 above).
- The TCC encourages a structured exchange of proposals and submissions for CMCs in advance of the hearing, including compliance with the timetables set by the CPR as regards the completion of the disclosure review document, costs budgets and costs budget discussion reports, so as to enable the parties to respond on an informed basis to proposals made.
- The judges of the TCC operate pro-active case management. In order to avoid the parties being taken by surprise by any judicial initiative, the judge will consider giving prior notification of specific or unusual case management proposals to be raised at a case management conference.

5.1.5 The TCC's aim is to ensure that where possible the trial of each case takes place before the judge who has managed the case since the first CMC, although continuity of judge is not always possible, because of the need for High Court Judges to be deployed on other duties, or because cases can sometimes overrun their estimated length through no fault of the parties.

5.1.6 To ensure that costs are properly controlled the judge will consider at all stages of case management whether there are ways in which costs can be reduced. If the judge considers that any particular aspect has unnecessarily increased costs, such as prolix pleadings or witness statements, the judge may make a costs order disallowing costs or ordering costs to be paid, either on the basis of a summary assessment, or by giving a direction to the costs judge as to what costs should be disallowed or paid on a detailed assessment: see also paragraph 5.5.5 below.

5.2 The Fixing of the First CMC

5.2.1 Where a claim has been started in the TCC, or where it has been transferred into the TCC, paragraph 8.1 of the Part 60 Practice Direction requires the court within **14 days** of the earliest of:

- the filing by the defendant of an acknowledgement of service, or
- the filing by the defendant of the defence, or
- the date of the order transferring the case to the TCC to fix the first CMC.

If some defendants but not others are served with proceedings, the claimant's solicitors should so inform the court and liaise about the fixing of the first CMC. See also paragraph 4.2.1 above.

5.2.2 The first CMC will usually be fixed sufficiently far ahead to allow the parties time to comply with the requirements of both the disclosure pilot and costs budgeting (although see paragraph.3.5 below as regards adjourning costs budgeting or disclosure in particular cases). If any of the parties wishes to delay the first CMC for any reason, it can write to the judge's clerk explaining why a delayed CMC is appropriate. Examples of good reasons for requesting a delay would include:

- the need for reasonable additional time to complete the exchange of statements of case;
- the need for reasonable additional time to comply with the disclosure pilot;
- the need to comply with the timetable for costs budgeting;
- the need for additional time to be allocated to the first CMC;
- the parties' wish to discuss transferring the case to the Capped Costs List or the Shorter or Flexible Trials Scheme (see paragraph 5.2.3) and
- the parties' wish to engage in ADR before the CMC.

The parties should consider and discuss this in good time before the time for the court to fix the first CMC, most obviously at the pre-action meeting required under the Pre-Action Protocol (see Section 2.4).If such a request identifies a good reason and is agreed by the other party or parties, it is likely that the judge will grant the request. If such a request is made after the first CMC has already been listed an

application will have to be made, by consent or, if not, on an opposed basis, which should normally be made as an electronic/ paper application (see Section 4.5).

5.2.3 The judge will consider in appropriate cases whether the case is suitable for transfer into the Capped Costs List or the Shorter or Flexible Trials Scheme. The parties are encouraged to consider these options in appropriate cases before proceedings are commenced, again most obviously at the pre-action meeting, but if they have not done so they should consider them in good time before the CMC since if the case is to be transferred into the Capped Costs List or into the Shorter or Flexible Trials Scheme there is no need to comply with the disclosure pilot and costs management will not apply.

5.3 The Case Management Information Sheet and Other Documents

5.3.1 All parties are expected to complete a detailed response to the case management information sheet sent out by the the listing office when the case is commenced/transferred. A copy of a blank case management information sheet is attached as Appendix A. It is important that all parts of the form are completed, particularly those sections that enable the judge to give directions in accordance with the overriding objective.

5.3.2 The the listing office will also send out a blank standard directions form to each party. A copy is attached at Appendix B (and is also available online). This provides an example of the usual directions made on the first CMC. The parties may either fill it in (manually), indicating the directions and timetable sought, or, preferably, provide draft directions in a similar format, revised as appropriate to suit the circumstances of the particular case. The standard directions contain references to the relevant sections of this Guide to assist those completing the standard directions form in a way which is consistent with the contents of this Guide.

5.3.3 The parties should return both the questionnaire and the proposed directions to the court, so that the areas (if any) of potential debate at the CMC can be identified. The parties are encouraged to exchange proposals for directions and the timetable sought, with a view to agreeing the same before the CMC for consideration by the court. Although Practice Direction 60.8.3 provides that the completed questionnaire and proposed directions should be filed not less than 2 (clear) days before the CMC, experience has shown that the parties will need to have produced and exchanged their drafts in good time

beforehand to allow meaningful discussions and agreement where possible and that it is preferable to return the completed questionnaire and proposed directions at least four clear days before the CMC.

5.3.4 The parties should note that the Practice Direction 57AD requires the parties no less than 14 days before the first CMC to file the completed disclosure review document and that CPR 3.13 requires the parties to file and exchange costs budgets not later than 21 days before the CMC and to file budget discussion reports no later than 7 days before the CMC. Failure to file a budget may result in a party's recoverable costs being limited to the applicable court fees.

5.3.5 The claim value of a case may be such that costs management does not apply unless the Court so orders. Further, there may be cases where the particular directions sought by one or more parties may have such an impact on costs budgeting that it would be impracticable or unduly burdensome for the parties to have to prepare to deal with costs budgeting at the first CMC. In such cases, it is open to a party or to the parties to apply, by consent or on an opposed basis, for a direction that costs budgeting should not be dealt with at the first CMC and that the steps required by CPR 3.13 should not be required to be taken. The Court has discretion to dispense with costs management where appropriate or extend time for filing cost budgets. Likewise, there may also be cases where the particular directions or disclosure sought by one or more parties may have such an impact on the nature and scope of any disclosure order to be made that it would be impracticable or unduly burdensome for the parties to have to prepare to deal with disclosure in full compliance with the disclosure pilot at the first CMC. Any such application should normally be made as an electronic application (see Section 4.5).

5.3.6 The claimant's solicitor is responsible for ensuring that a Permanent Case Management Bundle containing the required documents identified in paragraph 5.11 below is produced and provided not less than 2 working days before the hearing of the first CMC. The bundle for the first CMC must be provided to the court in electronic format unless the court otherwise directs.

5.3.7 If the case is proceeding in the High Court, the advocates should prepare a Note to be exchanged and provided to the judge at the latest by 4 pm two clear working days before the CMC which can address the issues in the case, the suggested directions, and the principal areas of dispute between the parties, so as to enable the other parties to have a reasonable opportunity to consider and respond at the CMC to any points raised and to enable the judge

to prepare for the CMC in good time. The advocates should also exchange and provide at the same time a skeleton argument for any applications as required by paragraphs 6.5.4 and 6.5.5.

5.3.8 In cases proceeding in the County Court, the advocates should prepare a Note for the CMC, to be provided at the latest by 4pm one clear working day before the CMC.

5.4 Checklist of Matters likely to be considered at the first CMC

5.4.1 The following checklist identifies the matters which the judge is likely to want to consider at the first CMC, although it is not exhaustive:

- The need for, and content of, any further statements of case to be served. This is dealt with in paragraph 5.5 below.
- The outcome of the Protocol process, and the possible further need for ADR. ADR is dealt with in Section 7 below.
- In an appropriate case, whether the case is suitable for transfer into the Capped Costs List (if the parties all agree) or for transfer into the Shorter Trials or the Flexible Trials Schemes.
- The desirability of dealing with particular disputes by way of a Preliminary Issue hearing. This is dealt with in Section 8 below.
- The court will require a list of issues to be provided and updated during the course of the procedural steps. This is dealt with in paragraph 5.6 below. Note that the list of the issues for determination at trial is likely to be different from the list of issues for disclosure as required by the disclosure pilot.
- Whether the trial should be in stages (e.g. stage 1 liability and causation, stage 2 quantum). In very heavy cases this may be necessary in order to make the trial manageable. In more modest cases, where the quantum evidence will be extensive, a staged trial may be in the interest of all parties.
- The appropriate orders in respect of the disclosure of documents and for a protocol to manage e-disclosure. This is dealt with in Section 11 below.
- The appropriate orders as to the exchange of written witness statements. This is dealt with in Section 12 below. It should be noted that, although it is normal for evidence-in-chief to be

given by way of the written statements in the TCC, the judge may direct that evidence about particular disputes (such as what was said at an important meeting) should be given orally without reference to such statements.

- Whether it is appropriate for the parties to rely on expert evidence and, if so, what disciplines of experts should give evidence, on what issues, and whether any issues can be conveniently dealt with by single joint experts. This may be coupled with an order relating to the carrying out of inspections, the obtaining of samples, the conducting of experiments, or the performance of calculations. Considerations relating to expert evidence are dealt with in Section 13 below. The parties must be aware that, in accordance with the overriding objective, the judge will only give the parties permission to rely on expert evidence if it is both necessary and appropriate, and, even then, will wish to ensure that the scope of any such evidence is limited as far as possible.

- Review of the parties' costs budgets and the making of a Costs Management Order (subject to any financial threshold relevant to the case). In certain cases there is the possibility of making a costs capping order. See paragraph 16.3 below.

- Whether there will be any additional claims under Part 20. See paragraph 5.5.4 below.

- The appropriate timetable for the taking of the various interim steps noted above, and the fixing of dates for both the PTR and the trial itself (subject to paragraph 5.4.2 below). The parties will therefore need to provide the judge with an estimate for the length of the trial, including judicial reading time, assuming all issues remain in dispute. Unless there is good reason not to, the trial date will generally be fixed at the first CMC (although this may be more difficult at court centres with only one TCC judge). Therefore, to the extent that there are any relevant concerns as to availability of either witnesses or legal representatives, they need to be brought to the attention of the court on that occasion. The length of time fixed for the trial will depend on the parties' estimates, and also the judge's own view, and will in most cases also need to provide for judicial pre-reading as well as, in substantial and complex cases, time for preparation and pre-reading of written closing submissions before delivery of oral closing submissions. In such cases the parties should give consideration to, and the court may fix, a date for the exchange

of written closing submissions and a further hearing for oral closing submissions. If the parties' estimate of trial length (including pre-reading) subsequently changes, they should inform the clerk of the assigned judge immediately.

5.4.2 The fixing of the trial date at the CMC is, unless the contrary is specified, a firm date and will not be vacated or re-arranged save for good reason and with the consent of the judge. However, the trial fee is payable in accordance with section 2.1 in Schedule 1 to the Civil Proceedings Fees Order 2008, usually at least 2 months prior to the trial date. It should be noted that if the trial fee is not paid on or before the trial fee payment date then the claim will be automatically struck out: see CPR 3.7A1 and 3.7AA.

5.4.3 Essentially, the judge's aim at the first CMC is to set down a detailed timetable which, in the majority of cases, will ensure that the parties need not return to court until the PTR.

5.5 Further statements of case

5.5.1 Defence

If no defence has been served prior to the first CMC, then (except in cases where judgment in default is appropriate) the court will usually make an order for service of the defence within a specified period. The defendant must plead its positive case. Bare denials and non-admissions are, save in exceptional circumstances, unacceptable.

5.5.2 Further Information

If any party wants to request further information of any other party's statement of case, the request should, if possible, be formulated prior to the first CMC, so that it can be considered on that occasion. All requests for further information should be kept within reasonable limits, and concentrate on the important parts of the case. The requests and the replies should always be set out in one composite document, with each reply appearing immediately after each request.

5.5.3 Reply

A reply to the defence is not always necessary. However, where the defendant has raised a positive defence on a particular issue, it may be appropriate for the claimant to set out in a reply how it answers such a defence. CPR 60.5 provides that the time for filing of the reply is 21 days after service of the defence. If no reply has been filed by the time of the CMC, the court may fix a different period or extend time for

filing. If the defendant makes a counterclaim, the claimant's defence to counterclaim and its reply (if any) should be in the same document.

5.5.4 Additional or Part 20 Claims

The defendant should, at the first CMC, indicate (so far as possible) any additional (Part 20) claims that it is proposing to make, whether against the claimant or any other party. Additional (Part 20) claims are required to be pleaded in the same detail as the original claim. They are a very common feature of TCC cases, because the widespread use of sub-contractors in the UK construction industry often makes it necessary to pass claims down a contractual chain. Defendants are encouraged to start any necessary Part 20 proceedings to join additional parties as soon as possible. It is undesirable for applications to join additional defendants to be made late in the proceedings.

5.5.5 Costs

If at any stage the judge considers that the way in which the case has been pleaded, particularly through the inclusion of extensive irrelevant material or obscurity, is likely to lead or has led to inefficiency in the conduct of the proceedings or to unnecessary time or costs being spent, the judge may order that the party should re-plead the whole or part of the case and may make a costs order disallowing costs or ordering costs to be paid, either on the basis of a summary assessment or by giving a direction to the costs judge as to what costs should be disallowed or paid on a detailed assessment: see also paragraph 5.1.6 above and paragraph 12.1.4 below.

5.5.6 List of Issues

After service of the defence and prior to the CMC the claimant should circulate a list of the key issues of fact and law in the case in electronic format. This should be a succinct neutral document, intended to assist efficient case management, which begins by summarising what is common ground and then fairly identifies the main issues by reference to the statements of case. It should not cover every detail or rehearse every possible argument. Since it does not supersede the statements of case no party will be disadvantaged by any errors or omissions in the list of issues and the court will firmly discourage and, if appropriate, penalise in costs any unnecessary disputes as to its precise terms. There should be no need for the defendant to produce a separate list but, if necessary, it may include any comments and any amendments with a view to reaching agreement. If there are additional claims, then the claimants in those claims should add to the list of issues so that one composite list of issues is produced. The list or

lists of issues should be provided to the judge in advance of the CMC and then kept under review by the parties.

5.6 Scott Schedules

5.6.1 It can sometimes be appropriate for elements of the claim, or any additional (Part 20) claim, to be set out by way of a Scott Schedule (i.e. by a table, often in landscape format, in which the Claimant's case on liability and quantum is set out item by item in the first few columns and the Defendant's response is set out in the adjacent columns). For example, claims involving a final account or numerous alleged defects or items of disrepair, may be best formulated in this way, which then allows for a detailed response from the defendant. Sometimes, even where all the damage has been caused by one event, such as a fire, it can be helpful for the individual items of loss and damage to be set out in a Scott Schedule. The secret of an effective Scott Schedule lies in the information that is to be provided and its brevity: excessive repetition is to be avoided. This is defined by the column headings. The judge may give directions for the relevant column headings for any Schedule ordered by the court. It is important that the defendant's responses to any such Schedule are as detailed as possible. Each party's entries on a Scott Schedule should be supported by a statement of truth.

5.6.2 Nevertheless, before any order is made or agreement is reached for the preparation of a Scott Schedule, both the parties and the court should consider whether this course (a) will genuinely lead to a saving of cost and time or (b) will lead to a wastage of costs and effort (because the Scott Schedule will simply be duplicating earlier schedules, pleadings or expert reports). A Scott Schedule should only be ordered by the court, or agreed by the parties, in those cases where it is appropriate and proportionate.

5.6.3 When a Scott Schedule is ordered by the court or agreed by the parties, the format must always be specified. The parties must co-operate in the physical task of preparation. Electronic transfer between the parties of their respective entries in the columns will enable a clear and user-friendly Scott Schedule to be prepared, for the benefit of all involved in the trial.

5.7 Agreement Between the Parties

5.7.1 Many, perhaps most, of the required directions at the first CMC may be agreed by the parties. If so, the Court will endeavour to make orders in the terms which have been agreed pursuant to CPR 29.4, unless

the judge considers that the agreed terms fail to take into account important features of the case as a whole, or the principles of the CPR. The agreed terms will always, at the very least, form the starting-point of the judge's consideration of the orders to be made at the CMC. If the agreed terms are submitted to the judge 3 days in advance of the hearing date, it may be possible to avoid the need for a hearing altogether, although it is normally necessary for the Court to consider the case with the parties (either at an oral hearing or by way of a telephone conference) in any event.

5.7.2 The approach outlined in paragraph 5.7.1 above is equally applicable to all other occasions when the parties come before the court with a draft order that is wholly or partly agreed.

5.8 Attendance and representation

5.8.1 Clients need not attend a CMC unless the Court otherwise directs. A representative who has conduct of the case must attend from each firm of solicitors instructed. At least one of the advocates instructed in the case on behalf of each party should attend. Where a party has engaged more than one advocate (eg. leading and junior counsel), there is no requirement that all attend. The experience of the court is that on many case management issues, junior advocates within a team may be well placed to assist the court. Parties should consider in every case (a) whether attendance by the more (or most) senior advocates instructed in the case is reasonably required and (b) whether, even where that is the position, at least some of the matters arising may appropriately be dealt with by the more (or most) junior advocates.

5.9 Drawing Up of Orders

5.9.1 Unless the Court itself draws up the order, it may direct one party (usually the claimant or applicant) to do so within a specified time. If no such direction is given, then the advocate appearing for the Claimant (or applicant) must prepare and seek to agree a draft order and submit it for the judge's approval within 7 days of the conclusion of the hearing. This is to ensure that the draft is presented to the court whilst the case is still fresh in the judge's mind so that the draft can be checked for accuracy and to ensure that it reflects the intended order. The party charged with drawing up the order must draw up the order and lodge it with the court for approval. Once approved, the order will be stamped by the Court and returned to that party for service upon all other parties. The order should refer to the date on which the order was made by stating "Date order made: [date]". Orders should

be referred to by this date, rather than later dates which reflect the process of submission of the draft order, approval by the judge and sealing by the Court.

5.9.2 In exceptional cases where the parties cannot agree a minute of order (whether within the specified time or at all), then the party with carriage of the order should submit the order, so far as it has been agreed, to the judge together with a summary of those elements of those parts of the order which are not agreed, and setting out any rival wording proposed by the other side, within the specified time. That communication must be in an agreed form as far as possible stating neutrally the other parties' objections, and it must be copied to the other parties when it is submitted to the court. The Court heavily discourages extended satellite correspondence over the precise form of order. If, exceptionally, the judge wishes to hear further submissions on the draft form of order before it is approved those submissions can be requested. Unilateral further submissions to the Court as to the order are only to be made in exceptional circumstances (e.g. where a party considers that there is a real risk that the Court is being misled or its position is being seriously misrepresented). Parties who unreasonably refuse to agree a minute of order, or who take up court time arguing over the precise form of minute can expect to have costs orders made against them.

5.9.3 It is often the case that the parties, after the hearing, decide that it is sensible to include other directions in the draft order by consent, or to vary the timetable to accommodate such matters. Any such agreement must be clearly indicated in both the draft order (e.g. by adding in the matters under a separate heading stating that such matters are being made "By Consent") and in an explanatory note for the judge submitted with the proposed order.

5.10 Further CMC

5.10.1 In an appropriate case, the judge will fix a review CMC, to take place part way through the timetable that has been set down, in order to allow the Court to review progress, and to allow the parties to raise any matters arising out of the steps that have been taken up to that point. However, this will not be ordered automatically and will be confined to cases of significant complexity.

5.10.2 Each party will be required to give notice in writing to the other parties and the Court of any directions which it will be seeking at the review CMC, two days in advance of the hearing.

5.11 The Permanent Case Management Bundle

5.11.1 In conjunction with the judge's clerk, the claimant's solicitor is responsible for ensuring that, for the first CMC and at all times thereafter, there is a permanent electronic bundle of documents available to the judge, which contains:

- any relevant documents resulting from the Pre-Action Protocol;
- the claim form and all statements of case;
- all orders;
- all completed case management information sheets;
- all costs budgets;
- any proposed protocol for e-disclosure (if agreed);
- Disclosure Review Documents and Disclosure Issues as required by PD 57AD.

5.11.2 The permanent case management bundle can then be supplemented by the specific documents relevant to any particular application that may be made. Whether these supplementary documents should (a) become a permanent addition to the case management bundle or (b) be set on one side, will depend upon their nature. The permanent case management bundle, whether electronic or hard copy, will usually not be retained by the judge after the hearing once the agreed order has been drawn up, approved and sealed, unless needed for a further imminent hearing or as agreed with the parties.

Section 6. Applications after the first CMC

6.1 Relevant parts of the CPR

6.1.1 The basic rules relating to all applications that any party may wish to make are set out in CPR Part 23 and its accompanying Practice Directions.

6.1.2 **Part 7** of the **Practice Direction** accompanying CPR Part 60, PD51O and the guidance in paragraph 3.8 in respect of electronic working are also of particular relevance.

6.2 Application Notice

6.2.1 As a general rule, any party to proceedings in the TCC wishing to make an application of any sort must file an application notice (CPR 23.3) and serve that application notice on all relevant parties as soon as practicable after it has been filed (CPR 23.4). Application notices should be served by the parties, unless (as happens in some court centres outside London) service is undertaken by the court. Where the circumstances may justify an application being made without notice, see paragraph 6.10 below.

6.2.2 The application notice must set out in clear terms what order is sought and, more briefly, the reasons for seeking that order: see CPR 23.6.

6.2.3 The application notice must be served at least **3 days** before the hearing at which the Court deals with the application: CPR 23.7 (1). Such a short notice period is only appropriate for the most straight-forward type of application.

6.2.4 Most applications, in particular applications for summary judgment under CPR Part 24 or to strike out a statement of case under CPR 3.4, will necessitate a much longer notice period than **3 days**. In such cases, it is imperative that the applicant obtain a suitable date and time for the hearing of the application before the application notice is issued. When providing a time estimate, the applicant should give some thought as to the reading time required by the Judge in advance of the hearing; if longer than 1-2 hours, the applicant should notify the court of this requirement when fixing the date so that reading time can be put in the diary. The applicant must serve the application notice and evidence in support sufficiently far ahead of the date fixed for the hearing of the application for there to be

time to enable the respondent to serve evidence in response. Save in exceptional circumstances, there should be a minimum period of **10 working days** between the service of the notice (and supporting evidence) and the hearing date. If any party considers that there is insufficient time before the hearing of the application or if the time estimate for the application itself is too short, that party must notify the court and the hearing may then be refixed by agreement.

6.2.5 When considering the application notice, the judge may give directions in writing as to the dates for the provision or exchange of evidence and any written submissions or skeleton arguments for the hearing.

6.2.6 In cases of great urgency applications may be made without formal notice to the other party, but that party should (save in exceptional cases) be informed of the hearing sufficiently in advance to enable him to instruct a representative to attend.

6.3 Evidence in support

6.3.1 The application notice when it is served must be accompanied by all evidence in support: CPR 23.7 (2).

6.3.2 Unless the CPR expressly requires otherwise, evidence will be given by way of witness statements. Such statements must be verified by a statement of truth signed by the maker of the statement: CPR 22.1.

6.4 Evidence in opposition and evidence in reply

6.4.1 Likewise, any evidence in opposition to the application should, unless the rules expressly provide otherwise, be given by way of witness statement verified by a statement of truth.

6.4.2 It is important to ensure that the evidence in opposition to the application is served in good time before the hearing so as to enable:

- the court to read and note up the evidence;
- the applicant to put in any further evidence in reply that may be considered necessary.

Such evidence should be served at least **5 working days** before the hearing.

6.4.3 Any evidence in reply should be served not less than **3 working days** before the hearing. Again, if there are disputes as to the time taken or to be taken for the preparation of evidence prior to a hearing, or any other matters in respect of a suitable timetable for that hearing, the Court will consider the written positions of both parties and decide such disputes on paper. It will not normally be necessary for either a separate application to be issued or a hearing to be held for such a purpose.

6.4.4 If the hearing of an application has to be adjourned because of delays by one or other of the parties in serving evidence, the Court is likely to order that party to pay the costs straight away, and to make a summary assessment of those costs.

6.5 Application Bundle

6.5.1 The bundle for the hearing of anything other than the most simple and straightforward application should consist of:

- the permanent case management bundle (see paragraph 5.8 above);
- the witness statements provided in support of the application, together with any exhibits;
- the witness statements provided in opposition to the application together with exhibits;
- any witness statements in reply, together with exhibits.

6.5.2 The permanent case management bundle should be provided to the court in electronic form not less than **2 working days** before the hearing. In any event, a paginated bundle in electronic form containing any material specific to the application should also be provided to the court not less than **2 working days** before the hearing, unless otherwise directed by the judge. A failure to comply with this deadline may result in the adjournment of the hearing, and the costs thrown away being paid by the defaulting party. The further guidance on electronic bundles in Appendix J applies.

