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Report and Recommendations of the Commercial Court Long Trials Working Party

December 2007

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December 2007 - Foreword

The Commercial Court Working Party on Long Trials was set up after the experience of two very large claims led to well publicised criticisms of the procedures used in long and complex trials.

Without pre-judging any of those criticisms, the Commercial Court organised a Symposium on the topic in October 2006 and in January 2007 the Commercial Court Users' Committee set up the working party which consisted of Commercial Court judges, barristers and solicitors who practise regularly in the court and two clients with wide experience and who have been involved in large cases in the court recently.

The Working Party's proposals and recommendations are set out in its Report to the Users' Committee. The Commercial Court is greatly indebted to Mr Justice Aikens and his colleagues for the enormous amount of valuable work that has been put into its preparation.

On 28 November 2007 the Commercial Court Users' Committee adopted the Report and its recommendations. The proposals and recommendations will be put into practice in the Commercial Court for a trial period from 1 February to 31 July 2008. The judges of the Court will then decide whether to continue the pilot or whether the recommendations should be adopted permanently, either in whole or in part. Any necessary changes to the Commercial Court Guide will then be made.

The Commercial Court was founded to deal with the disputes of the international commercial community as effectively and expeditiously as possible. Large scale commercial litigation is increasing and I am confident that this Report and its recommendations will ensure that the Commercial Court, together with the specialist Bar and solicitors who practise in it, will be able to meet the challenge of such litigation in the twenty–first century, particularly when the Court moves to its new premises in Fetter Lane in 2010.

6.xii.2007

David Steel
Judge in charge of the Commercial List

A. Executive Summary of Recommendations of the Working Party

A1. General (see Section B)

1. The Commercial Court Long Trials Working Party ("WP") was set up under the auspices of the Commercial Court Users Committee in January 2007. The WP gave itself wide terms of reference enabling it to consider all aspects concerning the management of heavy and complex litigation in the Commercial Court.

2. It concluded that the existing procedural code, under the CPR, contained sufficient powers to enable proposals for the more efficient conduct of these cases to be implemented. The WP concluded that there are further ways in which the procedural code can and should be supplemented and so more effectively used to achieve that greater efficiency, in the interests of the business community served by the Commercial Court. The WP identified a number of respects in which the Admiralty and Commercial Courts Guide ("the Guide") can be used to achieve this. Many of the arrangements recommended by the WP can be applied to, and should benefit, all Commercial Court cases and not simply the most heavy and complex. The areas in which the Guide will need change have been analysed.

3. The WP reviewed each of the stages of litigation. It noted that a problem in one stage could lead to problems in other stages. For example long and complex statements of case could lead to problems with disclosure, witness statements, client accountability and length of trial. To take another example, some forms of judicial control of complex litigation could occur too late in the litigation to have a sufficiently useful effect.

A2. Pre-Action Protocols (see Section C)

4. The WP concluded that litigants should continue to comply with the general protocols. However, consistently with the need to ensure that cases are developed with the benefit of greater definition and judicial involvement (in particular through the List of Issues: see paragraph 5 below) the WP concluded that, particularly in large cases, the time and burden of pre-action procedure should be kept within limits. Accordingly, it recommended that:

   a. The parties should comply with the minimum expectations of the existing pre-action protocol regimes.

   b. The Guide should be amended to provide that in such cases the pre-action letter of claim should be concise and do no more than explain the proposed claim sufficiently to enable it to be understood by the potential defendant. Similarly, the potential defendant need only provide a concise response.

c. Generally, there would be no need for the parties at this stage to appoint experts before writing a letter of claim, or responding to one.

d. Compliance with pre-action protocol regimes should not be required in cases where delays in starting proceedings might prompt forum shopping in other jurisdictions.

A3. Statements of Case and Lists of Issues (see Section D)

5. The WP noted a tendency of parties (through their lawyers) failing to plead only material facts and, instead, setting out detailed background facts and evidence, as well as law and argument. The WP considered that a client must be able readily to identify the key aspects of his case and the basis on which his opponent takes issue with them. The WP recommended that:

a. Statements of case should not exceed 25 pages in length without permission of the court and should (except in the case of very brief statements of case) include a short summary.

b. The court should regulate whether further information on a party's statement of case is required.

c. At the first Case Management Conference ("CMC") the court will settle judicially the list of key issues from an initial draft provided by the parties ("the List of Issues"). That list will thereafter become, effectively, a court document. The statements of case will thereafter increasingly have only secondary importance. A draft Model List of Issues is appended to this Report at Appendix 2.

d. "Pleading points" will be actively discouraged by the court.

e. The List of Issues would be used to regulate subsequent disclosure, witness statements and expert reports, all of which must be framed by reference to the issues within the List.