6.5.3 If the bundle is requested by the judge in hard copy, PD32, paragraph 27.15 now provides that the default position is that application bundles should be provided in double-sided printing unless the Court otherwise directs. In the TCC, bundles for applications and short trials (such as a one day Part 8 hearing or a 2 day preliminary issue

hearing) should be provided in single-sided printing (unless the Court otherwise directs).

6.5.4 In all but the simplest applications, the Court will expect the parties to provide skeleton arguments and copies of any authorities to be relied on. The form and content of the skeleton argument is principally a matter for the author, although the judge will expect it to identify the issues that arise on the application, the important parts of the evidence relied on, and the applicable legal principles. For detailed guidance as to the form, content and length of skeleton arguments, please see the relevant provisions of the King's Bench Guide, the Chancery Guide and the Commercial Court Guide.

6.5.5 For an application that is estimated to last half a day or less, the skeleton should be provided no later than **4pm one clear working day before the hearing**. It should be accompanied by an electronic bundle of the authorities relied on (preferably in the form of a common agreed bundle). An electronic copy of each skeleton argument (in Microsoft Word compatible format) should be sent to the clerk of the judge hearing the application: if a party is reluctant for other parties to be provided with its skeleton argument in Word, it may serve it in pdf (or other readable) form provided that it certifies that the version sent to the judge is identical in content to that served on the other parties.

6.5.6 For an application that is estimated to last more than half a day, the skeleton should be provided no later than **4 pm two clear working days before the hearing**. It should be accompanied by an electronic bundle of the authorities relied on (again, preferably in the form of a common agreed bundle).

6.5.7 The time limits at paragraphs 6.5.5 and 6.5.6 above will be regarded as the latest times by which such skeletons should be provided to the court. Save in exceptional circumstances, no extension to these periods will be permitted. **If the application bundle or skeleton argument is not provided by the time specified, the application may be stood out of the list without further warning and there may be cost consequences**.

6.5.8 Pagination

It is generally necessary for there to be a paginated bundle for the hearing. Where the parties have produced skeleton arguments, these should be cross-referred to the bundle page numbers. Where possible bundles should be paginated right through, but this may be

dispensed with where a document within a discrete section of the bundle has its own internal pagination.

6.6 Hearings

6.6.1 Arbitration applications may be heard in private: see CPR 62.10. All other applications will be heard in public in accordance with CPR 39.2, save where otherwise ordered.

6.6.2 Provided that the application bundle and the skeletons have been lodged in accordance with the time limits set out above, the parties can assume that the court will have a good understanding of the points in issue. However, the Court will expect to be taken to particular documents relied on by the parties and will also expect to be addressed on any important legal principles that arise. If the parties have failed to comply with the guidance in paragraph 6.2.4 in respect of time estimates for pre-reading or have given an inadequate time estimate, the parties should be aware that that may affect the conduct of the hearing and the time estimate for hearing and that the judge may, as a result, adjourn the hearing.

6.6.3 It is important that the parties ensure that every application is dealt with in the estimated time period. Since many applications are dealt with on Fridays, it causes major disruption if application hearings are not disposed of within the estimated period. If the parties take too long in making their submissions, the application may be adjourned, part heard, and the Court may impose appropriate costs sanctions.

6.6.4 If, in the light of the evidence served in respect of an application, it becomes apparent to either party that the time estimate given is likely to be inadequate, the parties should notify the Court as soon as possible. It may be possible for the Court to accommodate a longer hearing but, if the Court is unaware of the likely longer hearing, this can cause real difficulties, inhibit the giving of an ex tempore judgment, and delay reserved judgments. If the Court is unable to offer a longer hearing, the parties are expected to co-operate to re-list the hearing as soon as possible.

6.6.5 At the conclusion of the hearing, unless the Court itself draws up the order, it will direct the applicant to do so within a specified period.

6.6.6 If a party is likely to require a transcript of either the hearing or any judgment or ruling, it should notify the judge's clerk straight away: see paragraph 15.9.2. If, by that time, the judge has returned the papers, the party seeking the transcript should retain a set of all papers

used at the hearing in hard copy and/or electronic form and should inform the judge's clerk that they can be provided should the judge require them in order to correct and approve a form of judgment. Alternatively, the judge may seek the assistance of the parties in correcting proper names, citations, quotations and the like.

6.6.7 If an application settles the evening before a hearing or over a weekend, the parties should have regard to the guidance at paragraph 4.7.2 above.

6.7 Electronic Applications

6.7.1 As noted in Section 4 above some applications may be suitable for determination on written submissions and documents under the procedure set out in paragraph 4.5 above.

6.7.2 In addition, certain simple applications (particularly in lower value cases) arising out of the management of the proceedings may be capable of being dealt with by correspondence without the need for any formal application or order of the Court. This is particularly true of applications to vary procedural orders, which variations are wholly or largely agreed, or proposals to vary the estimated length of the trial. In such cases, the applicant should write to the other parties indicating the nature of its application and to seek their agreement to it. If, however, it emerges that there is an issue to be resolved by the Court, then a formal application must be issued and dealt with as a paper application or, possibly, at an oral hearing.

6.7.3 It is essential that any communication by a party to the judge or the Court is copied to all other parties, subject to paragraph 6.10 below (applications without notice).

6.8 Consent Orders

6.8.1 Consent Orders may be submitted to the Court in draft for approval without the need for attendance.

6.8.2 Two copies of the draft order should be lodged, at least one of which should be signed. The copies should be undated as the Court will set out the date the order is made: see paragraph 5.8.1 above.

6.8.3 As noted elsewhere, whilst the parties can agree between themselves the orders to be made either at the Case Management Conference or the Pre-Trial Review, it is normally necessary for the Court to consider the case with the parties (either at an oral hearing or by way of a telephone conference) on those occasions in any event.

6.8.4 Generally, when giving directions, the Court will endeavour to identify the date by which the relevant step must be taken, and will not simply provide a period during which that task should be performed. The parties should therefore ensure that any proposed consent order also identifies particular dates, rather than periods, by which the relevant steps must be taken.

6.9 Costs

6.9.1 Costs are dealt with generally at Section 16 below.

6.9.2 The costs of any application which took a day or less to be heard and disposed of will be dealt with summarily, unless there is a good reason for the court not to exercise its powers as to the summary assessment of costs.

6.9.3 Accordingly, it is necessary for parties to provide to the Court and to one another their draft statements of costs no later than **24 hours** before the start of the application hearing. Any costs which are incurred after these draft statements have been prepared, but which have not been allowed for (e.g. because the hearing has exceeded its anticipated length), can be mentioned at the hearing.

6.10 Applications without notice

6.10.1 All applications should be made on notice, even if that notice has to be short, unless:

- any rule or Practice Direction provides that the application may be made without notice; or
- there are good reasons for making the application without notice, for example, because notice might defeat the object of the application.

6.10.2 If the application is urgent, the TCC Listing Office should be given a clear explanation in writing, certified by the legal representatives of the applicant if they are represented, of the degree of and reasons for the urgency. It is important to remember that urgency is separate from, and additional to, the question whether it is appropriate to make the application without notice. Once the application documents have been submitted, the application and the explanation for urgency will go before a Judge who will decide if the application is urgent, and if so the degree of urgency.

6.10.3 Where an application without notice does not involve giving undertakings to the Court, it will normally be made and dealt with on the documents, as, for example, applications for permission to serve the claim form out of the jurisdiction, and applications for an extension of time in which to serve a claim form. Any application for an interim injunction or similar remedy will usually require an oral hearing.

6.10.4 A party wishing to make an application without notice which requires an oral hearing before a judge should contact the TCC Listing Office at the earliest opportunity.

6.10.5 If a party wishes to make an application without notice at a time when no TCC judge is available, the application should be made to the King's Bench Judge in Chambers.

6.10.6 On all applications without notice it is the duty of the applicant and those representing him:

- to make full and frank disclosure of all matters relevant to the application;
- to ensure that a note of the hearing of the without notice application, the evidence and skeleton argument in support and any order made all be served with the order or as soon as possible thereafter.

6.10.7 The papers lodged on the application should include two copies of a draft of the order sought. Save in exceptional circumstances, all the evidence relied upon in support of the application and any other relevant documents must be lodged in advance with the TCC Listing Office. If the application is urgent, the Listing Office should be informed of the fact and of the reasons for the urgency. Counsel's estimate of reading time likely to be required by the court should also be provided.

6.11 Interim Injunctions

6.11.1 Applications for interim injunctions are governed by CPR 25.

6.11.2 Applications must be made on notice in accordance with CPR 23 unless there are good reasons for proceeding without notice.

6.11.3 A party who wishes to make an application for an interim injunction must give the TCC Listing Office as much notice as possible, indicating the type of application likely to be made, the anticipated time

requirement for reading and a hearing, and when it is expected that papers will be ready for submission to a judge.

6.11.4 Except where there is such urgency as to make this impracticable, the applicant must issue a claim form and obtain the evidence on which it wishes to rely before making the application and should provide the Court with a skeleton argument in good time for the judge to read it before any hearing.

6.11.5 An affidavit, and not a witness statement, is required on an application for a freezing order: PD25A paragraph 3.1.

6.11.6 Where the applicant for an interim remedy is not able to show sufficient assets within the jurisdiction of the Court to provide substance for any undertakings given, it may be required to provide security in such form as the judge decides is appropriate.

6.11.7 An interim remedy expressed to remain in force until judgment, or further order, remains in force until the delivery of a final judgment (unless some other order is made in the meantime). If an interim remedy after judgment is required, an application to that effect must be made.

6.11.8 An order for an interim remedy should generally provide that acts which would otherwise be a breach of the order are permitted, if done with the written consent of the solicitor of the other party or parties, to reduce the need to come back to the Court with further applications.

6.11.9 Standard forms of wording for freezing injunctions, with important explanatory footnotes, are set out in Appendix 11 to the Commercial Court Guide. The standard wording may be modified but any modifications proposed by an applicant should be:

a) shown using tracked changes on a copy of the draft order provided to the Court;

b) identified and explained individually in any skeleton argument for the application; and

c) drawn to the judge's attention expressly at the application hearing.

6.11.10 Freezing injunctions made on an application without notice will provide for a return date unless the judge otherwise orders: PD25 paragraph 5.1(3).

However:

a) if, after service with notification of the injunction, one or more of the parties considers that the time allowed for the return date hearing will be insufficient to deal with the matter, the Listing Office should be informed forthwith and in any event not later than 4:00 pm one clear day before the return date;

b) if the parties agree to postpone the return date to a later date, an agreed form of order continuing the injunction to the postponed return date should be submitted for consideration by the judge; if the proposed order is approved, the parties do not need to attend on the original return date and the respondent, and any other interested party, will continue to have liberty to apply to vary or set aside the order;

c) a provision for the respondent to give notice of any application to discharge or vary the order is usually included as a matter of convenience in the order but it is not proper to attempt to fetter the right of the respondent to apply without notice or on short notice if necessary;

d) any bank or third parties served with, notified of, or affected by a freezing injunction may apply to the Court without notice to any party for directions, or notify the Court in writing without notice to any party, in the event that the order affects or may affect the position of the bank or third party under legislation, regulations or procedures aimed at preventing money laundering.

6.11.11 Applications to discharge or very freezing injunctions are treated as matters of urgency for listing purposes. Those representing applicants for discharge or variation should ascertain before a date is fixed for the hearing whether, having regard to the evidence which they wish to adduce, the other parties would wish to adduce further evidence; if so, all reasonable steps must be taken to agree the earliest practicable date at which the parties can be ready for a hearing, to avoid vacating a fixed date at the last minute. In cases of difficulty the matter should be referred to a judge.

6.11.12 If a freezing injunction is discharged on an application to discharge or vary, or on the return date, the judge will consider whether it is appropriate to assess damages forthwith and direct immediate payment by the applicant. Where a hearing in connection with the cross undertaking of damages or the assessment of damages is directed but postponed to a future date, case management directions will be given.

Section 7. ADR

7.1 General

7.1.1 The court will provide encouragement to the parties to use alternative dispute resolution ("ADR") and will, whenever appropriate, facilitate the use of such a procedure. In this Guide, ADR is taken to mean any process through which the parties attempt to resolve their dispute, which is voluntary. In most cases, ADR takes the form of inter-party negotiations or a mediation conducted by a neutral mediator. Alternative forms of ADR include early neutral evaluation either by a judge or some other neutral person who receives a concise presentation from each party and then provides his or her own evaluation of the case.

7.1.2 Although the TCC is an appropriate forum for the resolution of all IT and construction/engineering disputes, the use of ADR can lead to a significant saving of costs and may result in a settlement which is satisfactory to all parties.

7.1.3 Legal representatives in all TCC cases should ensure that their clients are fully aware of the benefits of ADR and that the use of ADR has been carefully considered prior to the first CMC.

7.2 Timing

7.2.1 ADR may be appropriate before the proceedings have begun or at any subsequent stage. However, the later ADR takes place, the more the costs which will have been incurred, often unnecessarily. The timing of ADR needs careful consideration.

7.2.2 The TCC Pre-Action Protocol (Section 2 above) itself provides for a type of ADR because it requires there to be at least one face-to-face meeting between the parties before the commencement of proceedings. At this meeting, there should be sufficient time to discuss and resolve the dispute. As a result of this procedure having taken place, the court will not necessarily grant a stay of proceedings upon demand and it will always need to be satisfied that an adjournment is actually necessary to enable ADR to take place.

7.2.3 However, at the first CMC, the court will want to be addressed on the parties' views as to the likely efficacy of ADR, the appropriate timing of ADR, and the advantages and disadvantages of a short

stay of proceedings to allow ADR to take place. Having considered the representations of the parties, the court may order a short stay to facilitate ADR at that stage. Alternatively, the court may simply encourage the parties to seek ADR and allow for it to occur within the timetable for the resolution of the proceedings set down by the court.

7.2.4 At any stage after the first CMC and prior to the commencement of the trial, the court, will, either on its own initiative or if requested to do so by one or both of the parties, consider afresh the likely efficacy of ADR and whether or not a short stay of the proceedings should be granted, in order to facilitate ADR.

7.3 Procedure

7.3.1 In an appropriate case, the court may indicate the type of ADR that it considers suitable, but the decision in this regard must be made by the parties. In most cases, the appropriate ADR procedure will be mediation.

7.3.2 If at any stage in the proceedings the court considers it appropriate, an ADR order in the terms of Appendix E may be made. If such an order is made at the first CMC, the court may go on to give directions for the conduct of the action up to trial (in the event that the ADR fails). Such directions may include provision for a review CMC.

7.3.3 The court will not ordinarily recommend any individual or body to act as mediator or to perform any other ADR procedure. In the event that the parties fail to agree the identity of a mediator or other neutral person pursuant to an order in the terms of Appendix E, the court may select such a person from the lists provided by the parties. To facilitate this process, the court would also need to be furnished with the CVs of each of the individuals on the lists.

7.3.4 Information as to the types of ADR procedures available and the individuals able to undertake such procedures is available from TeCSA, TECBAR, the Civil Mediation Council, and from some TCC court centres outside London.

7.4 Non-Cooperation

7.4.1 Generally

At the end of the trial, there may be costs arguments on the basis that one or more parties unreasonably refused to take part in ADR. The court will determine such issues having regard to all the circumstances

of the particular case. In Halsey v Milton Keynes General NHS Trust [2004] EWCA Civ 576; [2004] 1 WLR 3002, the Court of Appeal identified six factors that may be relevant to any such consideration:

a) the nature of the dispute;

b) the merits of the case;

c) the extent to which other settlement methods have been attempted;

d) whether the costs of the ADR would be disproportionately high;

e) whether any delay in setting up and attending the ADR would have been prejudicial;

f) whether the ADR had a reasonable prospect of success.

This case and later authority is the subject of extensive discussion in Civil Procedure, Volume 2, at Section 14. The parties' attention is also drawn to paragraph 1.1.6 of this Guide.

7.4.2 If an ADR Order Has Been Made

The court will expect each party to co-operate fully with any ADR procedure which takes place following an order of the court. If any other party considers that there has not been proper co-operation in relation to arrangements for mediation or any other ADR Procedure, the complaint will be considered by the court and cost orders and/or other sanctions may be ordered against the defaulting party in consequence. However, nothing in this paragraph should be understood as modifying the rights of all parties to a mediation or any other ADR Procedure to keep confidential all that is said or done in the course of that ADR Procedure.

7.5 Early Neutral Evaluation

7.5.1 An early neutral evaluation ("ENE") may be carried out by any appropriately qualified person, whose opinion is likely to be respected by the parties. In an appropriate case, and with the consent of all parties, a TCC judge may provide an early neutral evaluation either in respect of the full case or of particular issues arising within it. Unless the parties otherwise agree the ENE will be produced in writing and will set out conclusions and brief reasons. Such an ENE will not, save with the agreement of the parties, be binding on the parties.

7.5.2 If the parties would like an ENE to be carried out by the court, then they can seek an appropriate order from the assigned judge either at the first CMC or at any time prior to the commencement of the trial.

7.5.3 The assigned judge may choose to do the ENE. In such instance, the judge will take no further part in the proceedings once the ENE has been produced, unless the parties expressly agree otherwise. Alternatively, the assigned judge will select another available TCC judge to undertake the ENE.

7.5.4 The judge undertaking the ENE will give appropriate directions for the preparation and conduct of the ENE. These directions will generally be agreed by the parties and may include:

- a stay of the substantive proceedings whilst the ENE is carried out;
- a direction that the ENE is to be carried out entirely on paper with dates for the exchange of submissions;
- a direction that particular documents or information should be provided by a party.
- a direction that there will be an oral hearing (either with or without evidence), with dates for all the necessary steps for submissions, witness statements and expert evidence leading to that hearing; if there is an oral hearing the ENE will generally not last more than one day;
- a statement that the parties agree or do not agree that the ENE procedure and the documents, submissions or evidence produced in relation to the ENE are to be without prejudice, or, alternatively, that the whole or part of those items are not without prejudice and can be referred to at any subsequent trial or hearing;
- a statement whether the parties agree that the judge's evaluation after the ENE process will be binding on the parties or binding in certain circumstances (e.g. if not disputed within a period) or temporarily binding subject to a final decision in arbitration, litigation or final agreement.

7.6 Court Settlement Process

7.6.1 The Court Settlement Process is a form of mediation carried out by TCC judges. Whilst mediation may be carried out by any appropriately qualified person, in an appropriate case, and with the consent of all parties, a TCC judge may act as a Settlement Judge pursuant to a Court Settlement Order in the terms set out in Appendix G. This has proved to be successful in many cases.

7.6.2 If the parties would like to consider the use of the Court Settlement Process or would like further information, they should contact the TCC Registry in London or the TCC Liaison District Judges in the court centres outside London.

7.6.3 Where, following a request from the parties, the assigned TCC judge considers that the parties might be able to achieve an amicable settlement and that a TCC judge is particularly able to assist in achieving that settlement, that judge or another TCC judge, with the agreement of the parties, will make a Court Settlement Order (Appendix G) embodying the parties' agreement and fixing a date for the Court Settlement Conference to take place with an estimated duration proportionate to the issues in the case.

7.6.4 The TCC judge appointed as the Settlement Judge will then conduct the Court Settlement Process in accordance with that Court Settlement Order in a similar manner to that of a mediator. If no settlement is achieved then the case would proceed but, if the assigned judge carried out the Court Settlement Process, then the case would be assigned to another TCC judge. In any event, the Settlement Judge would take no further part in the court proceedings.

Section 8. Preliminary issues

8.1 General

8.1.1 The hearing of Preliminary Issues ("PI"), at which the Court considers and delivers a binding judgment on particular issues in advance of the main trial, can be an extremely cost-effective and efficient way of narrowing the issues between the parties and, in certain cases, of resolving disputes altogether.

8.1.2 Some cases listed in the TCC lend themselves particularly well to this procedure. A PI hearing can address particular points which may be decisive of the whole proceedings; even if that is not the position, it is often possible for a PI hearing to cut down significantly on the scope (and therefore the costs) of the main trial.

8.1.3 At the first CMC the Court will expect to be addressed on whether or not there are matters which should be taken by way of Preliminary Issues in advance of the main trial. Subject to paragraph 8.5 below, it is not generally appropriate for the Court to make an order for the trial of preliminary issues until after the defence has been served. After the first CMC, and at any time during the litigation, any party is at liberty to raise with any other party the possibility of a PI hearing and the Court will consider any application for the hearing of such Preliminary Issues. In many cases, although not invariably, a PI order will be made with the support of all parties.

8.1.4 Whilst, for obvious reasons, it is not possible to set out hard and fast rules for what is and what is not suitable for a PI hearing, the criteria set out in paragraph 8.2 below should assist the parties in deciding whether or not some or all of the disputes between them will be suitable for a PI hearing.

8.1.5 Drawbacks of preliminary issues in inappropriate cases

If preliminary issues are ordered inappropriately, they can have adverse effects:

a) evidence may be duplicated;

b) the same witnesses may give evidence before different judges, in the event that there is a switch of assigned judge;

c) findings may be made at the PI hearing, which are affected by evidence subsequently called at the main hearing;

d) the prospect of a PI hearing may delay the commencement of ADR or settlement negotiations; and

e) two trials are more expensive than one.

For all these reasons, any proposal for preliminary issues needs to be examined carefully, so that the benefits and drawbacks can be evaluated. The Court will give due weight to the views of the parties when deciding whether a PI hearing would be beneficial.

8.1.6 Staged trials

The breaking down of a long trial into stages should be differentiated from the trial of preliminary issues. Sometimes it is sensible for liability (including causation) to be tried before quantum of damages. Occasionally the subject matter of the litigation is so extensive that for reasons of case management the trial needs to be broken down into separate stages.

8.2 Guidelines

8.2.1 The Significance of the Preliminary Issues

The court would expect that any issue proposed as a suitable PI would, if decided in a particular way, be capable of:

- resolving the whole proceedings or a significant element of the proceedings; or
- significantly reducing the scope, and therefore the costs, of the main trial; or
- significantly improving the possibility of a settlement of the whole proceedings.

8.2.2 Oral Evidence

The court would ordinarily expect that, if issues are to be dealt with by way of a PI hearing, there would be either no or relatively limited oral evidence. If extensive oral evidence was required on any proposed PI, then it may not be suitable for a PI hearing. Although it is difficult to give specific guidance on this point, it is generally considered that a PI hearing in a smaller case should not take more than about 2 days, and in a larger and more complex case, should not take more than about 4 days.

8.3 Common Types of Preliminary Issue

The following are commonly resolved by way of a PI hearing:

a) Disputes as to whether or not there was a binding contract between the parties.

b) Disputes as to what documents make up or are incorporated within the contract between the parties and disputes as to the contents or relevance of any conversations relied on as having contractual status or effect.

c) Disputes as to the proper construction of the contract documents or the effect of an exclusion or similar clause.

d) Disputes as to the correct application of a statute or binding authority to a situation where there is little or no factual dispute.

8.4 Other Possible Preliminary Issues

The following can sometimes be resolved by way of a preliminary issue hearing, although a decision as to whether or not to have such a hearing will always depend on the facts of the individual case:

8.4.1 A Limitation Defence

It is often tempting to have limitation issues resolved in advance of the main trial. This can be appropriate in a suitable case - if a complex claim is statute-barred, a decision to that effect will lead to a significant saving of costs. However, there is also a risk that extensive evidence relevant to the limitation defence (relating to matters such as when the damage occurred or whether or not there has been deliberate concealment) may also be relevant to the liability issues within the main trial. In such a case, a preliminary issue hearing may lead to a) extensive duplication of evidence and therefore costs and b) give rise to difficulty if the main trial is heard by a different judge.

8.4.2 Causation and 'No Loss' Points

Causation and 'No Loss' points may be suitable for a PI hearing, but again their suitability will be diminished if it is necessary for the Court to resolve numerous factual disputes as part of the proposed PI hearing. The most appropriate disputes of this type for a PI hearing are those where the defendant contends that, even accepting all the facts alleged by the claimant, the claim must fail by reason of causation or the absence of recoverable loss.

8.4.3 'One-Off' Issues

Issues which do not fall into any obvious category, like economic duress, or misrepresentation, may be suitable for resolution by way of a PI hearing, particularly if the whole case can be shown to turn on them.

8.5 Use of PI as an adjunct to ADR

8.5.1 Sometimes parties wish to resolve their dispute by ADR, but there is one major issue which is a sticking point in any negotiation or mediation. The parties may wish to obtain the Court's final decision on that single issue, in the expectation that after that they can resolve their differences without further litigation.

8.5.2 In such a situation the parties may wish to bring proceedings under CPR Part 8, in order to obtain the Court's decision on that issue. Such proceedings can be rapidly progressed. Alternatively, if the issue is not suitable for Part 8 proceedings, the parties may bring proceedings under Part 7 and then seek determination of the critical question as a preliminary issue. At the first CMC the position can be explained and the judge can be asked to order early trial of the proposed preliminary issue, possibly without the need for a defence or any further pleadings.

8.6 Precise Wording of PI

8.6.1 If a party wishes to seek a PI hearing, either at the first CMC or thereafter, that party must circulate a precise draft of the proposed preliminary issues to the other parties and to the Court well in advance of the relevant hearing.

8.6.2 If the Court orders a PI hearing, it is likely to make such an order only by reference to specific and formulated issues, in order to avoid later debate as to the precise scope of the issues that have been ordered. Of course, the parties are at liberty to propose amendments to the issues before the PI hearing itself, but if such later amendments are not agreed by all parties, they are unlikely to be ordered. In any event, any proposals of the parties, whether agreed or not, to amend the terms of the issue(s) ordered by the court require the approval of the Court which should be sought well in advance of the hearing.

8.7 Appeals

8.7.1 When considering whether or not to order a PI hearing, the Court will take into account the effect of any possible appeal against the PI judgment, and the concomitant delay caused.

8.7.2 At the time of ordering preliminary issues, both the parties and the Court should specifically consider whether, in the event of an appeal against the PI judgment, it is desirable that the trial of the main action should (a) precede or (b) follow such appeal. It should be noted, however, that the first instance Court has no power to control the timetable for an appeal. The question whether an appeal should be (a) expedited or (b) stayed is entirely a matter for the Court of Appeal. Nevertheless, the Court of Appeal will take notice of any "indication" given by the lower court in this regard.

Section 9. Adjudication business

9.1 Introduction

9.1.1 The TCC is ordinarily the court in which the enforcement of an adjudicator's decision and any other business connected with adjudication is undertaken. Adjudicators' decisions predominantly arise out of adjudications which are governed by the mandatory provisions of the Housing Grants, Construction and Regeneration Act 1996 (as amended by the Local Democracy, Economic Development and Construction Act 2009 for contracts entered into on or after 1 October 2011) relating to the carrying out of construction operations in England and Wales ("HGCRA"). These provisions apply automatically to any construction contract as defined in the legislation. Some Adjudicators' decisions arise out of standard form contracts which contain adjudication provisions, and others arise from ad hoc agreements to adjudicate. The TCC enforcement procedure is the same for all kinds of adjudication.

9.1.2 In addition to enforcement applications, declaratory relief is sometimes sought in the TCC at the outset of or during an adjudication in respect of matters such as the jurisdiction of the adjudicator or the validity of the adjudication. This kind of application is dealt with in paragraph 9.4 below.

9.1.3 The HGCRA provides for a mandatory 28-day period within which the entire adjudication process must be completed, unless a) the referring party agrees to an additional 14 days, or b) both parties agree to a longer period. In consequence, the TCC has moulded a rapid procedure for enforcing an adjudication decision that has not been honoured. Other adjudication proceedings are ordinarily subject to similar rapidity.

9.2 Procedure in Enforcement Proceedings

9.2.1 Unlike arbitration business, there is neither a practice direction nor a claim form concerned with adjudication business. The enforcement proceedings normally seek a monetary judgment so that CPR Part 7 proceedings are usually appropriate. However, if the enforcement proceedings are known to raise a question which is unlikely to involve a substantial dispute of fact and no monetary judgment is sought, CPR Part 8 proceedings may be used instead.

9.2.2 The TCC has fashioned a procedure whereby enforcement applications are dealt with promptly. The details of this procedure are set out below.

9.2.3 The claim form should identify the construction contract, the jurisdiction of the adjudicator, the procedural rules under which the adjudication was conducted, the adjudicator's decision, the relief sought and the grounds for seeking that relief.

9.2.4 The claim form should be accompanied by an application notice that sets out the procedural directions that are sought. Commonly, the claimant's application will seek an abridgement of time for the various procedural steps, and summary judgment under CPR Part 24. The claim form and the application should be accompanied by a witness statement or statements setting out the evidence relied on in support of both the adjudication enforcement claim and the associated procedural application. This evidence should ordinarily include a copy of the Notice of Intention to Refer and the adjudicator's decision. Further pleadings in the adjudication may be required where questions of the adjudicator's jurisdiction are being raised.

9.2.5 The claim form, application notice and accompanying documents should be lodged in the appropriate registry or court centre clearly marked as being a "Paper without notice adjudication enforcement claim and application for the urgent attention of a TCC judge". A TCC judge will ordinarily provide directions in connection with the procedural application within **3 working days** of the receipt of the application notice at the Listing Office.

9.2.6 The procedural application is dealt with by a TCC judge on the documents, without notice. The application and the consequent directions should deal with:

a) the abridged period of time in which the defendant is to file an acknowledgement of service;

b) the time for service by the defendant of any witness statement in opposition to the relief being sought;

c) an early return date for the hearing of the summary judgment application and a note of the time required or allowed for that hearing; and

d) identification of the judgment, order or other relief being sought at the hearing of the adjudication claim.

The order made at this stage will always give the defendant liberty to apply.

9.2.7 A direction providing that the claim form, supporting evidence and court order providing for the hearing are to be served on the defendant as soon as practicable, or sometimes by a particular date, will ordinarily also be given when the judge deals with the electronic procedural application.

9.2.8 The directions will ordinarily provide for an enforcement hearing within about **6** to **8 weeks** of the directions being made and for the defendant to be given at least **14 days** from the date of service for the serving of any evidence in opposition to the adjudication application. In more straightforward cases, the abridged periods may be less.

9.2.9 Draft standard directions of the kind commonly made by the court on a procedural application by the claimant in an action to enforce the decision of an adjudicator are attached as Appendix F.

9.2.10 The claimant should, with the application, provide an estimate of the time needed for the hearing of the application. This estimate will be taken into account by the judge when fixing the date and length of the hearing. Where no time estimate is given, the judge will commonly give a 2 hour estimate for the hearing. The parties should bear in mind that that is done when the court may have minimal information as to the issues that are likely to be raised by the defendant on enforcement. The parties should, if possible jointly, communicate any revised time estimate to the court promptly and the judge to whom the case has been allocated will consider whether to refix the hearing date or, as is commonly the case, to alter the time period that has been allocated for the hearing.

9.2.11 If the parties cannot agree on the date or time fixed for the hearing, an electronic application must be made to the judge to whom the hearing has been allocated for directions.

9.2.12 Parties seeking to enforce adjudication decisions are reminded that they might be able to obtain judgment in default of service of an acknowledgment of service or, if the other party does not file any evidence in response, they might be able to obtain an expedited hearing of the Part 24 application. Generally, it is preferable for a party to enter default judgment rather than seek an expedited hearing, because that reduces the costs involved (the terms of the order usually mention this explicitly).

9.3 The Enforcement Hearing

9.3.1 Where there is any dispute to be resolved at the hearing, the judge should be provided with copies of the relevant sections of the HGCRA, the adjudication procedural rules under which the adjudication was conducted, the adjudicator's decision and copies of any adjudication provisions in the contract underlying the adjudication.

9.3.2 Subject to any more specific directions given by the court, the parties should lodge, **by 4.00 pm two clear working days before the hearing**, a bundle containing the documents that will be required at the hearing.

9.3.3 The parties should also file and serve short skeleton arguments and copies of any authorities which are to be relied on (preferably as an agreed joint bundle), summarising their respective contentions as to why the adjudicator's decision is or is not enforceable or as to any other relief being sought.

9.3.4 For a hearing that is expected to last half a day or less, the skeletons should be provided **no later than 4pm one clear working day before the hearing**.

9.3.5 For a hearing that is estimated to last more than half a day, the skeletons should be provided **no later than 4 pm two clear working days before the hearing**.

9.3.6 The parties should be ready to address the court on the limited grounds on which a defendant may resist an application seeking to enforce an adjudicator's decision or on which a court may provide any other relief to any party in relation to an adjudication or an adjudicator's decision.

9.4 Other Proceedings Arising Out Of Adjudication

9.4.1 As noted above, the TCC will also hear any applications for declaratory relief arising out of the commencement of a disputed adjudication. Commonly, these will concern:

- Disputes over the jurisdiction of an adjudicator. It can sometimes be appropriate to seek a declaration as to jurisdiction at the outset of an adjudication, rather than both parties incurring considerable costs in the adjudication itself, only for the jurisdiction point to emerge again at the enforcement hearing.

- Disputes over whether there is a construction contract within the meaning of the Act (and, in older contracts, whether there was a written contract between the parties).
- Disputes over the permissible scope of the adjudication, and, in particular, whether the matters which the claimant seeks to raise in the adjudication are the subject of a pre-existing dispute between the parties.

9.4.2 Any such application will be immediately assigned to a named judge. In such circumstances, given the probable urgency of the application, the judge will usually require the parties to attend a directions hearing **within 2 working days** of the assignment of the case, and will then give the necessary directions to ensure the speedy resolution of the dispute.

9.4.3 Although not exclusive, the examples in paragraph 9.4.1 make it clear that not all applications that have some connection with an adjudication are ones where the TCC will hear applications for declaratory relief with the abbreviated timescales applied in the case of adjudication enforcement. The label of "an adjudication application" should not be used by parties to obtain an expedited hearing (for example of a Part 8 claim for declaratory relief) where there is no other justification for an expedited hearing. A judge may refuse to hear a claim or application which has been given this label in an attempt to jump the queue.

9.4.4 It sometimes happens that one party to an adjudication commences enforcement proceedings, whilst the other commences proceedings under Part 8, in order to challenge the validity of the adjudicator's award. This duplication of effort is unnecessary and it involves the parties in extra costs, especially if the two actions are commenced at different court centres. Accordingly, there should be sensible discussions between the parties or their lawyers, in order to agree the appropriate venue and also to agree who shall be claimant and who defendant. All the issues raised by each party can and should be raised in a single action.

9.4.5 However, in cases where an adjudicator has made a clear error (but has acted within his jurisdiction), it may on occasions be appropriate to bring proceedings under Part 8 for a declaration as a pre-emptive response to an anticipated application to enforce the decision. In the light of this guidance, a practice had grown up of applications to enforce an adjudicator's decision being met by an application for a declaration that the adjudicator had erred often without proceedings

under Part 8 being commenced. This approach was disruptive and not in accordance with the spirit of the TCC's procedure for the enforcement of adjudicator's decisions. It is emphasised, therefore, that such cases are limited to those where:

a) there is a short and self-contained issue which arose in the adjudication and which the defendant continues to contest;

b) that issue requires no oral evidence, or any other elaboration beyond that which is capable of being provided during the interlocutory hearing for enforcement; and

c) the issue is one which, on a summary judgment application, it would be unconscionable for the court to ignore; and further that there should in all cases be proper proceedings for declaratory relief.

Section 10. Arbitration

10.1 Arbitration Claims in the TCC

10.1.1 "Arbitration claims" are any application to the court under the Arbitration Act 1996 and any other claim concerned with an arbitration that is referred to in CPR 62.2(1). Common examples of arbitration claims are challenges to an award on grounds of jurisdiction under section 67, challenges to an award for serious irregularity under section 68 or appeals on points of law under section 69 of the Arbitration Act 1996. Arbitration claims may be started in the TCC, as is provided for in paragraph 2.3 of the Practice Direction – Arbitration which supplements CPR Part 62.

10.1.2 In practice, arbitration claims arising out of or connected with a construction or engineering arbitration (or any other arbitration where the subject matter involved one or more of the categories of work set out in paragraph 1.3.1 above) should be started in the TCC. The only arbitration claims that must be started in the Commercial Court are those (increasingly rare) claims to which the old law (i.e. the pre-1996 Act provisions) apply: see CPR 62.12.

10.1.3 The TCC follows the practice and procedure for arbitration claims established by CPR Part 62 and (broadly) the practice of the Commercial Court as summarised by **Section O of the Commercial Court Guide**. In the absence of any specific directions given by the court, the automatic directions set out in section 6 of the Practice Direction supplementing CPR Part 62 govern the procedures to be followed in any arbitration claim from the date of service up to the substantive hearing.

10.2 Leave to appeal

10.2.1 Where a party is seeking to appeal a question of law arising out of an award pursuant to section 69 of the Arbitration Act 1996 and the parties have not in their underlying contract agreed that such an appeal may be brought, the party seeking to appeal must apply for leave to appeal pursuant to sections 69(2), 69(3) and 69(4) of that Act. That application must be included in the arbitration claim form as explained in paragraph 12 of PD62.

10.2.2 In conformity with the practice of the Commercial Court, the TCC will normally consider any application for permission to appeal on paper

after the defendant has had an appropriate opportunity to answer in writing the application being raised.

10.2.3 The claimant must include within the claim form an application for permission to appeal. No separate application notice is required.

10.2.4 The claim form and supporting documents must be served on the defendant. The judge will not consider the merits of the application for permission to appeal until (a) a certificate of service has been filed at the appropriate TCC registry or court centre and (b), subject to any order for specific directions, a further **28 days** have elapsed, so as to enable the defendant to file written evidence in opposition. Save in exceptional circumstances, the only material admissible on an application for permission to appeal is (a) the award itself and any documents annexed to or necessary to understand the award and (b) evidence relevant to the issue whether any identified question of law is of general public importance: see the requirements of paragraph 12 of the PD62.

10.2.5 If necessary, the judge dealing with the application will direct an oral hearing with a date for the hearing. That hearing will, ordinarily, consist of brief submissions by each party. The judge dealing with the application will announce his decision in writing or, if a hearing has been directed, at the conclusion of the hearing with brief reasons if the application is refused.

10.2.6 Where the permission has been allowed in part and refused in part:

a) Only those questions for which permission has been granted may be raised at the hearing of the appeal.

b) Brief reasons will be given for refusing permission in respect of the other questions.

10.2.7 If the application is granted, the judge will fix the date for the appeal, and direct whether the same judge or a different judge shall hear the appeal.

10.3 Appeals where leave to appeal is not required

10.3.1 Parties to a construction contract should check whether they have agreed in the underlying contract that an appeal may be brought without leave, since some construction and engineering standard forms of contract so provide. If that is the case, the appeal may be set down for a substantive hearing without leave being sought. The

arbitration claim form should set out the clause or provision which it is contended provides for such agreement and the claim form should be marked "Arbitration Appeal – Leave not required".

10.3.2 Where leave is not required, the claimant should identify each question of law that it is contended arises out of the award and which it seeks to raise in an appeal under section 69. If the defendant does not accept that the questions thus identified are questions of law or maintains that they do not arise out of the award or that the appeal on those questions may not be brought for any other reason, then the defendant should notify the claimant and the court of its contentions and apply for a directions hearing before the judge nominated to hear the appeal on a date prior to the date fixed for the hearing of the appeal. Unless the judge hearing the appeal otherwise directs, the appeal will be confined to the questions of law identified in the arbitration claim form.

10.3.3 In an appropriate case, the judge may direct that the question of law to be raised and decided on the appeal should be reworded, so as to identify more accurately the real legal issue between the parties.

10.4 The hearing of the appeal

10.4.1 Parties should ensure that the court is provided only with material that is relevant and admissible to the point of law. This will usually be limited to the award and any documents annexed to the award: see *Hok Sport Ltd v Aintree Racecourse Ltd* [2003] BLR 155 at 160. However, the court should also receive any document referred to in the award, which the court needs to read in order to determine a question of law arising out of the award: see Kershaw Mechanical Services Ltd v Kendrick Construction Ltd [2006] EWHC 727 (TCC).

10.4.2 On receiving notice of permission being granted, or on issuing an arbitration claim form in a case where leave to appeal is not required, the parties should notify the court of their joint estimate or differing estimates of the time needed for the hearing of the appeal.

10.4.3 The hearing of the appeal is in open court unless an application (with notice) has previously been made that the hearing should be wholly or in part held in private and the court has directed that this course should be followed.

10.5 Section 68 applications – Serious Irregularity

10.5.1 In some arbitration claims arising out of construction and engineering arbitrations, a party will seek to appeal a question of law and, at the same time, seek to challenge the award under section 68 of the Arbitration Act 1996 on the grounds of serious irregularity. This raises questions of procedure, since material may be admissible in a section 68 application which is inadmissible on an application or appeal under section 69. Similarly, it may not be appropriate for all applications to be heard together. A decision is needed as to the order in which the applications should be heard, whether there should be one or more separate hearings to deal with them and whether or not the same judge should deal with all applications. Where a party intends to raise applications under both sections of the Arbitration Act 1996, they should be issued in the same arbitration claim form or in separate claim forms issued together. The court should be informed that separate applications are intended and asked for directions as to how to proceed.

10.5.2 The court will give directions as to how the section 68 and section 69 applications will be dealt with before hearing or determining any application. These directions will normally be given in writing but, where necessary or if such is applied for by a party, the court will hold a directions hearing at which directions will be given. The directions will be given following the service of any documentation by the defendant in answer to all applications raised by the claimant.

10.6 Successive awards and successive applications

10.6.1 Some construction and engineering arbitrations give rise to two or more separate awards issued at different times. Where arbitration applications arise under more than one of these awards, any second or subsequent application, whether arising from the same or a different award, should be referred to the same judge who has heard previous applications. Where more than one judge has heard previous applications, the court should be asked to direct to which judge any subsequent application is to be referred.

10.7 Other applications and Enforcement

10.7.1 All other arbitration claims, and any other matter arising in an appeal or an application concerning alleged serious irregularity, will be dealt with by the TCC in the same manner as is provided for in CPR Part 62, Practice Direction – Arbitration and Section O of The Commercial Court Guide.

10.7.2 All applications for permission to enforce arbitration awards are governed by Section III of Part 62 (rules 62.17- 62.19).

10.7.3 An application for permission to enforce an award in the same manner as a judgment or order of the court may be made in an arbitration claim form without notice and must be supported by written evidence in accordance with CPR 62.18(6). Two copies of the draft order must accompany the application, and the form of the order sought must correspond to the terms of the award.

10.7.4 An order made without notice giving permission to enforce the award:

- must give the defendant 14 days after service of the order (or longer, if the order is to be served outside the jurisdiction) to apply to set it aside;
- must state that it may not be enforced until after the expiry of the 14 days (or any longer period specified) or until any application to set aside the order has been finally disposed of: CPR 62.18(9) and (10).

10.7.5 On considering an application to enforce without notice, the judge may direct that, instead, the arbitration claim form must be served on specified parties, with the result that the application will then continue as an arbitration claim in accordance with the procedure set out in **Section I of Part 62**: see CPR 62.18(1)-(3).

Section 11. Disclosure

11.1 General

11.1.1 Disclosure in the TCC generally is subject to the disclosure rules set out in Practice Direction 57AD.

11.1.2 However, there are some exceptions of relevance to the TCC, as stated in section 1.4 of the Disclosure Pilot, namely: (1) Public Procurement claims; (2) proceedings within the Shorter and Flexible Trials Scheme; (3) proceedings within a fixed costs regime.

11.1.3 The provisions of CPR 31 and the Practice Directions supplementing it continue to apply to Public Procurement claims, as modified by the particular considerations applicable to such cases, as to which see Appendix H of this Guide. In relation to electronic disclosure, attention is drawn to the relevant provisions in CPR Part 31 and Practice Direction 31B: Disclosure of Electronic Documents. A protocol for e-disclosure prepared by TeCSA, TECBAR and the Society for Computers and Law was launched on 1 November 2013 which provides a procedure and guidance in relation to these matters. The protocol was developed in consultation with the judges of the TCC and is likely to be ordered by the court if the parties have not agreed on any alternative by the time of the first CMC. It is available on the TeCSA website.

11.1.4 Specific provisions in relation to disclosure are made in relation to proceedings in the Shorter and Flexible Trials Scheme and the Capped Costs List Pilot Scheme, to which reference should be made.

11.1.5 It is not intended to provide detailed guidance in relation to the Disclosure Pilot in this Guide. It will be necessary for parties and their legal representatives to familiarise themselves with its contents before and during the course of proceedings to which the Disclosure Pilot applies. The Chancellor of the High Court said in UTB v Sheffield United [2019] EWHC 914 (ChD) at [75] that the Disclosure Pilot is intended to effect a culture change, which operates along different lines to the CPR and is driven by reasonableness and proportionality. The Chancellor has also given clear guidance as to the operation of the Disclosure Pilot in *McParland v Whitebread* [2020] EWHC 298 (Ch).

11.1.6 The parties and their legal representatives should ensure that they are aware in particular of the duties which they are under in relation to disclosure under paragraph 3 of the Disclosure Pilot, of the requirement to provide Initial Disclosure under paragraph 5 of the Disclosure Pilot with their statements of case, and of the requirement to complete the Disclosure Review Document pursuant to paragraphs 7 and following of the Disclosure Pilot in advance of the first CMC.

11.1.7 When preparing for the first CMC the parties and their legal representatives should note that the blank standard directions form includes provision for disclosure to be given by reference to the Disclosure Review Document as agreed by the parties and approved by the court and/or as determined by the court in case of any disagreement.

11.1.8 The order made at the CMC will state the time for complying with any order for Extended Disclosure. If any party has a justified concern that another party may not be ready to comply with that order on the date specified it may apply to the court for an order permitting or requiring the parties to file their Disclosure certificates and Extended Disclosure Lists of Documents instead of serving such documents and producing the documents disclosed as required by paragraph 12.1 of the Disclosure Pilot. In such a case the application may include a request for such documents to be filed as a confidential document in the Electronic Working Case File in accordance with paragraph 5.2A of PD 51O.

Section 12. Witness statements and factual evidence for use at trial

12.1 Witness statements

12.1.1 Witness statements should be prepared generally in accordance with CPR Part 22.1 (documents verified by a statement of truth) and CPR Part 32 (provisions governing the evidence of witnesses) and their practice directions and particularly Practice Direction PD57AC and the Appendix to PD57AC.

12.1.2 A trial witness statement should contain only:

a) evidence as to matters of fact that need to be proved at trial by the evidence of witnesses in relation to one or more of the issues of fact to be decided at trial; and

b) the evidence as to such matters that the witness would be asked by the relevant party to give, and the witness would be allowed to give, in evidence in chief if they were called to give oral evidence at trial.

12.1.3 The witness statement must set out only matters of fact of which the witness has personal knowledge that are relevant to the case, and must identify by list what documents, if any, the witness has referred to or been referred to for the purpose of providing the evidence set out in their trial witness statement. Unless otherwise directed by the court, witness statements should not have annexed to them copies of other documents, save where a specific document needs to be annexed to the statement in order to make that statement reasonably intelligible.

12.1.4 The witness statement should be as concise as possible without omitting anything of significance, refer to documents only where necessary and should not:

- quote at any length from any document to which reference is made;
- seek to argue the case, either generally or on particular points;

- take the court through the documents in the case or set out a narrative derived from the documents, those being matters for argument; or
- include commentary on other evidence in the case (either documents or the evidence of other witnesses).

12.1.5 Even when prepared by a legal representative or other professional, the witness statement should be, so far as practicable, in the witness's own words.

12.1.6 The witness statement should indicate which matters are within the witness's own knowledge and which are matters of information and belief. Where the witness is stating matters of hearsay or of either information or belief, the source of that evidence should also be stated.

12.1.7 The witness must verify the statement by a statement of truth and confirm compliance with PD57AC.

12.1.8 The witness statement must be endorsed by a certificate of compliance by the legal representative, confirming compliance with PD57AC.

12.1.9 Sanctions for non-compliance include an order to produce a fresh witness statement, adverse cost orders and exclusion of the witness statement from evidence.

12.1.10 The order made at the CMC will state the time for complying with any order for exchange of witness statements. If any party has a justified concern that another party may not be ready to comply with that order on the date specified it may apply to the court for an order permitting or requiring the parties to file their witness statements instead of serving such documents. In such a case the application may include a request for such documents to be filed as a confidential document in the Electronic Working Case File in accordance with paragraph 5.2A of PD 51O.

12.2 Other matters concerned with witness statements

12.2.1 Foreign language

If a witness is not sufficiently fluent in English to give his or her evidence in English, the witness statement should be in his or her own language and an authenticated translation provided. Where the witness is not confident in the use of English, the statement may be drafted by others so as to express the witness's evidence as accurately as possible. In that situation, however, the witness statement should indicate that this process of interpolation has occurred and also should explain the extent of the witness's command of English and how and to what parts of the witness statement the process of interpolation has occurred.

12.2.2 Reluctant witness

Sometimes a witness is unwilling or not permitted or is unavailable to provide a witness statement before the trial. The party seeking to adduce this evidence should comply with the provisions of CPR 32.9 concerned with the provision of witness summaries.