A4. Disclosure (see Section E)

6. The WP recognised the importance of disclosure but proposed the following steps to deal with the widely expressed concerns that, particularly in large scale litigation, the administrative burden and therefore cost of disclosure has grown disproportionately to its benefits:

a. Automatic disclosure should not take place until after the CMC scheduled to deal with disclosure.

b. In advance of that CMC the parties should prepare a schedule identifying the disclosure required by reference to the issues listed in the List of Issues, setting out (with brief reasons) whether "standard disclosure", or less or more, and when, was said to be required on each particular issue.

c. The aim will be to control disclosure on each issue by reference to classes of document, and periods of time, and level of disclosure, that are proportionate to the costs involved and the likelihood of the disclosure assisting the court in determining the issue.

A5. Witness Statements (see Section F)

7. The WP concluded that, in general, witness statements are often too long and insufficiently focused on the real issues that the witness can deal with. Accordingly it recommended that:

   a. In appropriate cases the court should impose a limit on the length of witness statements.

   b. The parties should, by headings in the witness statements themselves, identify which paragraphs of the statements relate to which of the issues in the List of Issues.

   c. In appropriate cases, on appropriate issues, the court should dispense with witness statements, order statements of the "gist" of evidence to be served, and/or allow limited examination in chief to be given at trial.

A6. Expert Evidence (see Section G)

8. The WP concluded that expert reports in large-scale litigation are often too long and over elaborate. The principal reason for this is the failure of the parties and the court to define with sufficient precision the relevant expert disciplines and issues before the experts write their reports. Accordingly, the WP recommended that:

   a. The List of Issues should identify the expert issues, either when it is first produced or subsequently when they have been properly identified.

   b. Expert reports should be framed by reference to those issues.

   c. Expert reports should normally be exchanged sequentially.

   d. The court should delay settling the List of Issues, to the extent that it relates to expert issues, if more time is needed before doing so.

   e. The court should always consider limiting the length of expert reports.

A7. Summary judgment/ Striking out/ Submissions of No Case to Answer (see Section H)

9. The WP concluded that it would be inappropriate if not impossible to have, for different types or size of case, different standards by which the court should judge whether to grant summary judgment or to strike out a claim or defence. However, it recommended that:

   a. The court should recognise that a more flexible approach to the range of costs orders available where applications for summary judgment or to strike out a claim or defence had failed might encourage parties to explore the use of these powers more.

   b. The List of Issues should be used by judges to promote a consideration of whether particular issues were appropriate for summary judgment or strike out applications.

c. In large cases which look likely to generate a large number of interim appeals (which often include summary judgment/strike out applications) a Lord Justice of Appeal with Commercial Court experience should be identified at an early stage in the case to be a member of every appeal panel, and arrangements should be made for appeals to be taken as promptly as possible.

10. The WP does not recommended that there be any change to the present rules and practice regarding a submission of "no case to answer" at the end of a claimant's case. However there may be cases where the judge can isolate one or more important issues and hear all the evidence and submissions on them and then rule on them.

A8. Indications from Judges as to the Merits of a Case/ Preliminary Issues (see Section H)

11. The WP noted the various occasions when a judge might give an indication of provisional views on the merits of a case. Overall the WP was in favour of this, provided it was done openly, with the parties' consent and the judge made it clear that the view was provisional. The WP recommended that:

a. Judges should be encouraged to give provisional views on the merits of particular issues identified in the List of Issues if it seemed appropriate to do so: eg at a CMC, as well as giving rulings at strike out/summary judgment applications.

b. The parties could agree that views could be given at suitable points in the trial.

c. The court should raise awareness of the existing early neutral evaluation ("ENE") facility referred to in the Guide.

d. More use should be made of preliminary issues, using the new List of Issues as the guide to identifying them.