12.2.3 Hearsay

Parties should keep in mind the need to give appropriate notice of their intention to rely on hearsay evidence or the contents of documents without serving a witness statement from their maker or from the originator of the evidence contained in those documents. The appropriate procedure is contained in CPR 33.1 – 33.5.

12.2.4 Supplementary Witness Statements

The general principle is that a witness should set out in their witness statement their complete evidence relevant to the issues in the case. The witness statement should not include evidence on the basis that it might be needed depending on what the other party's witnesses might say. The correct procedure in such cases is for the witness to provide a supplementary witness statement or, as necessary, for a new witness to provide a witness statement limited to responding to particular matters contained in the other party's witness statement and to seek permission accordingly. In some cases it might be appropriate for the court to provide for the service of supplementary witness statements as part of the order at the first case management conference.

12.2.5 Supplementary Evidence in Chief

The relevant witness evidence should be contained in the witness statements, or if appropriate witness summaries, served in advance of the hearing. Where, for whatever reason, this has not happened and the witness has relevant important evidence to give, particularly where the need for such evidence has only become apparent during the trial, the judge has a discretion to permit supplementary evidence in chief.

12.3 Cross-referencing

12.3.1 Where a substantial number of documents will be adduced in evidence or contained in the trial bundles, it is of considerable assistance to the court and to all concerned if the relevant page references are annotated in the margins of the copy witness statements. It is accepted that this is a time-consuming exercise, the need for which will be considered at the PTR, and it will only be ordered where it is both appropriate and proportionate to do so. See further paragraphs 14.5.1 and 15.2.3 below.

12.4 Video link

12.4.1 If any witness (whose witness statement has been served and who is required to give oral evidence) is located outside England and Wales or would find a journey to court inconvenient or impracticable, such evidence may be given via a video link with the Court's permission. Thought should be given before the PTR to the question whether this course would be appropriate and proportionate. Such evidence is regularly received by the TCC and facilities for its reception, whether in appropriate court premises or at a convenient venue outside the court building, are now readily available.

12.4.2 Any application for a video link direction and any question relating to the manner in which such evidence is to be given should be dealt with at the PTR. Attention is drawn to the Video-conferencing Protocol set out at Annex 3 to the Practice Direction supplementing CPR Part 32 - Evidence. The procedure described in Annex 3 together with the guidance in Appendix K is followed by the TCC.

Section 13. Expert evidence

13.1 Nature of expert evidence

13.1.1 Expert evidence is evidence as to matters of a technical or scientific nature and will generally include the opinions of the expert. The quality and reliability of expert evidence will depend upon (a) the experience and the technical or scientific qualifications of the expert and (b) the accuracy of the factual material that is used by the expert for his assessment. Expert evidence is dealt with in detail in CPR Part 35 ("Experts and Assessors") and in the Practice Direction supplementing Part 35. Particular attention should be paid to all these provisions, given the detailed reliance on expert evidence in most TCC actions. Particular attention should also be paid to the "Protocol for the instruction of experts to give evidence in civil claims" annexed to Practice Direction 35 – Experts and Assessors (it should be noted that this Protocol is expected to be replaced at some point with the "Guidance for the instruction of experts to give evidence in Civil claims").

13.1.2 The attention of the parties is drawn to the specific requirements in relation to the terms of the expert's declaration at the conclusion of the report.

13.1.3 The provisions in CPR Part 35 are concerned with the terms upon which the court may receive expert evidence. These provisions are principally applicable to independently instructed expert witnesses. In cases where a party is a professional or a professional has played a significant part in the subject matter of the action, opinion evidence will almost inevitably be included in the witness statements. Any points arising from such evidence (if they cannot be resolved by agreement) can be dealt with by the judge on an application or at the PTR.

13.2 Control of expert evidence

13.2.1 Expert evidence is frequently needed and used in TCC cases. Experts are often appointed at an early stage. Most types of case heard in the TCC involve more than one expertise and some, even when the dispute is concerned with relatively small sums, involve several different experts. Such disputes include those concerned with building failures and defects, delay and disruption, dilapidations, subsidence caused by tree roots and the supply of software systems. However, given the cost of preparing such evidence, the parties and

the court must, from the earliest pre-action phase of a dispute until the conclusion of the trial, seek to make effective and proportionate use of experts. The scope of any expert evidence must be limited to what is necessary for the requirements of the particular case.

13.2.2 At the first CMC, or thereafter, the court may be asked to determine whether the cost of instructing experts is proportionate to the amount at issue in the proceedings, and the importance of the case to the parties. When considering an application for permission to call an expert, the court is to be provided with estimates of the experts' costs: see CPR 35.4(2). The permission may limit the issues to be considered by the experts: see CPR 35.4(3). This should ordinarily be linked to the party's costs budget.

13.2.3 The parties should also be aware that the court has the power to limit the amount of the expert's fees that a party may recover from another party pursuant to **CPR 35.4 (4)**. Thus, where the costs of an expert are payable by one party to another, the amount recovered by the receiving party may be less than full costs reasonably incurred.

When exercising its discretion as to costs, the court must have regard to all the circumstances, including the conduct of all the parties (CPR 44.2(4)(a)). In this context, the "conduct of the parties" could include the unreasonable raising and pursuing of issues requiring expert evidence and any failure to comply with any pre-action protocol relating to such evidence (CPR 44.2(5)). Note also CPR 44.4 (factors to be taken into account in deciding amount of costs.) If parties instruct experts without waiting for the court to give permission they are at risk as to recovering the costs if the court subsequently decides that expert evidence is not necessary, see Coker v Barkland Cleaning Ltd, 6 December 1999, unrep., CA. Parties should ensure that the costs of experts are proportionate, see Kranidiotes v Paschali [2001] EWCA Civ 357; [2001] C.P. Rep. 81, CA.

13.3 Prior to and at the first CMC

13.3.1 There is an unresolved tension arising from the need for parties to instruct and rely on expert opinions from an early pre-action stage and the need for the court to seek, wherever possible, to reduce the cost of expert evidence by dispensing with it altogether or by encouraging the appointment of jointly instructed experts. This tension arises because the court can only consider directing joint appointments or limiting expert evidence long after a party may have incurred the cost of obtaining expert evidence and have already relied on it. Parties should be aware of this tension. So far as possible, the parties

should avoid incurring the costs of expert evidence on uncontroversial matters or matters of the kind referred to in Section 13.4.3 below, before the first CMC has been held.

13.3.2 In cases where it is not appropriate for the court to order a single joint expert, it is imperative that, wherever possible, the parties' experts co-operate fully with one another. This is particularly important where tests, surveys, investigations, sample gathering or other technical methods of obtaining primary factual evidence are needed. It is often critical to ensure that any laboratory testing or experiments are carried out by the experts together, pursuant to an agreed procedure. Alternatively, the respective experts may agree that a particular firm or laboratory shall carry out specified tests or analyses on behalf of all parties.

13.3.3 Parties should, where possible, disclose initial or preliminary reports to opposing parties prior to any pre-action protocol meeting, if only on a without prejudice basis. Such early disclosure will assist in early settlement or mediation discussions and in helping the parties to define and confine the issues in dispute with a corresponding saving in costs.

13.3.4 Before and at the first CMC and at each subsequent pre-trial stage of the action, the parties should give careful thought to the following matters:

- The number, disciplines and identity of the expert witnesses they are considering instructing as their own experts or as single joint experts.
- The precise issues which each expert is to address in his/her reports, to discuss without prejudice with opposing parties' experts and give evidence about at the trial.
- The timing of any meeting, agreed statement or report.
- Any appropriate or necessary tests, inspections, sampling or investigations that could be undertaken jointly or in collaboration with other experts. Any such measures should be preceded by a meeting of relevant experts at which an appropriate testing or other protocol is devised. This would cover (i) all matters connected with the process in question and its recording and (ii) the sharing and agreement of any resulting data or evidence.

- Any common method of analysis, investigation or reporting where it is appropriate or proportionate that such should be adopted by all relevant experts. An example of this would be an agreement as to the method to be used to analyse the cause and extent of any relevant period of delay in a construction project, where such is in issue in the case.
- The availability and length of time that experts will realistically require to complete the tasks assigned to them.

(Note that the amendment to CPR 35.4(3) permits the order granting permission to specify the issues which the expert evidence should address.)

13.3.5 In so far as the matters set out in the previous paragraph cannot be agreed, the court will give appropriate directions. In giving permission for the reception of any expert evidence, the court will ordinarily order the exchange of such evidence, with a definition of the expert's area of expertise and a clear description of the issues about which that expert is permitted to give evidence. It is preferable that, at the first CMC or as soon as possible thereafter, the parties should provide the court with the name(s) of their expert(s).

13.4 Single joint experts

13.4.1 An order may be made, at the first CMC or thereafter, that a single joint expert should address particular issues between the parties. Such an order would be made pursuant to CPR Parts 35.7 and **35.8**.

13.4.2 Single joint experts are not usually appropriate for the principal liability disputes in a large case, or in a case where considerable sums have been spent on an expert in the pre-action stage. They are generally inappropriate where the issue involves questions of risk assessment or professional competence.

13.4.3 On the other hand, single joint experts can often be appropriate:

- in low value cases, where technical evidence is required but the cost of adversarial expert evidence may be prohibitive;
- where the topic with which the single joint expert's report deals is a separate and self-contained part of the case, such as the valuation of particular heads of claim;
- where there is a subsidiary issue, which requires particular expertise of a relatively uncontroversial nature to resolve;

- where testing or analysis is required, and this can conveniently be done by one laboratory or firm on behalf of all parties.

13.4.4 Where a single joint expert is to be appointed or is to be directed by the court, the parties should attempt to devise a protocol covering all relevant aspects of the appointment (save for those matters specifically provided for by CPR 35.6, 35.7 and 35.8).

13.4.5 The matters to be considered should include: any ceiling on fees and disbursements that are to be charged and payable by the parties; how, when and by whom fees will be paid to the expert on an interim basis pending any costs order in the proceedings; how the expert's fees will be secured; how the terms of reference are to be agreed; what is to happen if terms of reference cannot be agreed; how and to whom the jointly appointed expert may address further enquiries and from whom he should seek further information and documents; the timetable for preparing any report or for undertaking any other preparatory step; the possible effect on such timetable of any supplementary or further instructions. Where these matters cannot be agreed, an application to the court, which may often be capable of being dealt with as a paper application, will be necessary.

13.4.6 The usual procedure for a single joint expert will involve:

- The preparation of the expert's instructions. These instructions should clearly identify those issues or matters where the parties are in conflict, whether on the facts or on matters of opinion. If the parties can agree joint instructions, then a single set of instructions should be delivered to the expert. However, CPR 35.8 expressly permits separate instructions and these are necessary where joint instructions cannot be agreed.

- The preparation of the agreed bundle, which is to be provided to the expert. This bundle must include **CPR 35**, the Practice Direction PD 35 and Section 13 of the TCC Guide.

- The preparation and production of the expert's report.

- The provision to the expert of any written questions from the parties, which the expert must answer in writing.

13.4.7 In most cases the single joint expert's report, supplemented by any written answers to questions from the parties, will be sufficient for the purposes of the trial. Sometimes, however, it is necessary for a single joint expert to be called to give oral evidence. In those circumstances, the usual practice is for the judge to call the expert and then allow

each party the opportunity to cross-examine. Such cross-examination should be conducted with appropriate restraint, since the witness has been instructed by the parties. Where the expert's report is strongly in favour of one party's position, it may be appropriate to allow only the other party to cross-examine.

13.5 Meetings of experts

13.5.1 The desirability of holding without prejudice meetings between experts at all stages of the pre-trial preparation should be kept in mind. The desired outcome of such meetings is to produce a document whose contents are agreed and which defines common positions or each expert's differing position. The purpose of such meetings includes the following:

- to provide to the expert any written questions from the parties, which the expert must answer in writing;
- to define a party's technical case and to inform opposing parties of the details of that case;
- to clear up confusion and to remedy any lack of information or understanding of a party's technical case in the minds of opposing experts;
- to identify the issues about which any expert is to give evidence;
- to narrow differences and to reach agreement on as many "expert" issues as possible; and
- to assist in providing an agenda for the trial and for cross examination of expert witnesses, and to limit the scope and length of the trial as much as possible.

13.5.2 In many cases it will be helpful for the parties' respective legal advisors to provide assistance as to the agenda and topics to be discussed at an experts' meeting. However, (save in exceptional circumstances and with the permission of the judge) the legal advisors must not attend the meeting. They must not attempt to dictate what the experts say at the meeting.

13.5.3 Experts' meetings can sometimes usefully take place at the site of the dispute. Thought is needed as to who is to make the necessary arrangements for access, particularly where the site is occupied or in the control of a non-party. Expert meetings are often more productive, if (a) the expert of one party (usually the claimant) is appointed as

chairman and (b) the experts exchange in advance agendas listing the topics each wishes to raise and identifying any relevant material which they intend to introduce or rely on during the meeting.

13.5.4 It is generally sensible for the experts to meet at least once before they exchange their reports.

13.6 Experts' Joint Statements

13.6.1 Following the experts' meetings, and pursuant to CPR 35.12 (3), the judge will almost always require the experts to produce a signed statement setting out the issues which have been agreed, and those issues which have not been agreed, together with a short summary of the reasons for their disagreement. In any TCC case in which expert evidence has an important role to play, this statement is a critical document and it must be as clear as possible.

13.6.2 It should be noted that, even where experts have been unable to agree very much, it is of considerable importance that the statement sets out their disagreements and the reasons for them. Such disagreements as formulated in the joint statement are likely to form an important element of the agenda for the trial of the action.

13.6.3 Whilst the parties' legal advisors may assist in identifying issues which the statement should address, those legal advisors must not be involved in either negotiating or drafting the experts' joint statement. Legal advisors should only invite the experts to consider amending any draft joint statement in exceptional circumstances where there are serious concerns that the court may misunderstand or be misled by the terms of that joint statement. Any such concerns should be raised with all experts involved in the joint statement.

13.7 Experts' Reports

13.7.1 It is the duty of an expert to help the court on matters within his expertise. This duty overrides any duty to his client: CPR 35.3. Each expert's report must be independent and unbiased. The Pre-Action Protocol for Construction and Engineering Disputes contain provisions as to experts in TCC cases and accordingly Annex C to the Practice Direction – Pre-Action Conduct does not apply: see The Practice Direction – Pre-Action Conduct.

13.7.2 The parties must identify the issues with which each expert should deal in his or her report. Thereafter, it is for the expert to draft and decide upon the detailed contents and format of the report, so as to

conform to the Practice Direction supplementing CPR Part 35 and the Protocol for the Instruction of Experts to give Evidence in Civil Claims. It is appropriate, however, for the party instructing an expert to indicate that the report (a) should be as short as is reasonably possible; (b) should not set out copious extracts from other documents; (c) should identify the source of any opinion or data relied upon; and (d) should not annex or exhibit more than is reasonably necessary to support the opinions expressed in the report. In addition, as set out in paragraph 15.2 of the Protocol for the Instruction of Experts to give Evidence in Civil Claims, legal advisors may also invite experts to consider amendments to their reports to ensure accuracy, internal consistency, completeness, relevance to the issues or clarity of reports.

13.8 Presentation of Expert Evidence

13.8.1 The purpose of expert evidence is to assist the court on matters of a technical or scientific nature. Particularly in large and complex cases where the evidence has developed through a number of experts' joint statements and reports, it is often helpful for the expert at the commencement of his or her evidence to provide the court with a summary of their views on the main issues. This can be done orally or by way of a PowerPoint or similar presentation. The purpose is not to introduce new evidence but to explain the existing evidence.

13.8.2 The way in which expert evidence is given is a matter to be considered at the PTR. However, where there are a number of experts of different disciplines the court will consider the best way for the expert evidence to be given. It is now quite usual for all expert evidence to follow the completion of the witness evidence from all parties. At that stage there are a number of possible ways of presenting evidence including:

- For one party to call all its expert evidence, followed by each party calling all of its expert evidence.
- For one party to call its expert in a particular discipline, followed by the other parties calling their experts in that discipline. This process would then be repeated for the experts of all disciplines.
- For one party to call its expert or experts to deal with a particular issue, followed by the other parties calling their expert or experts to deal with that issues. This process would then be repeated for all the expert issues.
- For the experts for all parties to be called to give concurrent evidence, colloquially referred to as "hot-tubbing". When this

method is adopted there is generally a need for experts to be cross-examined on general matters and key issues before they are invited to give evidence concurrently on particular issues. Procedures vary but, for instance, a party may ask its expert to explain his or her view on an issue, then ask the other party's expert for his or her view on that issue and then return to that party's expert for a comment on that view. Alternatively, or in addition, questions may be asked by the judge or the experts themselves may each ask the other questions. The process is often most useful where there are a large number of items to be dealt with and the procedure allows the court to have the evidence on each item dealt with on the same occasion rather than having the evidence divided with the inability to have each expert's views expressed clearly. Frequently, it allows the extent of agreement and reason for disagreement to be seen more clearly. The giving of concurrent evidence may be consented to by the parties and the judge will consider whether, in the absence of consent, any modification is required to the procedure for giving concurrent evidence set out in the CPR (at PD35, paragraph 11).

Section 14. The Pre-Trial Review

14.1 Timing and Attendance

14.1.1 The Pre-Trial Review ("PTR") will usually be fixed for a date that is 4-6 weeks in advance of the commencement of the trial itself. It is vital that the advocates, who are going to conduct the trial, should attend the PTR and every effort should be made to achieve this. It is usually appropriate for the PTR to be conducted by way of an oral hearing (in person, remote or hybrid hearing) or, at the very least, a telephone conference, so that the judge may raise matters of trial management even if the parties can agree beforehand any outstanding directions and the detailed requirements for the management of the trial. In appropriate cases, e.g. where the amount in issue is disproportionate to the costs of a full trial, the judge may wish to consider with the parties whether there are other ways in which the dispute might be resolved. However there may be some cases where the judge is prepared to dispense with the need for a PTR so long as a request is made in sufficiently good time before the PTR to enable a decision to be made.

14.2 Documents

14.2.1 The parties must complete the PTR Questionnaire (a copy of which is at Appendix C attached) and return it in good time to the court. In addition, the judge may order the parties to provide other documents for the particular purposes of the PTR.

14.2.2 In all cases, the advocates for each party should each prepare a Note for the PTR, which:

- addresses any outstanding directions or interlocutory steps still to be taken;
- explains the issues for determination at the trial and the evidence that will be required to determine those issues;
- addresses the most efficient way in which those issues might be dealt with at the trial, including all questions of timetabling of witnesses and speeches.

In any case proceeding in the High Court, the Notes should be exchanged and provided to the court at the latest by 4pm two clear working days before the PTR to enable the other parties to have a reasonable opportunity to deal with any points raised at the PTR itself.

In cases proceeding in the County Court the Notes should be exchanged and provided to the court at the latest by 4 pm one clear working day before the PTR.

14.2.3 The parties should also ensure that, for the PTR, the court has an up-to-date permanent case management bundle, together with a bundle of the evidence (factual and expert) that has been exchanged. This Bundle should also be made available to the court **by 4 pm one clear day before the PTR**.

14.3 Outstanding Directions

14.3.1 It can sometimes be the case that there are still outstanding interlocutory steps to be taken at the time of the PTR. That will usually mean that one, or more, of the parties has not complied with an earlier direction of the court. In that event, the court is likely to require prompt compliance, and may make costs orders to reflect the delays.

14.3.2 Sometimes a party will wish to make an application to be heard at the same time as the PTR. Such a practice is unsatisfactory, because it uses up time allocated for the PTR, and it gives rise to potential uncertainty close to the trial date. It is always better for a party, if it possibly can, to make all necessary applications well in advance of the PTR. If that is not practicable, the court should be asked to allocate additional time for the PTR, in order to accommodate specific applications. If additional time is not available, such applications will not generally be entertained.

14.4 Issues

14.4.1 The parties should provide the judge at the PTR with an updated list of the main issues for the forthcoming trial, agreed if possible. It should include, where appropriate, a separate list of technical issues to be covered by the experts. As with the list of issues to be provided for the CMC, the list of issues should not be extensive and should focus on the key issues. It is provided as a working document to assist in the management of the trial and not as a substitute for the pleadings.

14.4.2 If the parties are unable to agree the precise formulation of the issues, they should provide to the court their respective formulations. Because the list of issues should focus on the key issues the opportunity for disagreement should be minimised. The judge will note the parties' formulations, but, because the issues are those which arise on the pleadings, is unlikely to give a ruling on this matter at the PTR unless the different formulations show that there is a dispute as to the pleaded case.

14.5 Timetabling and Trial Logistics

14.5.1 Much of the PTR will be devoted to a consideration of the appropriate timetable for the trial, and other logistical matters. These will commonly include:

- Directions (or the revisiting of directions already given at the CMC) in respect of the timing and format of the oral and written openings and closings and any necessary reading time for the judge.
- Sequence of oral evidence; for example, whether as is the usual practice in the TCC all the factual evidence should be called before the expert evidence.
- Timetabling of oral evidence. To facilitate this exercise, the advocates should, after discussing the matter and whether some evidence can be agreed, provide a draft timetable indicating which witnesses need to be cross-examined and the periods during it is proposed that they should attend. Such timetables are working documents.
- The manner in which expert evidence is to be presented: see paragraph 13.8 above.
- Whether any form of time limits should be imposed. (Since the purpose of time limits is to ensure that that the costs incurred and the resources devoted to the trial are proportionate, this is for the benefit of the parties. The judge will endeavour to secure agreement to any time limits imposed.)
- Directions in respect of the trial bundle: when it should be agreed and lodged; the contents and structure of the bundle; avoidance of duplication; whether witness statements and/or expert reports should be annotated with cross references to page numbers in the main bundle (see paragraph 12.3 above); and similar matters.
- If there is a hard copy bundle, the normal practice will be that pleadings, witness statements and the body of the experts' reports will be printed single-sided. Annexes to reports, contracts, chronological documents and other documents may be printed single-sided or double-sided depending on the use likely to be made of the documents at trial. For example, letters and e-mails are likely to be easier to read and annotate if single-sided but technical specifications from which only one or two

pages will be referred to may conveniently be printed double-sided. Where there is an electronic bundle, the court may wish to have some key documents in hard copy.

- Whether there should be a core bundle; if so how it should be prepared and what it should contain. (The court will order a core bundle in any case where (a) there is substantial documentation and (b) having regard to the issues it is appropriate and proportionate to put the parties to cost of preparing a core bundle). A typical core bundle will contain dividers representing each chronological bundle in which copies of key documents will be placed (keeping their original pagination).
- Rules governing any email communication during trial between the parties and the court.
- Any directions relating to the use of electronic document management systems at trial (this subject to agreement between the parties). The judge may request an electronic pdf copy of the trial bundle even if no document management system is being used and may also request copies of certain documents such as openings, statements of case, witness statements and expert reports in electronic word format to assist in preparation for trial and for the production of a written judgment.
- Any directions relating to the use of simultaneous transcription at trial (this subject to agreement between the parties).
- Whether there should be a view by the judge.
- The form and timing of closing submissions including, in substantial and complex cases, time for preparation and pre-reading of written closing submissions before delivery of oral closing submissions.
- Whether there is a need for a special court (because of the number of parties or any particular facilities required).
- Whether there is need for evidence by video link.
- Any applications for review or variation of costs budgets.

14.5.2 The topics identified in paragraph 14.5.1 are discussed in greater detail in section 15 below.

Section 15. The trial

15.1 Arrangements prior to the trial – witnesses

15.1.1 Prior to the trial the parties' legal representatives should seek to agree on the following matters, in so far as they have not been resolved at the PTR: the order in which witnesses are to be called to give evidence; which witnesses are not required for cross examination and whose evidence in consequence may be adduced entirely from their witness statements; the timetable for the trial and the length of time each advocate is to be allowed for a brief opening speech. When planning the timetable, it should be noted that trials normally take place on Mondays to Thursdays, since Fridays are reserved for applications.

15.1.2 The witnesses should be notified in advance of the trial as to: (a) when each is required to attend court and (b) the approximate period of time for which he or she will be required to attend.

15.1.3 It is the parties' responsibility to ensure that their respective witnesses are ready to attend court at the appropriate time. It is never satisfactory for witnesses to be interposed, out of their proper place, and without good reason and, even where it is unavoidable, the relevant party must notify the other side and the Court as soon as they become aware of the issue. It would require exceptional circumstances for the trial to be adjourned for any period of time because of the unavailability of a witness.

15.2 Opening notes, trial bundle and oral openings

15.2.1 Opening notes

Unless the court has ordered otherwise, each party's advocate should provide an opening note, which outlines that party's case in relation to each of the issues identified at the PTR, including, where relevant, issues of law. Each opening note should indicate which documents (giving their page numbers in the trial bundle) that party considers that the judge should pre-read and, where relevant, the key paragraphs. The claimant's opening note should include a neutral summary of the background facts, as well as, where it will be of assistance, a neutral chronology and cast list. The other parties' opening notes should usually be shorter and should assume familiarity with the factual background. In general terms, all opening notes should be of modest length and proportionate to the size and

complexity of the case. Subject to any specific directions at the PTR, all opening notes must be served two clear working days before the start of the trial. If the opening notes are served and exchanged in pdf or equivalent format, each party should also provide a Word version to the judge's clerk for the benefit and use of the judge.

15.2.2 Trial bundles

Subject to any specific directions at the PTR, the trial bundles should be delivered to court at least three working days before the hearing. It is helpful for the party delivering the trial bundles to liaise in advance with the judge's clerk, in order to discuss practical arrangements, particularly when a large number of bundles are to be delivered. The parties should provide for the court an agreed index of all trial bundles. There should also be an index at the front of each bundle. This should be a helpful guide to the contents of that bundle. (An interminable list, itemising every letter or sheet of paper is not a helpful guide; nor are bland descriptions, such as "exhibit "JT3", of much help to the bundle user.) The spines and inside covers of any hard copy bundles should be clearly labelled with the bundle number set out in a large prominent format and a brief description.

15.2.3 As a general rule the trial bundles should be clearly divided between statements of case, orders, contracts, witness statements, expert reports and correspondence/minutes of meetings, along with an agreed authorities bundle. The correspondence/minutes of meetings should be in a separate bundle or bundles and in chronological order. Documents should only be included if they are relevant to the issues in the case or helpful as background material. There is no need to include every disclosed document in the chronological bundle and parties should seek to agree a chronological bundle of documents likely to be referred to or required for context. Documents should not be duplicated, and unnecessary duplication of e-mail threads should be avoided where possible. Exhibits to witness statements should generally be omitted, since the documents to which the witnesses are referring will be found elsewhere in the bundles. References within witness statements to exhibits should be updated to reflect the location of the exhibit in the trial bundle. This can be done by hand or typed insert into the margin of the statement. The bundles of contract documents and correspondence/minutes of meetings should be paginated, so that every page has a discrete number. If this stretches to many lever arch files, it is likely to be more accessible if each file has its own internal numbering, rather than there being continuous pagination across thousands of documents. The other bundles could be dealt with in one of two ways:

- The statements of case, witness statements and expert reports could be placed in bundles and continuously paginated.
- Alternatively, the statements of case, witness statements and expert reports could be placed behind tabbed divider cards, and then the internal numbering of each such document can be used at trial. If the latter course is adopted, it is vital that the internal page numbering of each expert report continues sequentially through the appendices to that report.

The court encourages the parties to provide original copies of expert reports in this way so that any photographs, plans or charts are legible in their original size and, where appropriate, in colour. In such cases sequential numbering of every page including appendices is essential.

The ultimate objective is to create trial bundles which are user friendly and in which any page can be identified with clarity and brevity (e.g. "bundle G page 273" or "defence page 3" or "Dr Smith page 12"). The core bundle, if there is one (as to which see paragraph 14.5.1 above), will be a separate bundle with its own pagination or contain documents from other bundles retaining the original bundle number behind a divider marked with the bundle number.

15.2.4 In document heavy cases the parties should consider the use of an electronic document management system that can be used at the trial. In order for the most effective use to be made of such a system, it is a matter that may require consideration at an early stage in the litigation. If there is an electronic trial bundle, this should be made available to the judge in advance of the trial and should form part of the arrangements made with the judge's clerk as referred to in paragraph 15.2.2 above.

15.2.5 Opening speeches

Subject to any directions made at the PTR, each party will be permitted to make an opening speech. These speeches should be prepared and presented on the basis that the judge will have pre-read the opening notes and the documents identified by the parties for pre-reading. The claimant's advocate may wish to highlight the main features of the claimant's case and/or to deal with matters raised in the other parties' opening notes. The other parties' advocates will then make shorter opening speeches, emphasising the main features of their own cases and/or responding to matters raised in the claimant's opening speech.

15.2.6 It is not usually necessary or desirable to embark upon legal argument during opening speeches. It is, however, helpful to foreshadow those legal arguments which (a) explain the relevance of particular parts of the evidence or (b) will assist the judge in following a party's case that is to be presented during the trial. In some cases, the legal issues are at the heart of the dispute, in which case it may then be appropriate for a more in-depth legal analysis to be included within an opening speech.

15.2.7 Narrowing of issues

Experience shows that often the issues between the parties progressively narrow as the trial advances. Sometimes this process begins during the course of opening speeches. Weaker contentions may be abandoned and responses to those contentions may become irrelevant. The advocates will co-operate in focussing their submissions and the evidence on the true issues between the parties, as those issues are thrown into sharper relief by the adversarial process.

15.3 Simultaneous transcription

15.3.1 Many trials in the TCC, including the great majority of the longer trials, are conducted with simultaneous transcripts of the evidence being provided. There are a number of transcribing systems available. It is now common for a system to be used involving simultaneous transcription onto screens situated in court. However, systems involving the production of the transcript in hard or electronic form at the end of the day or even after a longer period of time are also used. The parties must make the necessary arrangements with one of the companies who provide this service. The court can provide a list, on request, of all companies who offer such a service.

15.3.2 In long trials or those which involve any significant amount of detailed or technical evidence, simultaneous transcripts are helpful. Furthermore, they enable all but the shortest trials to be conducted so as to reduce the overall length of the trial appreciably, since the judge does not have to note the evidence or submissions in longhand as the trial proceeds. Finally, a simultaneous transcript makes the task of summarising a case in closing submissions and preparing the judgment somewhat easier. It reduces both the risk of error or omission and the amount of time needed to prepare a reserved judgment.

15.3.3 If possible, the parties should have agreed at or before the PTR whether a simultaneous transcript is to be employed. It is usual for

parties to agree to share the cost of a simultaneous transcript as an interim measure pending the assessment or agreement of costs, when this cost is assessable and payable as part of the costs in the case. Sometimes, a party cannot or will not agree to an interim cost sharing arrangement. If so, it is permissible for one party to bear the cost, but the court cannot be provided with a transcript unless all parties have equal access to the transcript. Unlike transcripts for use during an appeal, there is no available means of obtaining from public funds the cost of a transcript for use at the trial.

15.4 Time limits

15.4.1 Generally trials in the TCC are conducted under some form of time limit arrangement. Several variants of time limit arrangements are available, but the TCC has developed the practice of imposing flexible guidelines in the form of directions as to the sharing of the time allotted for the trial. These are not mandatory but an advocate should ordinarily be expected to comply with them.

15.4.2 The practice is, in the usual case, for the court to fix, or for the parties to agree, at the PTR or before trial an overall length of time for the trial and overall lengths of time within that period for the evidence and submissions. The part of those overall lengths of time that will be allocated to each party must then be agreed or directed.

15.4.3 The amount of time to be allotted to each party will not usually be the same. The guide is that each party should have as much time as is reasonably needed for it to present its case and to test and cross examine any opposing case, but no longer.

15.4.4 Before the trial, the parties should agree a running order of the witnesses and the approximate length of time required for each witness. A trial timetable should be provided to the court when the trial starts and, in long trials, regularly updated.

15.4.5 The practice of imposing a strict guillotine on the examination or cross examination of witnesses, is not normally appropriate. Flexibility is encouraged, but the agreed or directed time limits should not ordinarily be exceeded without good reason. It is unfair on a party, if that party's advocate has confined cross-examination to the agreed time limits, but an opposing party then greatly exceeds the corresponding time limits that it has been allocated.

15.4.6 An alternative form of time limit, which is sometimes agreed between the parties and approved by the court, is the "chess clock

arrangement". The available time is divided equally between the parties, to be used by the parties as they see fit. Thus each side has X hours. One representative on each side operates the chess clock. The judge has discretion "to stop the clock" in exceptional circumstances. A chess clock arrangement is only practicable in a two-party case, but a similar system could be adopted for multi-party disputes.

15.5 Oral evidence

15.5.1 Evidence in chief is ordinarily adduced by the witness confirming on oath the truth and accuracy of the previously served witness statement or statements. A limited number of supplementary oral questions will usually be allowed (a) to give the witness an opportunity to become familiar with the procedure and (b) to cover points omitted by mistake from the witness statement or which have arisen subsequent to its preparation.

15.5.2 In some cases, particularly those involving allegations of dishonest, disreputable or culpable conduct or where significant disputes of fact are not documented or evidenced in writing, it is desirable that the core elements of a witness's evidence-in-chief are given orally. The giving of such evidence orally will often assist the court in assessing the credibility or reliability of a witness.

15.5.3 If any party wishes such evidence to be given orally, a direction should be sought either at the PTR or during the openings to that effect. Where evidence in chief is given orally, the rules relating to the use of witness statements in cross-examination and to the adducing of the statement in evidence at any subsequent stage of the trial remain in force and may be relied on by any party.

15.5.4 It is usual for all evidence of fact from all parties to be adduced before expert evidence and for the experts to give evidence in groups with all experts in a particular discipline giving their evidence in sequence: see paragraph 13.8.2 above for ways for expert evidence to be given. Usually, but not invariably, the order of witnesses will be such that the claimant's witnesses give their evidence first, followed by all the witnesses for each of the other parties in turn. If a party wishes a different order of witnesses to that normally followed, the agreement of the parties or a direction from the judge must be obtained in advance.

15.5.5 In a multi-party case, attention should be given (when the timetable is being discussed) to the order of cross-examination and to the extent to which particular topics will be covered by particular cross-

examiners. Where these matters cannot be agreed, the order of cross-examination will (subject to any direction of the judge) follow the order in which the parties are set out in the pleadings. The judge will seek to limit cross examination on a topic which has been covered in detail by a preceding cross examination.

15.5.6 In preparing witness statements and in ascertaining what evidence a witness might give in an original or supplementary witness statement or as supplementary evidence-in-chief, lawyers may discuss the evidence to be given by a witness with that witness. The coaching of witnesses or the suggestion of answers that may be given, either in the preparation of witness statements or before a witness starts to give evidence, is not permitted. In relation to the process of giving evidence, witness familiarisation is permissible, but witness coaching is not. The boundary between witness familiarisation and witness coaching is discussed in the context of criminal proceedings by the Court of Appeal in R v Momodou [2005] EWCA Crim 177 at [61] – [62]. Once a witness has started giving evidence, that witness cannot discuss the case or their evidence either with the lawyers or with anyone else until they have finally left the witness box. Occasionally a dispensation is needed (for example, an expert may need to participate in an experts' meeting about some new development). In those circumstances the necessary dispensation will either be agreed between the advocates or ordered by the judge.

15.5.7 Where a party is represented by more than one advocate at the trial, the advocates may share the oral advocacy including submissions and examination of witnesses. The court encourages oral advocacy to be undertaken by junior advocates. However, the permission of the court is required for more than one advocate for a party to cross-examine the same witness.

15.6 Submissions during the trial

15.6.1 Submissions and legal argument should be kept to a minimum during the course of the trial. Where these are necessary, (a) they should, where possible, take place when a witness is not giving evidence and (b) the judge should be given forewarning of the need for submissions or legal argument. Where possible, the judge will fix a time for these submissions outside the agreed timetable for the evidence.

15.7 Closing submissions

15.7.1 The appropriate form of closing submissions may have already been addressed at the PTR, but, if not, that will be determined during the course of the trial. Those submissions may take the form of (a) oral closing speeches or (b) written submission alone or (c) written submissions supplemented by oral closing speeches. In shorter or lower value cases, oral closing speeches immediately after the evidence may be the most cost-effective way to proceed. Alternatively, if the evidence finishes in the late afternoon, a direction for written closing submissions to be delivered by specified (early) dates may avoid the cost of a further day's court hearing. In longer and heavier cases the judge may (in consultation with the advocates) set a timetable for the subsequent exchange of written submissions (alternatively, by sequential submissions) followed by an oral hearing. In giving directions for oral and/or written closing submissions, the judge will have regard to the circumstances of the case and the overriding objective.

15.7.2 It is helpful if, in advance of preparing closing submissions, the parties can agree on the principal topics or issues that are to be covered. It is also helpful for the written and oral submissions of each party to be structured so as to cover those topics in the same order.

15.7.3 It is both customary and helpful for the judge to be provided with electronic or hard copies of each authority and statutory provision that is to be cited in closing submissions.

15.8 Views

15.8.1 It is sometimes necessary or desirable for the judge to be taken to view the subject-matter of the case. In normal circumstances, such a view is best arranged to take place immediately after the openings and before the evidence is called. However, if the subject matter of the case is going to be covered up or altered prior to the trial, the view must be arranged earlier. In that event, it becomes particularly

important to avoid a change of judge. Accordingly, the court staff will note on the trial diary the fact that the assigned judge has attended a view. In all subsequent communications between the parties and court concerning trial date, the need to avoid a change of judge must be borne firmly in mind.

15.8.2 The matters viewed by the judge form part of the evidence that is received and may be relied on in deciding the case. However, nothing said during the view to (or in the earshot of) the judge, has any evidential status, unless there has been an agreement or order to that effect.

15.8.3 The parties should agree the arrangements for the view and then make those arrangements themselves. The judge will ordinarily travel to the view unaccompanied and, save in exceptional circumstances when the cost will be shared by all parties, will not require any travelling costs to be met by the parties.

15.9 Judgments

15.9.1 Depending on the length and complexity of the trial, the judge may (a) give judgment orally immediately after closing speeches; (b) give judgment orally on the following day or soon afterwards; or (c) deliver a reserved judgment in writing at a later date.

15.9.2 If a party wishes to obtain a transcript of an oral judgment, it should notify the judge's clerk so that any notes made by the judge can be retained in order to assist the judge when correcting the transcript.

15.9.3 Where judgment is reserved

The judge will normally indicate at the conclusion of the trial what arrangements will be followed in relation to (a) the making available of any draft reserved judgment and (b) the handing down of the reserved judgment in open court. If a judgment is reserved, it will be handed down as soon as possible. The judge will normally provide any reserved judgment in draft and will endeavour to do so within 3 months of the conclusion of the trial. Any enquiries as to the progress of a reserved judgment should be addressed in the first instance to the judge's clerk, with notice of that enquiry being given to other parties. If concerns remain following the judge's response to the parties, further enquiries or communication should be addressed to the judge in charge of the TCC.

15.9.4 If, as is usual, the judge releases a draft judgment in advance of the formal hand down, this draft judgment will be confidential to the

parties and their legal advisers and subject to an embargo as set out on the front page of the draft:

"This is a draft judgment to which CPR Practice Direction 40E applies. The judgment will be handed down electronically, in accordance with the Practice Guidance dated 16 December 2021 on [date] at [time].

This draft is confidential to the parties and their legal representatives. Neither the draft itself nor its substance may be disclosed to any other person or made public in any way. The parties must take all reasonable steps to ensure that it is kept confidential. As explained in *Counsel General v. BEIS* (No. 2) [2022] EWCA Civ 181, the draft judgment is only to be used to enable the parties to make suggestions for the correction of errors, prepare submissions on consequential matters and draft orders and to prepare themselves for the publication of the judgment. A breach of any of these obligations may be treated as a contempt of court.

The parties' lawyers should by [time] on [date] submit to the clerk to [judge's name] at [clerk's email address] any typing corrections and other obvious errors (nil returns are required). The official version of the judgment will be available from the clerk after hand down."

Solicitors and counsel on each side should send to the judge a note (if possible, agreed) of any clerical errors or slips which they note in the judgment. However, this is not to be taken as an opportunity to re-argue the issues in the case.

15.9.5 Written judgments are handed down remotely and published through the National Archives, available online at **Find Case Law**.

15.10 Disposal of judge's bundle after conclusion of the case

15.10.1 The judge will have made notes and annotations on any hard copy bundle during the course of the trial. Accordingly, the normal practice is that the entire contents of the judge's bundle are disposed of as confidential waste. The empty ring files can be recovered by arrangement with the judge's clerk.

15.10.2 If any party wishes to retrieve from the judge's bundle any particular items of value which it has supplied (e.g. plans or photographs), a request for these items should be made to the judge's clerk promptly at the conclusion of the case. If the judge has not made annotations on those particular items, they will be released to the requesting party.

Section 16. Costs and Costs Management

16.1 General

16.1.1 All disputes as to costs will be resolved in accordance with CPR Part 44, and in particular CPR 44.2.

16.1.2 The judge's usual approach will be to determine which party can be properly described as 'the successful party', and then to investigate whether there are any good reasons why that party should be deprived of some or all of their costs.

16.1.3 It should be noted that, in view of the complex nature of TCC cases, a consideration of the outcome on particular issues or areas of dispute can sometimes be an appropriate starting point for any decision on costs.

16.1.4 As set out in paragraphs 5.1.6, 5.5.5 and 12.1.4 above, if the judge considers that any particular aspect is likely to or has led to unnecessarily increased costs, the judge may make a costs order disallowing costs or ordering costs to be paid, either on the basis of a summary assessment, or by giving a direction to the costs judge as to what costs should be disallowed or paid on a detailed assessment.

16.2 Summary Assessment of Costs

16.2.1 Interlocutory hearings that last one day or less will usually be the subject of a summary assessment of costs in accordance with CPR 44.6 and paragraph 9 of PD44. The parties must ensure that their statements of costs, on which the summary assessment will be based, are provided to each other party, and the Court, no later than **24 hours** before the hearing in question: see paragraph 6.9.3 above.

16.2.2 The Senior Courts Costs Office ("SCCO") Guide to the Summary Assessment of Costs sets out clear advice and guidance as to the principles to be followed in any summary assessment. Generally summary assessment proceeds on the standard basis. In making an assessment on the standard basis, the court will only allow a reasonable amount in respect of costs reasonably incurred and any doubts must be resolved in favour of the paying party.

16.2.3 In arguments about the hourly rates claimed, the judge will have regard to the principles set out by the Court of Appeal in *Wraith v*

Sheffield Forgemasters Ltd [1998] 1 WLR 132: ie. the judge will consider whether the successful party acted reasonably in employing the solicitors who had been instructed and whether the costs they charged were reasonable compared with the broad average of charges made by similar firms practising in the same area.

16.2.4 When considering hourly rates, the judge in the TCC may have regard to any relevant guideline rates.

16.2.5 The court will also consider whether unnecessary work was done or an unnecessary amount of time was spent on the work.

16.2.6 It may be that, because of pressures of time, and/or the nature and extent of the disputes about the level of costs incurred, the court is unable to carry out a satisfactory summary assessment of the costs. In those circumstances, the court will direct that costs be assessed on the standard (or indemnity) basis and will usually order an amount to be paid on account of costs under CPR 44.3 (8).

16.3 Costs Management

16.3.1 The rules concerning cost budgeting are set out in CPR 3 Section II and in CPR Practice Direction 3E. The rules concerning the filing of Precedent H Cost Budgets (21 days before the first CMC) and Precedent R Cost Budget Discussion Reports (7 days before the first CMC) are referred to in Section 5 above relating to the preparation for the first CMC. Parties should take care to ensure that the times for service of these documents are complied with, failing which they are at risk of having their costs limited to the court fees unless the court orders otherwise or grants relief from sanction (see *Denton v TH White Ltd* [2014] EWCA Civ 906).

16.3.2 Save for in cases which are set out in CPR 3.12 (including cases where the value of the case is above £10 million), the rules require each party to file a costs budget in the prescribed form at the outset of the litigation (before the first CMC). Precedent H is the form for a costs budget. This divides the litigation into different phases, and the court will consider the amount of the fees and disbursements for each phase separately. Costs budgets are to be supported by a statement of truth (see CPR 3EPD.2). The parties are required to then serve Budget Discussion Reports setting out the figures which are agreed, which are not agreed, and a brief summary of the grounds of dispute. The parties are encouraged to do so within the provided Precedent R (see CPR 3EPD.3). The parties are encouraged to continue to discuss

cost issues between them so as to try and narrow or remove any outstanding issues.

16.3.3 At the first CMC the court will consider the costs budgets. If the estimated future costs are agreed, the court will make an order recording the extent to which the budgets have been agreed: see CPR 3.15(2)(a).

16.3.4 Where a budget or parts of a budget for estimated future costs are not agreed, the court will consider the budget and make such revisions as it thinks fit. These will then be recorded in a Costs Management Order: see CPR 3.15(2)(b).

16.3.5 Precedent H is the form for a costs budget. This divides the litigation into different phases, and the court will consider the amount of the fees and disbursements for each phase separately. Costs budgets are to be supported by a statement of truth (see CPR 3EPD.4).

16.3.6 Once approved, the costs shown in each phase of the costs budget will usually be recoverable on a detailed assessment if they have been incurred. Recovery will not usually be permitted where a party has overspent its budget for a particular phase, even though it may have underspent on another phase. The court will not depart from the approved figure in the budget unless satisfied that there is good reason to do so: see CPR 3.18.

16.3.7 Precedent H allows a party to provide an allowance for certain contingencies, but these must be set out in the budget and the reason for them given. It is open to a party to apply to the court to amend its costs budget if there is good reason to do so.

16.4 Costs Capping Orders

16.4.1 In exercising case management powers, the judge may make costs cap orders which, in normal circumstances, will be prospective only. New rules are set out in CPR 3, Section III. The judge should only do so, however, where:

- it is in the interests of justice to do so;
- there is a substantial risk that without such an order costs will be disproportionately incurred; and
- the court is not satisfied that the risk can be adequately controlled by case management and detailed assessment of costs after a trial.

See CPR 3 Section III "Costs Capping".

16.4.2 The possibility of a costs cap order should be considered at the first CMC. The later such an order is sought, the more difficult it may be to impose an effective costs cap.

16.4.3 The procedure for making an application for a costs capping order are set out in CPR 3.20 and PD3F Costs Capping (these include a new requirement that parties must file a costs budget rather than an estimate of costs with any application for a costs capping order).

16.5 Costs: Miscellaneous

16.5.1 Pursuant to CPR 44.8 and CPR 44PD.10, solicitors have a duty to tell their clients within 7 days if an order for costs was made against the clients and they were not present at the hearing, explaining how the order came to be made. They must also give the same information to anyone else who has instructed them to act on the case or who is liable to pay their fees.

Section 17. Enforcement

17.1 General

17.1.1 The TCC is concerned with the enforcement of judgments and orders given by the TCC and with the enforcement of adjudicators' decisions and arbitrators' awards. Adjudication and arbitration enforcement have been dealt with in, respectively, Sections 9 and 10 above.

17.2 High Court

17.2.1 London

A party wishing to make use of any provision of the CPR concerned with the enforcement of judgments and orders made in the TCC in London can use the TCC in London or any other convenient TCC BPC listed in Appendix D.

17.2.2 Outside London

Where the judgment or order in respect of which enforcement is sought was made by a judge of the TCC out of London, the party seeking enforcement should use the TCC BPC in which the judgment or order was made.

17.2.3 Where orders are required or sought to support enforcement of a TCC judgment or order, a judge of the TCC is the appropriate judge for that purpose. If available, the judge who gave the relevant judgment or made the relevant order is the appropriate judge to whom all applications should be addressed.

17.3 County Court

17.3.1 A TCC County Court judgment (like any other County Court judgment):

- if for less than £600, must be enforced in the County Court;
- if for between £600 and £5000, can be enforced in either the County Court or the High Court, at the option of the judgment creditor;
- if for more than £5,000, must be enforced in the High Court.

17.3.2 If a judgment creditor in a TCC County Court wishes to transfer any enforcement proceedings to any other County Court hearing centre (whether a TCC County Court or not), he must make a written request

to do so pursuant to section 2 of the Practice Direction supplementing Part 70. Alternatively, at the end of the trial the successful party may make an oral application to the trial judge to transfer the proceedings to some other specified County Court or County Court hearing centre for the purposes of enforcement.

17.4 Electronic Enforcement

17.4.1 Where the application or order is unopposed or does not involve any substantial dispute, the necessary order should be sought by way of an electronic application through CE-file.

17.5 Charging Orders and Orders For Sale

17.5.1 One of the most common methods of enforcement involves the making of a charging order over the judgment debtor's property. There are three stages in the process.

17.5.2 The judgment creditor can apply to the TCC for a charging order pursuant to CPR 73.3 and 73.4. The application is in Form N379 in which the judgment creditor must identify the relevant judgment and the property in question. The application is initially dealt with by the judge without a hearing, and he may make an interim charging order imposing a charge over the judgment debtor's interest in the property and fixing a hearing to consider whether or not to make the charging order final.