A9. Use of Technology – Scope for "paperless" Litigation (see Section I)

12. The WP recognised that at this stage any proposals for paperless trials must be limited. Nonetheless, the WP recommended that:

a. The Guide should contain a specific provision that the parties and the court must consider at an early stage in a case the scope for using IT, particularly at the trial and particularly in long and complex cases.

b. This consideration should include the production in hard copy of only those bundles likely to be referred to reasonably frequently at trial, with electronic copies of the remaining documents available in court.

c. A specialist working party should be set up, consisting of clients and practitioners who will be in and will use the new courts in the new building under construction in Fetter Lane. This group should develop specific proposals on how future trials can, where appropriate, become paperless.

A10. Costs (see Section J)

13. The WP considered that many of the existing powers of the court in relation to costs are among the advantages that litigation in the Commercial Court offers over litigation in many other jurisdictions.

14. The WP felt strongly that the introduction of daily Court fees would put the court, and thus the use and development of English commercial law, at a significant disadvantage.

15. The WP further recommended that:
    a. The court should be prepared to make a summary assessment of costs where the total costs claimed was £250,000 or less.
    b. More use should be made of payments on account of costs where a higher sum for costs than that is claimed.
    c. The court should make more use of its power to award costs to discourage parties from behaving unreasonably.

A11. Management of the Pre-Trial Timetable and the Trial (see Section K)

16. The WP considered that, by having the List of Issues and then focusing disclosure, witness statements and expert evidence on the issues identified in that list, there should be a narrower and more focused engagement of the parties at trial than has sometimes been the case in large and complex cases. Its recommendations for trials therefore include the following:
    a. No two-party trial, however complex, should ordinarily be listed for more than 13 weeks (3 months).
    b. The pre-trial and trial timetable should be organised around careful estimates for each piece of work, with an appropriate contingency built in.
    c. At the Pre-Trial Review provisional time limits should be set for every component of the trial, ie. openings, the examination-in-chief (if any), cross-examination of all witnesses and closing speeches. The timetable for preparation of the chronology, and the type required, should always be discussed.
    d. The court should make more use of its existing powers to decide the order in which issues are taken at trial and to take certain issues to the point of decision before moving onto other issues.
    e. The parties must agree a list of matters of common ground (within the List of Issues) and this should be updated so as to ensure that the trial remains focused on the key areas of difference between the parties.
    f. Outline opening arguments should be concise, not normally exceed 50 pages, and be structured in accordance with the List of Issues.
    g. No opening speech should ever ordinarily be estimated to exceed two days, even in the heaviest case.

h. Time limits should be set for the examination of witnesses (either individually or collectively) wherever appropriate.
i. Consideration should be given, on a case-by-case basis, to a change in court sitting hours during trial to meet the needs of those involved and to achieve the objective of efficiency.
j. The court should impose a page limit on the length of written closing arguments, and the oral closing argument by a party should not exceed two days.

A12. Client Accountability and Responsibility for Litigation (see Section L)

17. The WP concluded that there were respects in which it was possible to increase client involvement in the litigation, in the interests of ensuring that appropriate senior management responsibility continued to be taken for the litigation, and thus that there was greater client accountability.

18. The WP has proposed the following:

a. Senior client representatives should be required to sign a fresh statement of truth shortly before trial verifying statements of case.
b. At appropriate stages those representatives should also be required to sign a statement to the court indicating whether ADR has been considered internally within the client organisation.
c. The power of the judge to require such representatives to be present in court (by video link if necessary), if the judge considers that doing so will assist in case management or resolution of the dispute, should be emphasised. At the same time care must be taken not to deter foreign clients from litigating in London by requiring their attendance when not really necessary.

A13. Judicial Resource Management for Heavy and Complex Cases (see Section M)

19. The WP recognised that its recommendations will require more judicial resources if long and complex cases are to be prepared and managed efficiently before and at the trial. It appreciated that Commercial Judges are called upon to undertake duties away from the Commercial Court. Accordingly, the WP recommended that:

a. The "two judge team" system should continue to be used where appropriate. It should be the duty of the parties to ask for a two judge team at an early stage, if they think that the case is sufficiently heavy/complex.
b. Steps should be taken to ensure that at all times one or other of the two judges nominated for a heavy and complex case will be available to sit in the Commercial Court to deal with CMCs/interim matters in that case and/or the trial.

c. Arrangements should be put in place to enable the parties in a heavy and complex case to contact one or other of the two judge team informally (ie by telephone or email, via the clerk or the Listing Office), so as to deal with urgent matters or to seek guidance on procedural points.

B. The Working Party, Terms of Reference, Meetings and Topics Discussed

B1. General

20. The Commercial Court Long Trials Working Party ("the WP") was set up following the Commercial Court Symposium on Heavy and Complex Trials, which was held on 30 October 2006 under the Chairmanship of Mr Justice David Steel, judge in charge of the Commercial Court. The Symposium was attended by judges[1], barristers, solicitors, client users of the Commercial Court, arbitrators, mediators and academic lawyers. The WP was set up under the auspices of the Commercial Court Users Committee and the WP therefore reports to that Committee.

21. The membership of the WP is intended to reflect those who use the Commercial Court for heavy and complex litigation. It therefore comprises Commercial Court judges, together with barristers, solicitors and clients who use the court regularly. Its membership is as follows:

    a. Mr Justice Aikens, Judge of the Commercial Court (Chairman of the WP);

    b. Mrs Justice Gloster, Judge of the Commercial Court;

    c. Victoria Cochrane, Director, Ernst & Young LLP;

    d. Simon Davis, President of the London Solicitors Litigation Association; Clifford Chance;

    e. Alec Haydon, barrister; Brick Court Chambers;

    f. Graham Huntley, immediate past President of the London Solicitors Litigation Association; Lovells;

    g. Robin Knowles CBE, QC, immediate past Chairman of the Commercial Bar Association ("COMBAR"); 3/4 South Square;

    h. Alison Padfield, member of the COMBAR Executive Committee; barrister, Devereux Chambers (Secretary to the WP);

    i. Stephen Pearson, Head of Litigation at the Royal Bank of Scotland Group.

B2. Genesis of the Working Party, Aims and Terms of Reference

22. The Symposium was held because of the considerable public attention that had been attracted by two very long cases in the Commercial Court in which the claimants' cases had, effectively, collapsed after years of pre-trial procedures, then many months of trial, all at great expense[2]. Comments, particularly those made in the press, suggested that perhaps there was some fundamental flaw in the procedures or methods of the Commercial Court that had permitted apparently "hopeless" cases to be pursued for so long and at such cost. In particular, the Governor of the Bank of England had made highly critical remarks when speaking at a

1 They included the Lord Chief Justice, the Master of the Rolls, the Chancellor and the President of the Queen's Bench Division, as well as Lords Justices and judges of the Commercial Court, the Technology and Construction Court and the Chancery Division.

2 These were the so–called BCCI case and the Equitable Life Insurance Company case. Each claim had been struck out by the Commercial judge at an early stage. The House of Lords had held that the BCCI case was arguable, although on grounds which were not subsequently at the forefront of the liquidators' case. In the Equitable Life case, the Court of Appeal had permitted a major part of the claim to proceed.

Lord Mayor's Banquet, expressing the view that something must be radically wrong with the Court's procedures if they had permitted the liquidators' ultimately hopeless claim in the BCCI case to drag on for so long.

22. Mr Justice David Steel invited any interested parties to prepare papers in advance of the Symposium. He said that writers could make any reasoned criticisms and offer any suggestions they wished regarding the Court's procedures for heavy and complex trials. 26 papers were received before the Symposium. At the Symposium itself, five addresses were given and a wide-ranging, open, discussion took place. Several important points emerged as a result.

24. First, everyone accepted that the adversarial method of conducting the trial itself was suitable for heavy and complex cases. But many participants thought that there needed to be major modifications in the way the adversarial method was used during the pre-trial period and the trial of such cases. Secondly, no one stated that there were irremediable problems in conducting trials of heavy and complex cases in the Commercial Court. Thirdly, no one advocated jettisoning the basic elements of the present system of preparation for a trial: viz. stating a case in writing, disclosure of documents and the exchange of witness statements and experts' reports. However, some advocated a serious review of those basic elements in the present system of preparing for a trial. Fourthly, papers and participants' remarks concentrated on proposals for ensuring that existing methods and procedures would work efficiently when the Court had to deal with particularly heavy and complex cases. Needless to say, there were widely differing views on how procedures could be improved.