17.5.3 The interim charging order must be served in accordance with CPR 73.7. If the judgment debtor or any other person objects to the making of a final charging order, then he must set out his objection in accordance with CPR 73.10. There will then be a hearing at which the court will decide whether or not to make the charging order final.

17.5.4 Ultimately, if the judgment remains unsatisfied, the party who has obtained the final charging order may seek an order for the sale of the property in accordance with CPR 73.10C. Although paragraph 4.2 of PD 73 might suggest that a claim for an order for sale to enforce a charging order must be started in the Chancery Division, there is no such restriction in the rule itself and practical difficulties have arisen for parties who have obtained a judgment, an interim charging order and a final charging order in the TCC and who do not want to have to transfer or commence fresh proceedings in another division in order to obtain an order for sale. The TCC will, in appropriate circumstances, in accordance with the overriding objective, make orders for sale in such circumstances, particularly if the parties are agreed that is the

most convenient cost-effective course: *see Packman Lucas Limited v Mentmore Towers Ltd* [2010] EWHC 1037 (TCC).

17.5.5 In deciding whether or not to make an order for sale, the court will consider, amongst other things, the size of the debt, and the value of the property relative to that debt, the conduct of the parties and the absence of any other enforcement option on the part of the judgment creditor.

Section 18. The TCC judge as arbitrator

18.1 General

18.1.1 Section 93(1) of the Arbitration Act 1996 ("the 1996 Act") provides that a judge of the TCC (previously an Official Referee) may "if in all the circumstances he thinks fit, accept appointment as a sole arbitrator or as an umpire by or by virtue of an arbitration agreement." Judges of the TCC may accept appointments as sole arbitrators or umpires pursuant to these statutory provisions. The 1996 Act does not limit the appointments to arbitrations with the seat in England and Wales.

18.1.2 However, a TCC judge cannot accept such an appointment unless the Lord Chief Justice "has informed him that, having regard to the state of (TCC) business, he can be made available": see section 93(3) of the 1996 Act. In exceptional cases a judge of the TCC may also accept an appointment as a member of a three-member panel of arbitrators if the Lord Chief Justice consents but such arbitrations cannot be under section 93 of the 1996 Act because section 93(6) of the 1996 Act modifies the provisions of the 1996 Act where there is a judge-arbitrator and this could not apply to arbitral tribunals with three arbitrators, one of whom was a judge-arbitrator.

18.1.3 Application should be made in the first instance to the judge whose acceptance of the appointment is sought. If the judge is willing to accept the appointment, he will make an application on behalf of the appointing party or parties, through the judge in charge of the TCC, to the Lord Chief Justice for his necessary approval. He will inform the party or parties applying for his appointment once the consent or refusal of consent has been obtained.

18.1.4 Subject to the workload of the court and the consent of the Lord Chief Justice, the TCC judges will generally be willing to accept such requests, particularly in short cases or where an important principle or point of law is concerned. Particular advantages have been noted by both TECBAR and TeCSA in the appointment of a TCC judge to act as arbitrator where the dispute centres on the proper interpretation of a clause or clauses within one of the standard forms of building and engineering contracts.

18.2 Arbitration Management and Fees

18.2.1 Following the appointment of the judge-arbitrator, the rules governing the arbitration will be decided upon, or directed, at the First

Preliminary Meeting, when other appropriate directions will be given. The judge-arbitrator will manage the reference to arbitration in a similar way to a TCC case.

18.2.2 The judge sitting as an arbitrator will sit in a TCC court room (suitably rearranged) unless the parties and the judge-arbitrator agree to some other arrangement.

18.2.3 Fees are payable to the Court Service for the judge-arbitrator's services and for any accommodation provided. The appropriate fee for the judge-arbitrator, being a daily rate, is published in the Fees Order and should be paid through the TCC Registry.

18.3 Modifications to the Arbitration Act 1996 for judge-arbitrators

18.3.1 As section 93 envisages that appointments of judge-arbitrators will be in arbitrations where the seat of the arbitration is in England and Wales, Schedule 2 of the 1996 Act modifies the provisions of the Act which apply to arbitrations where the seat is in England and Wales.

18.3.2 In relation to arbitrations before judge-arbitrators, **paragraph 2 of Schedule 2 to the Arbitration Act 1996** provides that references in Part I of the 1996 Act to "the court" shall be construed in relation to a judge-arbitrator, or in relation to the appointment of a judge-arbitrator, as references to "the Court of Appeal". This means that, for instance, any appeal from a judge-arbitrator under section 69 of the 1996 Act is therefore heard, in the first instance, by the Court of Appeal.

Appendix A: Case management information sheet

This Appendix is the same as Appendix A to the Part 60 Practice Direction.

Appendix B: Case management directions form

[Delete or amend the following directions, as appropriate to the circumstances of the case]

Claim No: HT-[*yyyy*]-[*nnnnnn*]

[Title]

[Insert name of judge in title of order]

Dated [*dd*] *[mm] [yyyy] [Date on which the order was actually made]*

DIRECTIONS ORDER ON CASE MANAGEMENT CONFERENCE[1]

Warning: you must comply with the terms imposed upon you by this order otherwise your case is liable to be struck out or some other sanction imposed. If you cannot comply you are expected to make formal application to the court before any deadline imposed upon you expires.

[Delete or amend the following directions, as appropriate to the circumstances of the case]

Further hearings[2]

1. The trial [*Where required*: of all issues / of the following issues, namely … (*complete as required, if lengthy by reference to an Appendix to the order*)] shall take place as follows, subject to any further directions to be given at the pre-trial review:

    1.1 Reading day(s) (at which the parties are not required to attend): …..

    1.2 Trial day 1: …

    1.3 Length of trial (excluding reading day(s) and Fridays[3]): …

1 See section 5 of the TCC Guide for general guidance in relation to case management conferences. Refer to the relevant sections of the TCC Guide in relation to the further hearings / steps set out below.

2 It may not always be possible to fix dates at the CMC itself but dates will be fixed in time for the Order to be drawn up

3 In London the practice is that non-trial business is listed on Fridays. Outside London the practice may differ.

1.4 Any other trial directions: (… *Where appropriate, including any directions for provisional trial timetable, and for time for preparation of written closing submissions and for delivery of oral closing submissions in substantial and/or complex cases*)]

2. *Where required*: A review case management conference / further hearing (*specify which*) for the following purposes, namely … (*complete as required*) shall be held on … at …am / pm.

   Time allowed …

3. The pre-trial review[4] shall be held on … at … am / pm. Time allowed …

General matters

4. *Where required*: The following directions shall apply only in relation to the preliminary issues directed above (save where expressly stated to the contrary).

5. This action is to be (consolidated / managed and tried with action no … (*specify which*)). The lead action shall be … All directions given in the lead action shall apply to both actions, unless otherwise stated.

6. At all stages the parties must consider settling this litigation by any means of Alternative Dispute Resolution (including Mediation); any party not engaging in any such means proposed by another must serve a witness statement giving reasons within 21 days of that proposal; such witness statement must not be shown to the trial judge until questions of costs arise. [*Where required*: The action is stayed for such purpose from … to … / the court is satisfied that the parties can engage in Alternative Dispute Resolution within the timetable set for these directions without the need for a stay (*specify which*)]

Further statements of case and list of issues and Scott Schedule

7. *Where required*: Further statements of case shall be filed and served as follows (*complete as required*):

   7.1 Defence and any counterclaim by 4 pm on …

   7.2 Reply (if any) and Defence to counterclaim (if any) by 4 pm on …

   7.3 Replies to the Requests for Further Information served by the … by 4pm on …

8. *Where required*: Permission to the … to amend the … in accordance with the draft (identify), as to which the following directions shall apply.

4 Pre-trial reviews are usually ordered but may be dispensed with if unnecessary. The TCC Guide makes provision for the parties to agree and to seek the court's agreement to vacate a PTR if it transpires at the time to be unnecessary.

8.1 (*Specify which*: The … shall file and serve the amended …, verified by statement of truth, by 4pm on … / re-service is dispensed with.)

8.2 The … shall file and serve an amended … consequential upon the amendments to the …, by 4pm on …

8.3 (*Provision for any further consequential amendments, if required*)

8.4 The costs of and occasioned by the amendments shall be paid by the … in any event.

9. (*If required include any directions which may be required in relation to the list of issues*)

10. (*If required*: There shall be a Scott Schedule in respect of the following issues … (*specify, for example defects / items of damage / remedial costs*) as to which the following directions shall apply

10.1 The column headings shall be (as follows … (*complete*) / agreed following liaison between the parties, with any dispute to be referred to and resolved by the judge (*specify which*))

10.2 … to serve the Scott Schedule, populated with its comments in the required column headings, in electronic format by 5 pm on …

10.3 … to respond to the Scott Schedule, populated with its comments in the required column headings, in electronic format by 5 pm on …

10.4 (… to serve its reply, populated with its comments in the required column headings, in electronic format by 5 pm on … (*if required*))

10.5 The format for the Scott Schedule shall be as follows shall be (as follows … (*e.g. whether word or excel, A4 or A3, portrait or landscape*) / agreed following liaison between the parties, with any dispute to be referred to and resolved by the judge (*specify which*))

10.6 The party producing the final version of the Scott Schedule shall file an electronic copy at court.

Disclosure

11. Disclosure is to be given by each party in accordance with Practice Direction 57AD – Disclosure for the Business and Property Courts and the Disclosure Review Document for the Business and Property Courts and the Disclosure Review Document (as agreed by the parties / as agreed by the parties and as determined by the judge at the hearing, an amended version of which, to include such amendments, shall be filed and served by the Claimant's solicitors within 7 days of the hearing (*specify which*). Further:

1) The time for compliance with any order for Extended Disclosure in accordance with paragraph 12 of the Practice Direction shall be (specify date or dates).

2) When complying with an order for Extended Disclosure the parties should have regard to the guidance set out in Section 3 of the Disclosure Review Document.[5]

3) *Where required*: In relation to the matters recorded in the schedule left over for further discussion and agreement, if no agreement is reached by (specify date) the parties must issue an application notice to fix a Disclosure Guidance Hearing[6].

4) *Where required*: The question of which party bears the costs of disclosure is to be given separate consideration at … (*specify later stage*).[7]

5) … (*any further specific directions as required*)]

Witness statements

12. Signed statements of witnesses of fact (and any witness summaries or other notices relating to evidence) to be mutually exchanged by 5 pm on …

13. *Where required*: Supplementary statements of witnesses of fact, limited to matters raised in the witness statements served by the other party and not already covered in the principal witness statements, to be mutually exchanged by 5 pm on …

Expert evidence

14. *Where separate experts are permitted*: The parties each have permission to call the expert witnesses specified below in respect of the following issues:

    14.1 [Party] [Name of witness] [Discipline] [Issues to be addressed]

15. In respect of any expert evidence permitted under paragraph 14:

    15.1 *Where required*: Directions for carrying out inspections/ taking samples/ conducting experiments/ performance of calculations shall be … (*complete as appropriate*)

    15.2 Experts in like fields to hold discussions in accordance with rule 35.12 by …

5 See paragraph 9.8 of the Disclosure Practice Direction.

6 See paragraph 11 of the Disclosure Practice Direction.

7 See paragraph 9.9 of the Disclosure Practice Direction.

15.3 Experts' statements in accordance with rule 35.12 (3) to be prepared and filed by 5 pm on …

15.4 Experts' reports to be served by 5 pm on …

15.5 *Where required*: If the experts in like fields consider it appropriate, they shall be permitted to hold further discussions upon sight of reports served by the other experts with a view to reaching further agreement or narrowing or clarifying the issues in dispute and to prepare and file supplemental statements by 5pm on ….

15.6 (The experts shall attend trial if they are not in substantial agreement on all material matters / Any application for the experts to attend trial shall be made by … (*specify which*)).

16. *Where a single joint expert is permitted*: A single joint expert shall be appointed by the parties to report on the following issue(s)

16.1 [Name of witness] [Discipline] [Issues to be addressed]

17. The following directions shall govern the appointment of the single joint expert:

17.1 (*complete as appropriate, including a timetable for agreeing the identity of the expert or referring any disagreement to the court, for agreeing and sending a letter of instruction or in default of agreement letters of instruction, for production of the report, for submitting questions, for applying or permission for the expert to attend court for cross-examination*)

The single joint expert shall be entitled to request a reasonable sum on account of reasonable fees and disbursements before beginning work. Such sum shall be paid in equal proportions by the instructing parties, subject to any final costs order made following judgment.

Costs management

18. Costs Management (*complete as appropriate*)

18.1 It is recorded that the parties have agreed the respective costs budgets dated …

18.2 The costs budgets filed by the parties are approved (or)

18.3 The costs budget filed by the … (*complete*) is approved, and

18.4 The costs budgets filed by the … (*complete*) are approved subject to the following revisions:

The parties shall file amended costs budgets giving effect to such revisions by …

Extensions of time

19. The above dates and time limits may be extended by agreement between the parties. Nevertheless:

The dates and time limits specified above may not be extended by more than [14] days without the permission of the court.

The dates specified in paragraphs 1 (trial), 2 (further hearing) and paragraph 3 (pre-trial review) cannot be varied without the permission of the court.

Costs

20. The costs of the case management conference are … (*specify, usually costs in the case, include any other particular costs order made*).

DATED …

Appendix C: Pre-trial review questionnaire

This Appendix is the same as Appendix C to the Part 60 Practice Direction.

Appendix D: Contact details for Technology and Construction Court

The High Court of Justice, King's Bench Division, Technology and Construction Court

Business and Property Courts sitting at:

The Rolls Building, 7 Rolls Buildings, Fetter Lane, London EC4A 1NL

Management

Court Manager: Mr Wilf Lusty
Email: wilf.lusty@justice.gov.uk

TCC Listings

Senior Listing Officer: Mr Michael Tame
Email: michael.tame@justice.gov.uk

Listing Officer: Ms Gina Hitchman
Email: tcc.listing@justice.gov.uk

General TCC listing enquiries – Email: tcc.listing@justice.gov.uk
Registry Tel: 020 7947 7591

TCC Judges

Mrs Justice O'Farrell DBE (Judge in Charge of the TCC)
Clerk: Samia Nur (samia.nur@justice.gov.uk)
Tel: 020 7073 1670

Mr Justice Fraser
Clerk: Madeleine Collins (madeleine.collins@justice.gov.uk)
Manizja Latifi (Cover) (manizja.latifi@justice.gov.uk)
Tel: 020 7947 6124

Mrs Justice Jefford DBE
Clerk: Sam Taylor (sam.taylor1@justice.gov.uk)
Tel: 020 7947 7205

The following High Court Judges may be available, when necessary and by arrangement with the President of the King's Bench Division, to sit in the TCC:

Mrs Justice Cockerill DBE
Clerk: Laura Hope (laura.hope@justice.gov.uk)
Tel: 020 7947 6231

Mr Justice Waksman
Clerk: Lucius Allen lucius.allen@justice.gov.uk)
Tel: 020 7947 6104

Mr Justice Pepperall
Clerk: Chelsea Fincham (Chelsea.Fincham@justice.gov.uk)
Tel: 020 7947 6117

Mr Justice Kerr
Clerk: Mandy Torrens (Mandy.Torrens@Justice.gov.uk)
Tel: 020 7947 6143

Mr Justice Choudhury
Clerk: Katherine Stent (katherine.stent@justice.gov.uk)
Tel: 020 7947 7056

Mr Justice Eyre
Clerk: Rebecca Murphy (Rebecca.murphy4@justice.gov.uk)
Tel: 020 7947 7855

Mrs Justice Joanna Smith DBE
Clerk: Caroline Reid (caroline.reid@Justice.gov.uk)
Tel: 020 7071 5619

Business and Property Courts based in the Birmingham Civil Justice Centre at:

33 Bull Street, Birmingham, West Midlands B4 6DS

TCC listing enquiries: ClerktoHHJWatson@justice.gov.uk

Clerk: Susan Thomas (ClerktoHHJWatson@justice.gov.uk)
Tel: 012 1681 3181

TCC Judges

- Her Honour Judge Sarah Watson (Principal TCC Judge)

The following judges at Birmingham are nominated to deal with TCC business:

- HHJ David Worster
- HHJ Richard Williams
- HHJ Brian Rawlings
- HHJ James Tindal (from September 2022)

Business and Property Courts based at Bristol Civil Justice Centre at:

2 Redcliff Street, Bristol BS1 6GR

TCC Listing

TCC Listing Officer: Debbie Greenwood
Tel: 011 7366 4860 (hub)
Email: bristoltcclisting@justice.gov.uk

TCC Judges

- His Honour Judge Russen KC (Principal TCC judge)

Business and Property Courts in Wales based at Cardiff Civil and Family Justice Centre at:

2 Park Street, Cardiff, CF10 1ET

Main switchboard: 029 2037 6400

Listing office:

Tel: 029 2037 6430
Listings Email: bpc.cardiff@justice.gov.uk

Listing Manager: Matthew Solomons
Email: matthew.solomons1@justice.gov.uk
Tel: 029 2037 6430

Specialist Listing Clerk: Amanda Barrago
Email: amanda.barrago@justice.gov.uk
Tel: 029 2037 6430

TCC Judges

- His Honour Judge Keyser KC (Principal TCC Judge)
- His Honour Judge Jarman KC

Central London Civil Justice Centre, based at:

Thomas More Building, Royal Courts of Justice, Strand, London WC2 2LL

TCC Listing Enquiries

Tel: 030 0123 5577
Email: Enquiries.centrallondon.countycourt@justice.gov.uk & Leslie.Alfonso@justice.gov.uk

TCC Judges

- His Honour Judge Nick Parfitt
- His Honour Judge Alan Johns KC

Business and Property Courts based at Leeds Combined Court Centre at:

The Courthouse, Oxford Row, Leeds LS1 3BG

Listing Enquiries:

TCC Listing Officer: Sandie Umarji
Email: TCC.Leeds@justice.gov.uk
Tel: 011 3306 2460/ 2461

TCC Judges

- Her Honour Judge Siobhan Kelly (Principal/Lead TCC Judge)
- His Honour Judge Jonathan Klein
- His Honour Judge Malcolm Davis-White KC
- Her Honour Judge Claire Jackson

Business and Property Courts based at Liverpool Civil Justice Centre at:

35 Vernon Street, Liverpool, L2 2BX

TCC Listings:

TCC listing officer: Kevin Fitzmaurice
Email: Kevin.Fitzmaurcie@justice.gov.uk

TCC Clerk: Steve Christiansen
Email: steve.christiansen@justice.gov.uk
Tel: 0151 296 2483

TCC Judges

- His Honour Judge Cadwallader (Principal TCC Judge)
- His Honour Judge Graham Wood KC
- District Judge Baldwin

Business and Property Courts based at Manchester Civil Justice Centre, at:

1 Bridge Street West, Manchester M60 9DJ

TCC Clerk:

Samantha Samkange (BPC section team leader)
Tel: 016 1240 5307
Fax: 012 6478 5034

Listings:

BPC.Manchester@justice.gov.uk

TCC Judges

- His Honour Judge Stephen Davies (Principle TCC judge)

The following judges at Manchester are nominated to deal with TCC business:

- HHJ David Hodge KC
- HHJ Nigel Bird

- HHJ Richard Pearce
- HHJ Mark Halliwell
- HHJ Cawson

TCC District Judge

- DJ Andrew Bartley

Business and Property Courts based at Newcastle upon Tyne Court/District Registry, at:

The Civil and Family Courts and Tribunal Centre, Barras Bridge, Newcastle upon Tyne NE1 8QF, DX 336901 Newcastle upon Tyne 55

Listings:

Listing Team
Email: **Helen Tait (Clerk to HH Judge Kramer)** & NewcastleBPC@justice.gov.uk
Tel: 0191 205 8751/8752/8753/8754/8755

TCC Judges

- His Honour Judge Kramer (Principal TCC judge)

Appendix E: Draft ADR Order

1. By [date/time] the parties shall exchange lists of three neutral individuals who have indicated their availability to conduct a mediation or ENE or other form of ADR in this case prior to [date].

2. By [date/time] the parties shall agree an individual from the exchanged lists to conduct the mediation or ENE or other form of ADR by [date]. If the parties are unable to agree on the neutral individual, they will apply to the Court in writing by [date/time] and the Court will choose one of the listed individuals to conduct the mediation or ENE or other form of ADR.

3. There will be a stay of the proceedings until [date/time] to allow the mediation or ENE or other form of ADR to take place. On or before that date, the Court shall be informed as to whether or not the case has been finally settled. If it has not been finally settled, the parties will:

    a) comply with all outstanding directions made by the Court;

    b) attend for a review CMC on [date/time].

DATED ...

Appendix F: Draft directions order in adjudication enforcement proceedings

Before **[Judge-in-Charge]** sitting in the High Court of Justice, Business and Property Courts of England and Wales, Technology and Construction Court (KBD) at the Rolls Building, 7 Rolls Buildings, London EC4A 1NL on **[date of order]**

UPON READING the Claimant's application for enforcement of an adjudication decision and supporting evidence

AND UPON the Court having considered matters on the papers

AND OF THE COURT'S OWN MOTION

IT IS ORDERED THAT

Remote hearing

1. The Claimant shall as soon as practicable after receipt of this Order serve this application upon the Defendant together with:

    1) the Claim Form, Response Pack and any statement relied upon;

    2) this Order.

2. The time for the Defendant to file its Acknowledgement of Service is abridged to four (4) working days. The Defendant is advised that failure to comply with the requirement to file this Acknowledgment can lead to judgment in default being entered against it. The Claimant is reminded that if there is such failure, serious consideration should be given to entering judgment in default as a cheaper option than taking the matter through to a hearing.

3. Any further evidence shall be served and filed:

    1) By the Defendant, on or by [**date**];

    2) By the Claimant, in response to that of the Defendant, on or by [**date**]; and in either case no later than 4.00 pm that day.

4. The Claimant has permission to issue an application for summary judgment prior to service by the Defendant of either an Acknowledgment of Service or a Defence, pursuant to CPR Rule 24.4(1). The period of notice to be given to the Defendant is abridged to four (4) working days.

5. There shall be a remote hearing of the Claimant's summary judgment application on **[date]** at **[time]** with a time estimate of 2 hours for the hearing (this time may be varied at short notice to accommodate the listing requirements of the court.

THIS HEARING SHALL TAKE PLACE BY REMOTE HEARING.

6. If and to the extent that such hearing cannot take place in public, then the hearing is to take place in private pursuant to CPR 39.2(3)(g) and Practice Direction 51Y.

Notification of attendance

7. By no later than 10:00am on **[date - 2 days before the hearing]**, each party must file by email to **[the Judge's clerk]** the identity of each person attending the hearing, the capacity in which they will attend, their email and telephone contact details.

Provision of documents for the hearing

8. The parties shall co-operate in ensuring that all documents necessary for the Court to determine the application or trial are made available in electronic form in good time before the hearing.

9. The Claimant shall serve and file an indexed and paginated electronic bundle comprising all relevant documents, including pleadings, statements, reports and other material by 1.00pm on **[date]**.

    1) Electronic bundles should contain only documents that are essential to the remote hearing. Please note that large electronic files can be slow to transmit and unwieldy to use.

    2) Electronic bundles can be prepared in .pdf or another format and should facilitate electronic annotation. Where possible, the electronic bundles should be sent to the court by link to an online data room or delivered to the court on a USB stick. If that is not possible, they must be filed through CE-file or sent by email to the Judge's clerk.

10. Any skeleton arguments should be prepared and sent to the Judge's clerk by email by 1.00pm on **[date – 2 days before the hearing]**.

11. Any authorities relied upon (an agreed bundle if possible) should be provided by electronic bundle to the judge's clerk and to all other representatives and parties by 1.00pm on **[date – 1 day before the hearing]**.

The hearing

12. The vehicle for the remote hearing shall be Microsoft Teams.

13. Invitations to join the meeting will be sent by email to all persons who have notified the Court as attending the remote hearing. Any person who has so notified the Court but not received an invitation to the hearing by 2:00pm on **[the day before the hearing]** should contact **[the Judge's clerk or listings]**.

14. Thirty (30) minutes before the hearing, the Claimant's legal representative will sign in and all attendees are obliged to attempt to sign in shortly thereafter, so that any issues with the connection can be addressed before the hearing is due to begin. Issues should be raised with **[the Judge's clerk]**.

15. The hearing will be recorded by the Judge's clerk. Although the hearing is being conducted remotely, the hearing remains a court hearing. The usual rules and formalities continue to apply. In particular, it is not permitted for any other party to record these proceedings, and breach of this rule amounts to a contempt of court.

Liberty to apply

16. The parties have permission to apply to set aside or vary these directions on two (2) working days' written notice to the other.