25. The WP's study has been based on these conclusions. Throughout our discussions we have been conscious of three facts. First, that the Commercial Court has, over the years, adapted procedures that have generally been regarded as satisfactory for heavy and complex cases, even though there have been criticisms from time to time before the present well-publicised ones. Secondly, civil procedure generally underwent a major review and change as a result of the "Woolf Reforms" in the late 1990s. Although these reforms were modelled on what was needed in the simpler types of civil case, the particular needs of Commercial Court litigation were dealt with by considerable revisions to the Guide which were made at the time. The Guide has been developed over the years and it deals specifically with the needs of "heavy" litigation. There is always the temptation to make changes because they look attractive.Thirdly, we appreciated that one of the main criticisms of the "Woolf Reforms" has been that they have actually increased the cost of litigation and have "front-loaded" litigation costs. We are conscious of the fact that most cases, even in the Commercial Court, do not get to trial. Approximately 70% of all cases in the Commercial Court settle before the start of a trial[3]. We have been conscious of the need to try to

3 This is the figure for the year to June 2007. It has not varied much over recent years.

avoid making changes which have the unintended consequence of even greater costs at an early stage in the litigation process.

26. A threshold question is, of course: what is comprised by a "heavy and complex" case, or "long and/or complex" case, or a "Supercase", to use the sobriquet which has often been applied. Like the proverbial elephant, a "long (or heavy) and complex" case is easier to recognise than to define. The amount at stake in the litigation, the number of parties involved, the potential length of the trial, the number of issues raised and the complexity of the legal or technical issues could all be measures by which to gauge whether a particular case merits the badge of "long and complex" or "heavy and complex" or "Supercase". The WP appreciated that there are many cases in the Commercial Court that are not particularly long (say 4 weeks or under) but are often very "heavy" in terms of fact or law or both. The WP concluded that it must examine the procedures that affect "heavy and complex" cases and must not be confined to "long and complex" cases. The WP also concluded that it could not be prescriptive about the definition of a "heavy and complex" case. However, the WP is certain that, in future, it is imperative that the parties and, in particular the court asks at the earliest stages of litigation of any case that has one or more of the above features: "does this look like being a heavy and complex case?"

27. Our recommendations apply primarily to "heavy and complex" cases – hereafter "HCCs". However, we think that many of our recommendations can be applied with advantage to shorter and less complex commercial litigation. The parties and the court will have to be flexible and mould the procedure to the needs of the individual case.

28. It is obvious that heavy and complex litigation in commercial cases cannot be avoided altogether; the exigencies of commercial life make it inevitable. Indeed, the Commercial Court has historically had a high reputation for tackling such cases, many of which involve clients from outside the UK[4]. But the WP quickly concluded that it agreed with the majority of participants in the Symposium that improvements in the Commercial Court's procedure are needed to ensure HCCs are handled more efficiently by the court. The WP decided that if heavy and complex litigation starts in the Commercial Court then it is vital that, within the overall objective of achieving justice fairly and openly, the following are essential guiding principles:

    a. The existing rule that a Commercial Court judge is in charge of all preparatory procedures must remain. Furthermore, the judge must be able to keep firm control over all the procedure before trial and during the trial.

    b. The procedure must be kept as simple as an HCC will allow.

    c. Clients, whose litigation it is, must be kept informed and given responsibility for the litigation being conducted in their names.

4 The statistics have remained constant for many years: about 50% of all Commercial Court cases involve parties all of which come from outside the UK. 80% of cases involve at least one party from outside the UK.

d. Costs have to be kept under control.

e. As far as possible, bad claims or defences must be recognised as such as early as possible and rejected.

f. Parties must always be encouraged to compromise their disputes, using ADR or other means, including the Court's assistance.

g. Technology should be used as much as possible to facilitate procedures before and at the trial, whilst keeping costs of using it as low as practicable.

h. Where possible and appropriate, the appellate stages in the litigation (especially those concerned with preliminary issues or procedural points) must be consistent with the aim of efficient conduct of the litigation as a whole.

29. With these aims, the WP set its terms of reference widely:

"The Commercial Court Long Trials Working Party will consider all aspects concerning the management of heavy and complex cases in the Commercial Court and report and make recommendations to the Commercial Court Users' Committee including, if necessary, recommendations for changes in practice and/or to the Admiralty and Commercial Courts Guide (7th edition, 2006)".

B3. Meetings and methodology of the Working Party

30. The WP held eight meetings between January and July 2007. At the first meeting the WP framed its terms of reference and considered which broad topics needed to be investigated and covered in its report. Members of the WP agreed to prepare papers on the topics identified. The papers were then discussed in detail at subsequent meetings. Alison Padfield, as secretary, drew up minutes of the meetings that recorded our conclusions.