REASONS

1. I have considered the papers in this matter and can see no reason why the application cannot fairly be disposed of by way of a remote hearing.
2. However, remote hearings bring with them added complexity, in terms of:
   i) Ensuring the presence of all relevant parties; and
   ii) Ensuring that all material documents are before the Court in a manner that all parties can easily identify and reference.

The order seeks to anticipate and deal with these issues.

Remote Hearing Attendance Form

Case No	
Case Name	
Claimant	
Defendant	
Hearing date and time	
Party filing this document	

ALL PERSONS ATTENDING ON BEHALF OF THIS PARTY				
Name	**Email**	**Direct phone**	**Capacity attending**	**Speaking Y/N**

Appendix G: Draft Court Settlement Order

Court Settlement

1. The Court Settlement Process under this Order is a confidential, voluntary and non-binding dispute resolution process in which the Settlement Judge assists the Parties in reaching an amicable settlement at a Court Settlement Conference.

2. This Order provides for the process by which the Court assists in the resolution of the disputes in the Proceedings. This Order is made by consent of the Parties with a view to achieving the amicable settlement of such disputes. It is agreed that the Settlement Judge may vary this Order at any time as he thinks appropriate or in accordance with the agreement of the Parties.

3. The following definitions shall apply:

    1) The Parties shall be [names]

    2) The Proceedings are [identify]

    3) The Settlement Judge is [name]

The Court Settlement Process

4. The Settlement Judge may conduct the Court Settlement Process in such manner, as the Judge considers appropriate, taking into account the circumstances of the case, the wishes of the Parties and the overriding objective in Part 1 of the Civil Procedure Rules. A Preliminary Court Settlement Conference shall be held, either in person or in some other convenient manner, at which the Parties and the Settlement Judge shall determine, in general terms, the procedure to be adopted for the Court Settlement Process, the venue of the Court Settlement Conference, the estimated duration of the Court Settlement Conference and the material which will be read by the Settlement Judge in advance of the Court Settlement Conference.

5. Unless the Parties otherwise agree, during the Court Settlement Conference the Settlement Judge may communicate with the Parties together or with any Party separately, including private meetings at which the Settlement Judge may express views on the disputes. Each Party shall cooperate with the Settlement Judge. A Party may request a private meeting with the Settlement Judge at any time during the Court Settlement Conference. The Parties shall give full assistance to enable the Court Settlement Conference to proceed and be concluded within the time stipulated by the Settlement Judge.

6. In advance of the Court Settlement Conference, each Party shall notify the Settlement Judge and the other Party or Parties of the names and the role of all persons involved in the Court Settlement Conference. Each Party shall nominate a person having full authority to settle the disputes.

7. No offers or promises or agreements shall have any legal effect unless and until they are included in a written agreement signed by representatives of all Parties (the "Settlement Agreement").

8. If the Court Settlement Conference does not lead to a Settlement Agreement, the Settlement Judge may, if requested by the Parties, send the Parties such assessment setting out his views on such matters as the Parties shall request, which may include, for instance, his views on the disputes, his views on prospects of success on individual issues, the likely outcome of the case and what would be an appropriate settlement. Such assessment shall be confidential to the parties and may not be used or referred to in any subsequent proceedings.

Termination of the Settlement Process

9. The Court Settlement Process shall come to end upon the signing of a Settlement Agreement by the Parties in respect of the disputes or when the Settlement Judge so directs or upon written notification by any Party at any time to the Settlement Judge and the other Party or Parties that the Court Settlement Process is terminated.

Confidentiality

10. The Court Settlement Process is private and confidential. Every document, communication or other form of information disclosed, made or produced by any Party specifically for the purpose of the Court Settlement Process shall be treated as being disclosed on a privileged and without prejudice basis and no privilege or confidentiality shall be waived by such disclosure.

11. Nothing said or done during the course of the Court Settlement Process is intended to or shall in any way affect the rights or prejudice the position of the Parties to the dispute in the Proceedings or any subsequent arbitration, adjudication or litigation. If the Settlement Judge is told by a Party that information is being provided to the Settlement Judge in confidence, the Settlement Judge will not disclose that information to any other Party in the course of the Court Settlement Process or to any other person at any time.

Costs

12. Unless otherwise agreed, each Party shall bear its own costs and shall share equally the Court costs of the Court Settlement Process.

Settlement Judge's Role in Subsequent Proceedings

13. The Settlement Judge shall from the date of this Order not take any further part in the Proceedings nor in any subsequent proceedings arising out of the Court Settlement Process and no party shall be entitled to call the Settlement Judge as a witness in any subsequent adjudication, arbitration or judicial proceedings arising out of or connected with the Court Settlement Process.

Exclusion of Liability

14. For the avoidance of doubt, the Parties agree that the Settlement Judge shall have the same immunity from suit in relation to a Court Settlement Process as the Settlement Judge would have if acting otherwise as a Judge in the Proceedings.

Particular Directions

15. A Court Settlement Conference shall take place on [date] at [place] commencing at [time].

16. If by [date] the Parties have not concluded a settlement agreement, the matter shall be listed on the first available date before an appropriate judge who shall be allocated for the future management and trial of the Proceedings.

17. The Court Settlement Process shall proceed on the basis of such documents as might be determined at the Preliminary Court Settlement Conference and which may include the documents filed in the court proceedings and further documents critical to the understanding of the issues in the dispute and the positions of the Parties.

Dated this ...

Appendix H: TCC Guidance Note on Procedures for Public Procurement Cases

Introduction

1. This protocol provides guidance on the management of public procurement claims. This is a rapidly developing area of law; while this guide should assist, practitioners must ensure that they are aware of the most recent relevant case law.

2. Public procurement cases, particularly those involving claims which seek to set aside the decision to award the contract in question, raise singular procedural issues and difficulties. The claimant commonly feels that it has insufficient evidence or documentation fully to particularise its case or otherwise prepare for trial, while the short limitation and mandatory standstill periods mean that proceedings are necessarily issued hastily. The provision of pleadings and documentation on disclosure often gives rise to serious difficulties in connection with confidentiality, particularly where there is a real risk that there will have to be a re-tendering process. Confidentiality rings will often need to be set up by agreement or order.

3. The issue and notice of proceedings challenging a contract award decision before the contract has been entered into, results in automatic suspension of the conclusion of the contract with the successful tenderer. The latter has a particular interest in the protection of the confidential information in its documents, many of which will be in the possession of the contracting authority and may wish to make representations in relation to confidentiality and other matters.[8] It is therefore not unusual for the successful tenderer to make an application to be joined in the proceedings or to have its interests protected by some other means.

8 This protocol refers to contracting authorities, but the same issues arise in relation to utilities under the relevant Utilities Contracts Regulations

Pre-Action Process and ADR

4. Given the short limitation period, the time for any pre-action process is limited. As the mandatory standstill period is only 10 days, a potential claimant may need to commence proceedings without delay to obtain automatic suspension of the award of the contract. Whilst a claimant is not bound to comply with the Protocol, it aims to enable parties to settle the issues between them without the need to start proceedings, by encouraging the parties to exchange information about the claim, and to consider using Alternative Dispute Resolution (ADR) to resolve cases before or during proceedings. Litigation should always be a last resort. Therefore, to the extent that this is practical and does not make it unreasonably difficult to issue and serve proceedings within the limitation period, the parties are encouraged to use a pre-action process.

5. The pre-action process which is recommended is as follows:

    1) The potential claimant will send a letter before claim to the contracting authority. This should identify the procurement process to which the claim relates; the grounds then known for the claim (both factual and legal); any information sought from the authority; the remedy required, and any request for an extension of the standstill period and/or a request not to enter into the contract for a specific period of time and/or not to do so without a specified period of notice to the potential claimant. The letter should propose an appropriate, short, time limit for a response.

    2) The authority should promptly acknowledge receipt of the letter before claim, notify its solicitors' details and (if requested) indicate whether the standstill period will be extended and if so,by how long. The authority should then provide any information to which the claimant may be entitled as soon as possible, and send a substantive response within the timescale proposed by the claimant, or as soon as practical thereafter.

    3) Having exchanged correspondence and information, the parties should continue to make appropriate and proportionate efforts to resolve the dispute without the need to commence proceedings.

6. The parties should act co-operatively and reasonably in dealing with all aspects of the litigation, including requests for extensions of time, taking into account the expiry of the standstill period and/or any limitation periods. The parties should also act co-operatively and reasonably in dealing with all aspects of the litigation, including amendments following further disclosure.

7. The parties should also act reasonably and proportionately in providing one another with information, taking into account any genuine concerns with regard to confidentiality, whether their own, or those of third parties. The parties should consider the use of confidentiality rings and undertakings to support resolution of the dispute prior to the issue of proceedings (as to confidentiality rings and undertakings see below). The aim should be to avoid the need to issue proceedings simply to obtain early specific disclosure. The authority is strongly encouraged to disclose the key decision materials at an early stage where relevant to the complaint made.[9]

8. ADR processes are encouraged, both before and during proceedings. The Court may order a stay of proceedings, direct a window in the timetable leading up to trial to enable mediation or other ADR to take place, or make an ADR order in the terms of Appendix E (see paragraph 7.3.2) particularly if (due to the claim being or becoming limited to damages) there is less urgency in fixing an early trial date.

Institution of Proceedings

Service of the Claim Form

9. The Claim Form must be served on the Defendant within 7 days after the date of issue, the first day of the 7 being the day following the day on which the Court seals the Claim Form: accordingly, a claim form issued on Wednesday must be served no later than the following Wednesday. "Service" for the purposes of the regulations requires the claimant to complete the step constituting service under CPR 7.5(1) within 7 days of issuing the Claim Form.[10]

Service of the Particulars of Claim

10. Parties should be aware of the provisions of CPR 7.4 (1) and (2). CPR 7.4(2) requires that the Particulars of Claim be served no later than the latest time for serving the Claim Form.

9 Roche Diagnostics Limited v the Mid Yorkshire Hospitals NHS Trust [2013] EWHC 933

10 Heron Bros. Ltd. V Central Bedfordshire Borough Council [2015] EWHC 604 (TCC)

11. If the Particulars of Claim (or other pleadings) contain confidential information, the party serving the pleading should lodge with the Court (a) a non-confidential version of the pleading redacted so as to preserve confidential information and (b) an unredacted version marked as confidential and sealed in an envelope also marked as confidential and seek an order by letter, copied to the other party and any relevant third parties, that the access to the Court file be restricted. Wherever possible, confidential information should be contained in a self-contained schedule or annex. Where a pleading is served electronically, the party serving it should ensure that redaction is effective and should give consideration to methods of protecting confidentiality, such as password protection. The continued arrangements to protect confidentiality should be addressed at the first CMC pursuant to paragraph 22 below.

Judicial Review

12. Sometimes claimants find it necessary to bring proceedings for Judicial Review in the Administrative Court as well as issuing a claim under the Regulations in the TCC. This usually happens where the claimant's right to bring a claim under the Regulations is or may be disputed, but there may be other reasons.

13. Where this happens the claim for Judicial Review will, unless otherwise ordered by the Judge in Charge of either the Administrative Court or the TCC, be heard and case managed together with the related claim in the TCC before a TCC judge who is also a designated judge of the Administrative Court.

14. In this situation claimants are to take the following steps:

    1) At the time of issuing the claim form in the Administrative Court the claimant's solicitors are to write to the Administrative Court Office, with a copy to the Judges in Charge of both the Administrative Court and the TCC, to request that the claim be heard alongside the related claim in the TCC.

    2) The letter is to be clearly marked

       "URGENT REQUEST FOR THE HEARING OF A PUBLIC PROCUREMENT CLAIM BY A JUDGE OF THE TCC WHO IS A DESIGNATED JUDGE OF THE ADMINISTRATIVE COURT"

    3) If they are not notified within 3 days of the issue of the claim form that the papers will be transferred to the TCC, the claimant's solicitors should contact the Administrative Court Office and thereafter keep the TCC informed of the position.

15. This procedure is to apply only when claim forms are issued by the same claimant against the same defendant in both the Administrative Court and the TCC almost simultaneously (in other words, within 48 hours of each other, excluding non-working days).

16. When the papers are transferred to the TCC by the Administrative Court Office the Judge in Charge of the TCC will review the papers immediately to ensure that it is appropriate for the two claims to be case managed and/or heard together by a judge of the Administrative Court who is also a judge of the TCC.

17. The Judge in Charge of the TCC will then notify the claimants and the Administrative Court Office whether or not both claims should proceed in the TCC. If it appears that the claim for Judicial Review should not be heard by a judge of the TCC, the Judge in Charge of the TCC will, after consultation with the Judge in Charge of the Administrative Court, transfer the case back to the Administrative Court and give his/her reasons for doing so.

18. If it is directed that the claim for Judicial Review should be heard by a judge of the TCC, the Judge in Charge of the TCC will ensure that the application for permission to apply for Judicial Review is determined at the earliest opportunity by a judge of the TCC who is also a designated judge of the Administrative Court.

19. If permission is granted, the claim will be case managed and heard by a TCC judge who is a designated judge of the Administrative Court, save that routine directions may, if it is appropriate and expedient to do so, be given by a judge of the TCC who is not a designated charge of the Administrative Court.

20. At all stages of the proceedings the titles of all documents filed in the JR proceedings are to bear the Administrative Court title and case number and are to state that the claim is being heard and managed together with TCC Case No HT-[]-[].

CMC

21. An early CMC may be appropriate, so that the Court may assess the urgency and fix appropriate dates for trial, specific anticipated applications (such as applications for lifting the statutory suspension, or applications for specific disclosure or expedited trial) and other stages of trial or other matters such as disclosure, witness statements and expert reports (the deployment of expert evidence will require clear justification). Either party may request the Court to fix the first CMC and the Court will endeavour to accommodate such requests.

22. The parties should be aware of the pilot scheme for Shorter and Flexible Trial Procedures and Practice Direction 51N and to address their minds to the question of whether either scheme might be appropriate for their case. These issues should be addressed at the first CMC.

Cost budgeting

23. The provisions in the CPR about preparation of costs budgets (CPR Part 3.13 and Practice Direction 3E) and electronic disclosure (Practice Direction 31B) apply. However, if there is uncertainty as to the course the proceedings may take so that it is not possible to prepare a realistic costs budget, or if the speed at which proceedings are being pursued is such that there is insufficient time for the parties to prepare and file sensible costs budgets or to take the steps required in connection with electronic disclosure in time for the CMC fixed by the Court, it is recommended that the claimant apply to the Court in writing, either before or at the same time as applying to fix the CMC, for an urgent order that the parties do not have to serve costs budgets 7 days before the CMC or dis-applying the provisions of 31BPD.4 in relation to disclosure of electronic documents. Unless one party objects, the Court will deal with such applications on paper.

Specific and Early Disclosure

24. Early disclosure may be justified to enable the claimant to plead its case properly or to secure finalised pleadings if and when expedited trials are ordered.

25. Contracting authorities are encouraged to provide their key decision making materials at a very early stage of proceedings or during any pre-action correspondence. This may include the documentation referred to in Regulation 84 of the Public Contracts Regulations 2015 ("the 2015 Regulations").

26. The question of disclosure will be considered at the first CMC. Applications which are likely to be contested should be brought on promptly; early hearings can be fixed if required. The parties' attention is drawn to the general provisions on disclosure in this Guide at Section 11 and to the protocol for e-disclosure prepared by TeCSA of 9 January 2015.

Confidentiality generally

27. Public procurement claims frequently involve the disclosure of, and reliance upon, confidential information. Confidentiality is not a bar to disclosure.[11] However, the need to protect confidential information needs to be balanced by the basic principle of open justice. Managing the use of confidential information in the proceedings tends to increase both the cost and complexity of the litigation. The Court will seek to manage the proceedings so that confidentiality is protected where genuinely necessary but ensuring that the issue of confidentiality does not give rise to unnecessary cost or complexity. Assertions of confidentiality should only be made where properly warranted.

11 Science Research Council v Nasse [1980] AC 1028

28. Once a case has been allocated to a particular TCC judge, papers and communications, particularly those which are to be treated as confidential, should generally be passed through the relevant Judge's Clerk to limit the risk of inadvertent disclosure.

29. Papers delivered to and communications with the Court and the Judge's Clerk should be marked as "Confidential" if they are confidential.

30. It is recommended that documents containing confidential material are provided on coloured paper so that their confidential status is immediately apparent (practitioners are asked to take care that the print remains legible when printed on a coloured background). Where relevant, the level of confidentiality should be identified either by a stamp or mark (e.g. "Confidential 1st Tier") or by a particular colour of paper.[12]

31. Where necessary to protect confidential information the Court may, if requested, make an order restricting inspection of the Court files. Requests to restrict inspection should only be made where necessary. Any member of the public may seek an order from the Court varying any such restrictions. Consideration should be given to providing appropriately redacted pleadings for the Court file so as to permit public access to them. As to the management of confidential information in pleadings generally, see paragraph 11 above.

Redactions

32. Redaction of disclosed documents, statements or pleadings can be justified on the grounds that the redactions cover privileged and/or confidential material. In the latter case, redactions may be justified to enable documents to be more widely disclosable to people outside any confidentiality rings. In such cases, a schedule should be prepared which explains the justification for the redactions. The schedule should list the information in respect of which confidential treatment is claimed and the reasons for the claim for confidentiality. The schedule should contain two columns: the first giving the relevant page and paragraph reference (a line number should be added if there are a number of pieces of confidential information in one paragraph in the document concerned); and the second setting out the reasons for asserting confidentiality. For example:

12 As to the use of tiers in confidentiality rings see paragraphs 41 and 42

Document Title	
Location in Document	**Reason for assertion of confidentiality**
Page 15, paragraph 4.2	The deleted material relates to ABC Limited's confidential costs and prices The information is in the nature of a business secret

33. Save in exceptional circumstances or where redacted material is irrelevant, the Court should, at the appropriate stage, be provided with the redacted documents also in unredacted form with the redactions highlighted in a prominent colour which does not obscure the information beneath it, together with the schedule of redactions. This can be important on specific disclosure applications as well as at trial. Each page of the document must include the header "CONTAINS CONFIDENTIAL INFORMATION".

Confidentiality Rings and Undertakings

34. Confidentiality rings may be established where necessary to facilitate the disclosure of confidential information. A confidentiality ring comprises persons to whom documents containing confidential information may be disclosed on the basis of their undertakings to preserve confidentiality.

35. It is highly desirable that any confidentiality ring is established as early as feasible. Agreements or proposals for confidentiality rings, their scope and limitations should be put before the Court at the first CMC or application for specific disclosure, whichever is earlier, with explanations as to why they are justified. The Court may make orders implementing, approving or amending the parties' agreements or proposals.

36. The terms of any confidentiality ring will depend on the circumstances of the particular case, including the matters in dispute and the nature of the material to be disclosed. Generally, however, it will be necessary to determine (1) who should be admitted to the ring and (2) the terms of the undertakings which any members of the ring may be required to give.

37. As to personnel, a party's external legal advisors (solicitors and counsel) will need to be admitted to any ring that is established.

38. Parties, and in particular the claimant, may also wish to include certain of their own employees in the ring, who may be in house lawyers or other personnel. This will usually be for the purpose of understanding material disclosed into the ring and/or for giving instructions to external lawyers.

39. Where a party proposes to admit an employee representative, and the ring contains material which is confidential to a commercial competitor of that party, relevant factors are likely to include that party's right to pursue its claim, the principle of open justice, the confidential nature of the document and the need to avoid distortions of competition and/or the creation of unfair advantages in the market (including any retender) as a result of disclosure.

40. In considering whether a particular person should be admitted to the ring, the Court will take account of his/her role and responsibilities within the organisation; the extent of the risk that competition will be distorted as a result of disclosure to them; the extent to which that risk can be avoided or controlled by restrictions on the terms of disclosure; and the impact that any proposed restrictions would have on that individual (for example by prohibiting them from participating in a re-tender or future tenders for a period of time).

41. In order to manage these risks employee representatives may be admitted to a confidentiality ring on different terms from external representatives. Employee representatives may also have access to some but not all of the material disclosed into the ring (for example, technical material but not pricing information). This is sometimes referred to as a "two tier" ring.

42. Under an alternative form of two tier ring, the external representatives of a party in the first tier may apply for an employee representative in the second tier to have access to a particular document or documents, whether in open form or partly redacted. One way of dealing with this is for notice to be given to any person affected by the proposed disclosure, identifying the document, the form in which its disclosure to members of the second tier is sought, and the reasons why disclosure to the second tier is sought, and for the person affected to consent or object within a fixed time. The person or persons affected may be the contracting authority and/or the owner of the confidential information. In cases subject to expedition the period for response may be short and,in appropriate cases, less than a working day. Two tier rings necessarily introduce additional cost and complexity and will need to be justified in the circumstances.

43. Other specialist advisors (such as accountants or those with other expertise) may also be admitted to the ring if that is demonstrated to be necessary, either in lieu of or in addition to employee representatives.[13]

44. As to the terms of disclosure, the Court will order that confidential documents, information or pleadings are only to be provided to members of the ring if undertakings are given to the Court. Such undertakings will preclude the use of the relevant material other than for the purposes of the proceedings and prevent disclosure outside the ring. They will also contain provisions controlling the terms on which confidential information must be stored and the making of copies, and requiring the receiving person to either return or destroy the documents in question, or render them practically inaccessible, at the conclusion of the proceedings.

45. Additional undertakings may be required, particularly where there are concerns that disclosure could have an impact on competition and/or any subsequent procurement. These may include terms:

    1) Preventing employee representatives from holding copies of documents at their place of work and requiring them to inspect the material at a defined location (such as the offices of their external lawyers);

    2) Limiting the involvement of a recipient of a document in any re-procurement of the contract which is the subject of the litigation;

    3) Limiting the role which a recipient can play in competitions for other similar contracts for a fixed period of time in a defined geographic area; and/or

    4) Preventing the recipient from advising on or having any involvement in certain matters, again for a fixed period of time.

46. Whilst the Court will give weight to the need to protect competition in the market, the more onerous the proposed restriction is, the more clearly it will need to be justified. Further, the terms of the ring will need to be workable taking account of the timetable for the litigation, including any order for expedition.

47. Confidentiality rings will also contain provisions which establish how confidential information is to be identified as such, and how claims to confidentiality may be challenged.

13 The provision of such advice is to be distinguished from acting as an expert witness.

48. Where documents are disclosed into the ring in confidential form, further non-confidential versions of those documents should also be disclosed with necessary redactions.

Suspension lifting applications

49. The Court can lift the statutory suspension that prevents the contracting authority from entering into the contract in question. The timing of the application is a matter for the applicant but, if urgency in placing the contract is to form part of any balance of convenience test, the application needs to be brought on expeditiously. However, enough time needs to be provided for the respondent to submit evidence and for there to be any evidence in reply before any hearing.

50. If the Court orders that the suspension is to be lifted a stay of such an order will only be granted when it is appropriate to do so. The Court, if it considers that a stay is appropriate, and particularly when it has refused permission to appeal, will give consideration to a short stay of 1-2 working days to enable the applicant to seek expedited permission and to enable the Court of Appeal to set a timetable; such a stay will often be accompanied by a requirement that any application for permission or for an extended stay should be on notice to the other party, to enable it to make representations to the Court of Appeal.

Interested Parties

51. Procurement claims frequently engage the interests of parties other than the claimant and the contracting authority ("interested parties"; in this protocol the term "interested party" is given a wider meaning than in CPR Part 54).

52. In particular, the successful bidder may be affected by the relief sought in a procurement claim, which typically claims an order setting aside the award decision in his favour. The successful bidder may also be affected by the disclosure of confidential information contained in his bid, as may other unsuccessful bidders.

53. Whilst an interested party may apply to become a full party to the proceedings, its interests can usually be considered and addressed by the Court without that being necessary.

54. The claimant and the defendant should take steps to ensure that an interested party is on notice of matters which affect its interests. It will often be appropriate for the defendant to ensure that other bidding parties are given such notice. However, particularly where applications are made as a matter of urgency, it may be appropriate for the claimant to ensure that the interested party has been given appropriate notice.

55. In order to allow an interested party to consider its position, it may be necessary to provide it with copies of any pleadings, redacted if necessary, any relevant application, supporting evidence and/or other relevant documentation.

56. An interested party needs to apply to be represented (if it so wishes) as soon as practicable. A written application, which may take the form of a letter to the Court, should be sent to the Court and served on all litigation parties (and any other interested parties). The application should clearly indicate the scope of the interested party's proposed involvement. If the interested party's involvement is agreed with the litigation parties, then that should be made clear in the application. In general, the Court will expect to hear from interested parties who are affected by an application or claim.