B4. Thanks

31. As Chairman I would like to express my thanks to all the members of the WP for their hard work and commitment to this exercise, which was very time consuming. I wish to thank my clerk, Mrs Elizabeth Robertson, for all the arranging and administration that she had to undertake in connection with the WP's work. I should also like to record that very helpful contributions were made by a number of correspondents to the WP, in particular Mr Justice David Steel, Mr Justice Colman, Mr Justice Tomlinson, Chief Costs Judge Hurst and Cyril Kinsky (barrister).

B5. Matters Considered

32. At its first and subsequent meetings, the WP decided that the following particular topics required special attention:

- Pre-Action Protocols

- Statements of Case/Lists of Issues
- Disclosure
- Witness Statements/Experts' Reports
- Summary Judgment/Strike-out/Indications from Judges as to Merits/ ADR
- Use of Technology – Scope for "Paperless" Litigation
- Costs and Cost Capping
- Management of Timetable and Trial
- Client Accountability and Responsibility for Litigation
- Judicial Resource Management.

33. Each of the papers that were prepared took an agreed format. In relation to the topic being covered, the paper (a) identified the relevant CPR and practice direction (if any) and provisions in the Guide; (b) referred to any relevant authorities (if any); then (c) considered whether the existing powers were sufficient to deal with the problems of an HCC, or were not being sufficiently enforced; or (d) set out proposed further provisions if it concluded that they were needed.

34. The WP reminded itself that the CPR[5] gives judges wide powers with regards to case management which can be used for heavy and complex trials. The WP noted that the Guide did indeed often provide solutions to problems in such cases. But we concluded, sadly, that in some cases either the parties or judges or both were not enforcing provisions in the CPR or the Guide with sufficient rigour. We concluded that there needs to be a re-education programme for both practitioners and the Commercial Court judges, to remind them of the procedures and powers that are already in place and those that we hope will be adopted as a result of this Report and to show how they might be used. That process can best be started by holding another symposium after this Report has been adopted and there has been a trial period.

35. This Report recognises that practitioners, judges and staff all have (in varying degrees and respects) a responsibility to work on improvements in the way HCCs are handled. There is much to learn from what has, as well as what has not, worked in the past. The WP feels that, both with respect to the past and the future, it ought to be direct in expressing its views, so it has not refrained from doing so where necessary.

5 In particular CPR 1.4(2) and 3.1, which both make it clear how much latitude a judge has to mould case management to the needs of a particular case.

C. Pre-Action Protocols

C1. Pre-Action Protocols: General

36. It is obviously better for parties to resolve their disputes before litigation starts at all. To encourage this, the CPR introduced the idea of the Pre-Action Protocol ("PAP") for various types of case. There is a Practice Direction on Protocols which deals with cases not covered by any specific, approved PAP[6]. There is a specific PAP for professional negligence cases (the Professional Negligence Pre-Action Protocol), but there is no approved PAP for the Commercial Court. The WP decided that it should consider whether a PAP for Commercial Court cases was desirable, or, if it was not, whether we should recommend other procedures that might avoid parties starting litigation in the first place.

37. The object of a PAP is to give each side sufficient information about the claim and defence so that the parties can judge the strength and weakness of their positions. The aim of this advance disclosure is to encourage the parties to compromise before engaging in expensive litigation, which may ultimately end in compromise anyway.

38. The potential problem with any pre-action procedure is that it can lead to more work before litigation and so generate considerable cost. The WP is anxious that costs should be minimised at all stages of a dispute. It decided that, overall, there was nothing to be gained by having a specific PAP for Commercial Court cases or for HCCs in particular. To do so would simply transfer the costs of preparing the factual and expert case to a period before proceedings were issued, instead of incurring the bulk of them afterwards, when the Commercial Court can use its powers and procedures to streamline work and so reduce costs. Thus the WP concluded that it would not expect a potential claimant to have assembled evidence on all aspects of a potential "heavy" claim. For example, it should not be necessary for a potential claimant to have appointed an expert before a letter of claim is written, although in many cases this might well be done.

39. However, the WP recognised that potential litigants should comply with the general protocols set out in the Practice Direction. This should be emphasised in the Guide. But in order to ensure that costs of pre-action work are kept to a minimum, particularly in large cases, the Guide should also stress that the Court expects the parties to exercise constraint in the pre-action procedures. So, if a party is contemplating proceedings in the Commercial Court, then:

    a. The letter of claim should be concise and do no more than explain the proposed claim sufficiently for the potential defendant to understand and investigate the allegations being made. The letter should identify the key dates involved.

    b. Only essential documents should be supplied with the letter of claim.