57. The Court may direct that an interested party is to be treated as a respondent to an application (CPR 23.1) but a direction to this effect is not essential, particularly in cases of urgency. The Court may order that an interested party is permitted or entitled to participate in particular applications, hearings or issues and/or may order that the involvement of the interested party is to be limited in defined respects.

58. If expedition so demands, the application for the interested party to be represented may be heard immediately before the relevant substantive application. However, earlier resolution is preferable to allow orderly preparation for hearings and the preparation of relevant evidence or submissions.

59. Attention is drawn to the requirement under Regulation 47F(3) of the Public Contracts Regulations (As Amended) 2006 and Regulation 94(3) of the Public Contracts Regulations 2015 to the requirement to give notice to the party to whom the contract was awarded in relation to claims for ineffectiveness.

60. Other interested parties who may express interest in procurement claims include sector regulators, competition authorities and/or sub-contractors, and the Court will give directions in relation to their involvement as appropriate.

61. An interested party can recover or be required to pay costs.[14]

14 See e.g. Section 51(3) of the Senior Courts Act 1981 and Bolton Metropolitan District Council v The Secretary of State for the Environment [995] 1 W.L.R. 1176.

Expedition

62. Article 1 of Directive 89/665/EC (as amended by Article 1 of Directive 2007/66/EC) requires member states to ensure that decisions taken by contracting authorities may be reviewed "as rapidly as possible". Particularly in cases where the automatic suspension has been maintained, and subject to the principles set out in paragraph 1.1.4 of this Guide, the TCC is likely to support (and in appropriate cases may impose) rapid progress to a trial as early as is practicable. An expedited trial may in particular be appropriate where it will enable the contracting authority to enter into the contract without undue disruption to its timetable, or where the automatic suspension is maintained following an application for its termination.

63. In considering whether the trial should be expedited, it will be necessary to consider how the required procedural steps will be accomplished within the abbreviated timetable. In particular, adequate time will be required for disclosure and for the hearing of any interim applications which are expected. The Court may use its powers to control and define the scope of disclosure in cases where expedition is ordered.

64. The party applying for an expedited trial should do so on notice and at as early a stage as is practicable. The party applying should set out the reasons why expedited trial is appropriate and the party's proposals for the management of procedural steps. The Court should be provided with details of any third parties affected and third parties (in particular the successful tenderer) should be put on notice of the application. Where appropriate it will be part of the agenda for the first CMC.

Trial

65. Consideration needs to be given to confidentiality in terms of what may be reported, whether there should be restricted access to the Court recording of the proceedings and who can be present in the courtroom. The Court will as a matter of generality require as much of the trial as possible to be open to all who wish to attend and limit restrictions to those which are legitimate, fair and proportionate.

Judgments

66. Judgments in procurement cases will be handed down as open documents, save in the most exceptional circumstances (for instance in cases involving Official Secrets). Any confidential information will usually be contained in a separate schedule to the judgment (or such other form as appropriate) which will not be available more widely than the membership of any confidentiality ring if applicable) without an order of the Court. Counsel should co-operate through the Judge's Clerk to agree what may be made publicly available.

Appendix I: General Guidance on Statements of Case

1. The following principles apply to all statements of case. They should, as far as possible, also be observed when drafting a Part 8 claim form.

    a) The document must be as concise as possible.

    b) The document must be set out in separate consecutively numbered paragraphs and sub-paragraphs.

    c) The document must deal with the case on a point by point basis to allow a point by point response. In particular, each separate cause of action, or defence, should be pleaded separately wherever possible.

    d) So far as possible each paragraph or sub-paragraph should contain no more than one allegation.

    e) Special care should be taken to set out (with proper particulars) only those factual allegations which are necessary to establish the cause of action, defence, or point of reply being advanced ("primary allegations"), to enable the other party to know what case it has to meet. Evidence should not be included, and a general factual narrative is neither required nor helpful (and is likely to contravene paragraphs (f), (h) and/or (k) below).

    f) Particulars of primary allegations should be stated as particulars and not appear as if they are primary allegations.

    g) A party wishing to advance a positive case must set that case out; and reasons must be set out for any denial of an allegation.

    h) Where particulars are given of any allegation or reasons are given for a denial, the allegation or denial should be stated first and the particulars or reasons for it listed one by one in separate numbered sub-paragraphs.

    i) Where they will assist:

        i) headings should be used; and

        ii) abbreviations and definitions should be established and used, and a glossary annexed.

    j) Contentious headings, abbreviations and definitions should not be used. Every effort should be made to ensure that headings, abbreviations and definitions are in a form that will enable them to be adopted without issue by the other parties.

k) Where it is necessary to give lengthy particulars of an allegation, these should be set out in schedules or appendices.

l) A response to particulars set out in a schedule should be set out in a corresponding schedule.

m) Where it is necessary for the proper understanding of the statement of case to include substantial parts of a lengthy document the passages in question should be set out in a schedule rather than in the body of the statement of case.

n) Contentious paraphrasing should be avoided.

o) The document must be signed by the individual person or persons who drafted it, not, in the case of a solicitor, in the name of the firm alone.

2. There is no general rule or maximum length for statements of case. It is recognised that some TCC cases by their nature require more detailed particulars of allegations than other cases. Where practicable, consideration should be given to the use of schedules and appendices to ensure that excessive detail does not detract from an understanding of the essential facts necessary for the purpose of formulating a complete cause of action set out in the body of the pleading.

3. Particulars of Claim, the Defence (and Counterclaim) and any Reply must comply with the provisions of CPR 16.4 and 16.5.

4. Where the Disclosure Practice Direction (PD57AD) applies, Initial Disclosure must accompany each statement of case in accordance with paragraph 5.1 of PF57AD unless the parties have agreed to dispense with it or the court has ordered that it is not required.

5. If the Disclosure Pilot does not apply or Initial Disclosure under it has been dispensed with by agreement or order, then:

a) if any documents are to be served at the same time as a statement of case they should normally be served separately from rather than attached to the statement of case;

b) only those documents which are of central importance and necessary for a proper understanding of the statement of case should be attached to or served with it; and

c) the statement of case must itself refer to the fact that documents are attached to or served with it.

6. Particulars of claim, a defence and any reply must be verified by a statement of truth, as must any amendment, unless the Court otherwise orders: CPR 22.1.

Appendix J: General Guidance on Electronic Court Bundles

This general guidance is intended to ensure a level of consistency in the provision of electronic bundles ("e-bundles") for court hearings (but not tribunal hearings) in a format that promotes the efficient preparation for, and management of, a hearing. It is subject to any specific guidance by particular courts or directions given for individual cases. It updates and replaces previous guidance published in May 2020.

1. E-bundles must be provided in pdf format.

2. All pages in an e-bundle must be numbered by computer-generated numbering, not by hand. The numbering should start at page 1 for the first page of the bundle (whether or not that is part of an index) and the numbering must follow sequentially to the last page of the bundle, so that the pagination matches the pdf numbering. If a hard copy of the bundle is produced, the pagination must match the e-bundle.

3. Each entry in the index must be hyperlinked to the indexed document. All significant documents and all sections in bundles must be bookmarked for ease of navigation, with a short description as the bookmark. The bookmark should contain the page number of the document.

4. All pages in an e-bundle that contain typed text must be subject to OCR (optical character recognition) if they have not been created directly as electronic text documents. This makes it easier to search for text, to highlight parts of a page, and to copy text from the bundle.

5. Any page that has been created in landscape orientation should appear in that orientation so that it can be read from left to right. No page should appear upside down.

6. The default view for all pages should be 100%.

7. If a core bundle is required, then a PDF core bundle should be produced complying with the same requirements as a paper bundle.

8. Thought should be given to the number of bundles required. It is usually better to have a single hearing e-bundle and (where appropriate) a separate single authorities e-bundle (compiled in accordance with these requirements), rather than multiple bundles (and follow any applicable court specific guidance – see eg CPR PD52C Section VII).

9. The resolution of the bundle should not be greater than 300 dpi, in order to avoid slow scrolling or rendering. The bundle should be electronically optimised so as to ensure that the file size is not larger than necessary.

10. If a bundle is to be added to after it has been transmitted to the judge, then new pages should be added at the end of the bundle (and paginated accordingly). An enquiry should be made of the court as to the best way of providing the additional material. Subject to any different direction, the judge should be provided with both (a) the new section and, separately, (b) the revised bundle. This is because the judge may have already marked up the original bundle.

Delivering e-bundles

Filename: The filename for a bundle must contain the case reference and a short version of the name of the case and an indication of the content of the bundle – eg "CO12342021 Carpenters v Adventurers Hearing Bundle" or "CO12342021 Carpenters v Adventurers Authorities Bundle".

Email: If the bundle is to be sent by email, please ensure the file size is not too large. For justice.gov e-mail addresses the maximum size of email and attachments is 36Mb in aggregate. Anything larger will be rejected. The subject line of the email should contain the case number, short form case name, hearing date and name of judge (if known).

Uploading bundles: Bundles should be sent to the court in accordance with the court's directions. Where the bundle would otherwise be sent by email (rather than being uploaded to a portal) but is too large to be sent under cover of a single email then it may be be sent to the Document Upload Centre by prior arrangement with the court – for instructions see the Professional Users Guide.

Unrepresented litigants

Ordinarily the applicant is responsible for preparing the court bundles. If the applicant is unrepresented then the bundles must still if at all possible, comply with the above requirements. If it is not possible for an unrepresented litigant to comply with the requirements then a brief explanation of the reasons for this should be provided to the court as far in advance of the hearing as possible. Where possible the litigant in person should suggest a practical way of overcoming the problem. If the other party is represented then that party should consider offering to prepare the bundle.

Other internet guidance

There is guidance available freely available on the internet on how to use software to create bundles.

Appendix K: The BPC Protocol for Remote and Hybrid Hearings

Introduction to this Protocol

1. This Protocol contains guidance on preparing for and conducting Remote and Hybrid Hearings in the Business and Property Courts. It is relevant to hearings of all kinds, including but not limited to trials, applications and those in which litigants in person are involved. It does not set out the circumstances in which the Court may consider it appropriate to order a Remote or Hybrid Hearing.

2. The Protocol is intended to assist judges and court users but it should be applied flexibly. It remains the case that the manner in which all hearings are conducted is a matter for individual judges, acting in accordance with applicable law, the Civil Procedure Rules (the 'CPR') and Practice Directions. Nothing in this Protocol derogates from the judge's duty to determine all issues that arise in the case judicially and in accordance with normal principles. A hearing conducted in accordance with this Protocol should, however, be treated for all other purposes as a hearing in accordance with the CPR.

3. The following defined terms are used in this Protocol:

    a) A 'Hybrid Hearing' is a hearing in which some Participants, together with the judge(s), are physically present in a courtroom, while other Participants attend the hearing by telephone or video link.

    b) A 'Remote Hearing' is a hearing in which all Participants, and the judge(s), attend the hearing from separate locations by telephone or video link, instead of gathering physically in a courtroom.

    c) A 'Participant' means a party to the proceedings (meaning, in the case of corporate entities, a representative of the entity), a legal representative of a party, any person or entity instructed for the purposes of the hearing by a party, a witness, or an expert.

    d) A 'Speaker' means a legal representative of a party, a witness, an expert and any other attendee who is required to present, respond, and/or give oral evidence at a Remote or Hybrid Hearing.

    e) A 'Working Day' means every day except weekends and public holidays in England and Wales.

4. The general rule is that all court hearings, including Remote and Hybrid Hearings, are in public. This can be achieved in a number of ways. These include, without limitation, the Court directing that:

    a) the audio and (if available) video of the hearing be relayed to an open courtroom,

    b) a media representative be allowed to access the Remote or Hybrid Hearing, and/or

    c) the hearing be live-streamed over the internet, where such a broadcast is authorised in legislation (such as s85A of the Courts Act 2003).

5. Where this is not practicable, the Court may direct that a Remote Hearing must take place in private where this is necessary to secure the proper administration of justice (CPR Practice Direction 51Y). This is in addition to the requirement that a hearing (howsoever conducted) be held in private where the Court is satisfied that it is necessary in order to secure the proper administration of justice (CPR 39.2(3)(g)).

6. The unauthorised recording or transmission of a hearing is an offence. The taking of photographs (including screen shots) or the recording or transmission of someone taking part in a Remote Hearing is also prohibited. However, Remote and Hybrid Hearings will be recorded by the Court, unless a recording has been dispensed with under CPR 39.9(1).

Preparing for a Remote or Hybrid Hearing

General points

7. In order to function effectively, Remote Hearings and, in particular, Hybrid Hearings require a high degree of preparation and co-operation between the parties and the Court.

8. Whether a hearing will take place as a Remote Hearing or a Hybrid Hearing is a decision for the Court. Where a party believes that a Remote or Hybrid Hearing would be appropriate, they should discuss and if possible agree the question with the other parties and then raise it with the Court:

    a) at or in advance of the PTR, if there is one; or

    b) where no PTR has been fixed, in correspondence in good time before the hearing.

9. At the time a Remote or Hybrid Hearing is requested, the parties should co-perate with each other in order to inform the Court of any matters which they wish the Court to reflect in any directions it may give, including (without limitation):

a) any support or adjustments which any Participant would require in order to participate in and/or attend a Remote or Hybrid Hearing; and

b) any proposal to instruct a third party provider to facilitate the Remote or Hybrid Hearing (see the section on 'Third party providers' below for more guidance).

10. The Court may order a Remote or Hybrid Hearing and give directions for its conduct in whatever manner appears to it appropriate including at any PTR, at a short case management conference convened for the purpose, or on paper. In any event, the Court's listing office or judge's clerk will seek to contact the parties and/or their legal representatives in advance of a Remote or Hybrid Hearing to inform them of the time and date for the hearing as well as the format and the platform for the hearing.

11. Where a Hybrid Hearings is ordered, parties and/or their legal representatives should liaise with the Court's listing office or judge's clerk in advance of the hearing as to:

i) the number of courtrooms that will be available for the hearing and their capacity; and

ii) what extra equipment and preparation will be required to facilitate the Hybrid Hearing.

12. The Court's listing office or judge's clerk will seek to ensure that the parties are informed, as far in advance as possible, of the identity of the judge(s) hearing the case.

Attendance

13. Subject to applicable law, it is for the Court to determine who may attend a Remote or Hybrid Hearing and to set such conditions for their attendance as it may consider appropriate. No person may access a Remote or Hybrid Hearing remotely without the Court's permission. Unauthorised access may constitute an offence under section 41 of the Criminal Justice Act 1925 and section 9 of the Contempt of Court Act 1981.

14. In all cases, parties must inform the Court in advance of whom they wish to attend the hearing, following the procedure set out in the following paragraphs.

15. The Court may permit a person outside England and Wales to attend a Remote Hearing as a Participant where it considers that appropriate. The Court has no express power to allow the broadcasting of a Hybrid Hearing to persons outside England and Wales. However, that does not prevent the Court permitting Participants to attend such a hearing from outside England and Wales. The onus is on the relevant Participant to ensure that such attendance is not in breach of any local laws or regulations and that, if permission is required from the local court or other authority in the foreign jurisdiction, such permission has been obtained (and see paragraph 34 below in relation to witnesses attending a hearing from abroad).

16. The parties or their legal representatives should, before the Remote or Hybrid Hearing, provide the Court's listing office or judge's clerk with the following details for each Participant who wishes to attend:

    a) name;

    b) organisation;

    c) email address;

    d) the location, including country, from which they would be joining the hearing (in this regard, parties should note paragraph 15 above); and

    e) whether it is proposed that the person in question be a Speaker.

    In the ordinary course, the parties should provide the information sought in this paragraph no later than 10.30am two working days before the hearing.

17. In addition, each party should nominate one of its proposed Participants as its 'Primary Contact', being the person who should be contacted in accordance with the lost connections procedure set out at paragraph 31 below.

18. A member of the public or media representative who wishes to attend a Remote or Hybrid Hearing must notify the Court by email of the details set out in subsections (a) to (d) of paragraph 16 above using the contact details set out in the Daily Cause List or the Hearing Notice.

19. If the Court is satisfied that the requirements of paragraph 16 have been met in relation to any person, it will seek to facilitate attendance by that person at the Remote or Hybrid Hearing. However:

    a) there is no absolute right to attend a Remote or Hybrid Hearing;

    b) failure to give timely notice of a wish to attend may mean that attendance cannot be facilitated; and

c) access cannot in any event be guaranteed; the needs of other litigants, the limits on resources and the need to monitor the identities of those who view the proceedings may mean that the Court is not able to provide access.

20. For hearings conducted by audio link:

a) either the Court (or a third party provider authorised by the Court) will call the parties at the time of the hearing or the parties should dial in to the hearing using the information provided in the invitation to join the remote hearing. In order to attend and/or participate in a telephone hearing, Participants will require access to a telephone with any relevant call barring services switched off; or

b) the Court will notify the parties that they are to dial in to the hearing on a video or audio conferencing platform, in which case the Court will, no later than two working days before the hearing, provide the relevant telephone number and access code.

21. For hearings conducted by video link, the Court's listing office or judge's clerk will send the parties information about the video hearing, including a link to access the hearing and any sign in details, no later than one working day before the hearing. In order to attend and/or participate in a hearing conducted by video link, Participants will require access to a device with internet access, which enables audio and video transmission.

22. A link provided to a Participant is for their own use. No-one who is provided with a link may forward it to any other person without the Court's permission.

23. Available platforms for Remote and Hybrid Hearings conducted via telephone conference include (non-exhaustively): BT conference call, BT MeetMe, Microsoft Teams and ordinary telephone call. Available methods for videoconferences include (non-exhaustively): Microsoft Teams, Cloud Video Platform (CVP), Video Hearing Service (VHS), court video link, and Zoom. But any communication method available to the Participants can be considered if appropriate.

24. For video conferences, it is usually possible for the parties and/or their representatives to contact the Court's listing office or judge's clerk to arrange a test call. The test call should be conducted with a maximum of 10 users. In any event, Participants are advised to test their own devices and ensure they are able to access the relevant platform in advance of the hearing. Any technological issues should be made known to the Court's listing office or judge's clerk in advance of the hearing.

25. Parties and/or their legal representatives should notify the Court's listing office or judge's clerk no later than two working days before the video hearing if telephone dial-in facilities are required for Participants without internet access.

Conduct of the hearing

26. Participants should join the hearing no later than 15 minutes before the set start time.

27. Remote and Hybrid Hearings should resemble courtroom hearings as closely as practicable. This means maintaining the same level of formality as is expected in the courtroom.

28. Subject to any contrary or more detailed direction of the Court, Participants should observe the following etiquette:

    a) All persons who are not Speakers should keep their microphones muted and cameras switched off throughout the hearing.

    b) Speakers should keep their cameras turned on and mute their microphones when they are not speaking.

    c) A Participant who is not a Speaker may not address the Court without the Court's prior permission.

    d) Where possible, Speakers should ensure their cameras are at eye level and should maintain a reasonable distance from the camera (with a plain background behind them) in order to ensure their head and upper body are clearly visible. Speakers may wear headsets if they wish.

    e) Speakers should try to attend the hearing from a quiet place from which privacy and minimal noise disruptions can be ensured.

    f) Reasonable and proportionate and noise-free use of devices to enable communication between team members or legal representatives and their clients is permitted during the hearing, provided that this does not interfere with the hearing; in particular, Participants must ensure that all notifications are set to silent for the duration of the hearing. However, Participants are reminded that witnesses must not communicate with anyone else about their evidence until their testimony is concluded. See the section below titled 'Witnesses, experts and other third parties' for further guidance.

29. It is the responsibility of each party and/or their legal representatives to inform those attending the Remote or Hybrid Hearing (including any person or entity engaged to provide technical support or assistance) of the strict prohibitions against any unauthorised dissemination of the hearing and the making of any sound or video recording of it (and of any other restrictions outlined in the relevant court order), in addition to the other obligations set out in this section.

30. In the event of an internet or phone line disconnection or degrading to an unusable degree during the Remote or Hybrid Hearing, the Court's listing office or judge's clerk will contact the Primary Contact for each party to discuss whether a continuation is possible or whether an adjournment of the hearing is required.

Witnesses, experts and other third parties

31. Where a witness gives evidence by video or audio link in a Remote or Hybrid Hearing, the objective should be to make the process as close as possible to the usual practice in an in-person hearing where evidence is taken in open court.

32. In such cases, guidance should be taken from **Annex 3 to Practice Direction 32** which addresses videoconferencing.

33. In particular, parties should be aware that where evidence is to be taken from a witness located outside the jurisdiction, permission may be required from the local court or other authority in the foreign jurisdiction. It is for the party calling the witness to ensure that such permission, if required, is obtained in good time for the hearing at which the witness is to give evidence and to inform the Court that such permission has been obtained.

34. If a party wishes one or more of its witnesses to give their evidence from the offices of a legal representative, that party should notify the other parties at the earliest opportunity, with a view to permitting a representative of the other parties to attend or making arrangements to ensure that the Court can ascertain that the witness is not communicating with any other person or otherwise receiving assistance during the course of their evidence.

35. In some cases, it may be appropriate to arrange to have more than one camera available in the location from which the witness is giving their evidence to ensure that impermissible reference to notes, prompting etc. is not taking place.

36. Witnesses must only have access to a device on which they access and participate in the hearing, the hearing bundle and their statement(s) and exhibit (either in electronic or hard copy, or both). The Court will expect the parties to have made efforts to ensure that each witness has access to these materials in a format which is convenient and accessible to the witness. In some cases it may be more appropriate for a witness to have access to a hard copy bundle whether they are participating remotely or in person.

37. Where a witness has access to the hearing bundle only in electronic form, and the witness is asked a question about a document appearing in the bundle, the Court and the advocates should ensure that the witness is given a proper opportunity to orientate or familiarise themselves with the document (for instance by being shown the front page, or the pages before/after the section they are being asked about) before answering.

38. Parties and/or their legal representatives should ensure that witnesses decide in good time before the hearing whether they prefer to swear an oath on a holy book/scripture or to make an affirmation. The relevant holy book/scripture or text of the affirmation should be made available to the witness in advance of the hearing.

39. Parties are reminded that it will be for the parties to provide the necessary facilities to enable the witness to access the hearing bundle in electronic format even if the hearing takes place in a court room.

Bundles / documents for the hearing

40. The claimant should, if necessary, prepare an electronic bundle of documents and an electronic bundle of authorities for each Remote or Hybrid Hearing. Each electronic bundle should be compiled, formatted and delivered in accordance with the relevant court's guide.

41. To the greatest extent practicable, all bundles should be electronic, not hard copy (subject to paragraph 37). However, parties or their legal representatives should liaise with the Court in advance of the hearing to determine whether the Judge's preferences in the matter.

Third party providers

Transcribers

42. Hearings in the Business and Property Courts are tape-recorded or digitally-recorded by the Court unless the judge directs otherwise (CPR 39.9(1)). A party may, after a hearing, require a transcript to be produced by a court-approved transcriber. Form EX107 should be completed and submitted to the Court. The Guidance Notes to Form EX107 set out the procedure to be followed, a list of approved transcribers and the relevant charges.

43. Parties may, with the prior permission of the Court, engage court-approved transcribers to prepare a real-time transcript of a hearing. The Court's permission will be recorded in an Order which may also, without limitation, regulate the dissemination of the real-time transcript. The requesting party and the transcriber they wish to instruct must also submit to the Court a completed Form EX107 OFC. A copy of the Court's Order must be provided to the transcribers.

Hearing support services

44. The scale or logistical complexity of some Remote or Hybrid Hearings may lead the parties to consider engaging a specialist third party to provide technical support services. These services can include the selection and operation of hardware and/or software necessary to support the hearing itself and/or electronic document management.

45. Permission to engage such third-party providers must be sought from the Court in advance of the hearing. The parties and/or their legal representatives bear the responsibility of informing the relevant representatives from the third-party provider of any requirements and/or prohibitions set out in the relevant Court order, in addition to the strict prohibition against making any unauthorised dissemination or recording of the hearing by any electronic means and that failure to comply could result in them being found in contempt of court and liable to criminal penalties.

Interpreters

46. Where a Participant or Participants require an interpreter, a request should be made to the Court in advance of the hearing. Parties or their legal representatives should provide the Court with the details in paragraph 17 for the interpreter as relevant. If possible, parties or their legal representatives should try to arrange a test call with the interpreter and relevant witness in advance of the hearing. All Participants are reminded that using remote interpretation services may cause delays and/or technical difficulties and are encouraged to be mindful of this.

47. Where a witness is to give evidence remotely by an interpreter, consideration should be given as to where the interpreter should be located.

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This publication is available for download at www.justice.gov.uk