6 See the Practice Direction – Protocols, paras 4.1 to 4.10.

c. The intended defendant's written response need only provide a concise response to the claim. Again, only the key dates should be included and only key documents provided with this letter.

40. The WP noted that in the Professional Negligence PAP, paragraph B4 contemplates that there would be a period of 3 months following acknowledgement of the letter of claim to enable the potential defendant to investigate the claim. This suggests that there would be detailed investigation by the potential defendant. The WP concluded that this period is too long to be the general rule for Commercial cases. The rule should be one month, with a maximum of three months. Therefore, the Guide should emphasise two things. First, potential claimants must not expect an immediate response to the letter of claim, because a potential defendant must have time to investigate the matter. But, secondly, a potential defendant is not expected to do a full investigation at that stage. It must respond as promptly as it can to the letter of claim, usually within one month, having done sufficient investigation to send a reasoned response.

41. The Guide should also emphasise that if parties do not comply with these pre-action procedures, then the court may take that into account when giving directions and making orders as to costs.

42. There will be some cases when it will not be practicable to follow the practice set out above and it is either necessary or appropriate to start proceedings without following a pre-action procedure. For example, a contract may contain a jurisdiction clause giving exclusive jurisdiction to the English Courts, or specifically the Commercial Court. Sometimes one side may threaten to start proceedings in another jurisdiction. If a pre-action procedure were employed, the period before litigation may be used to evade the English jurisdiction clause. Obviously, there must be no delay by the party that wishes to enforce the jurisdiction provisions that the parties had agreed upon.

C2. Pre-Action Protocols: Recommendations

43. Our proposals on pre-action matters are therefore as follows:

a. There should not be a specific PAP for Commercial Court cases generally or HCCs in particular.

b. Potential claimants and defendants whose litigation, if it occurs, is likely to take place in the Commercial Court will be expected to comply with the principles of pre-action protocols as set out in the current Practice Direction. The Guide should be amended to say so specifically.

c. In cases that are not governed by a specific PAP, it is sufficient that the parties comply with the minimum expectations of the pre-action protocol regime. The Guide should so state.

d. The Guide should provide that in such cases the letter of claim should be concise and do no more than explain the proposed claim sufficiently for the potential defendant to understand and investigate the allegations being made and to identify the key dates involved.

e. Only essential documentation need be provided with the letter of claim.

f. The potential defendant need only provide a concise response to the letter of claim.

g. Parties will not be required to have assembled their evidence or appointed experts before writing a letter of claim, or responding to one.

h. Although a potential defendant must be given sufficient time to make necessary investigations of allegations made in a letter of claim, this must be done as quickly as possible, so that the reasoned response is provided within the shortest time possible. The response should generally be within one month and the maximum period between letter of claim and response must be no more than three months.

i. In an appropriate case (eg. threatened “forum shopping”) it may be necessary or proper to start proceedings without following pre-action procedures.

D. Statements of Case and Lists of Issues

D1. General

44. It is obviously imperative that in any litigation a claimant sets out the case it wishes to make so that the other parties to the litigation can see what issues they have to meet and defendants can set out their defences and counterclaims to the claimant's points. But the WP concluded that the length and complexity of statements of case in even "average" cases in the Commercial Court, let alone HCCs, had increased, is increasing and ought to be diminished. The prolixity of statements of case means that they become virtually unreadable[7].

45. The WP concluded that the current habit of very long statements of case is largely the result of three factors. First, pleaders often depart from the former basic rule that only material facts, not background facts, nor evidence nor law nor argument, should be pleaded. Secondly, pleaders are often under pressure from clients to "argue" in detail their case, in the manner of a Complaint in United States litigation. Thirdly, pleaders are naturally anxious to ensure that opponents should not be able to assert that a point of fact or law cannot be pursued at a trial because it has not been adequately pleaded. They do not wish to be on the receiving end of a "pleading point".

46. The WP reminded itself that, from 1894 to 1999, pleadings in the Commercial Court were headed "Points of Claim", "Points of Defence" and "Points of Reply". Those titles were deliberate. The intention was to make the pleader set out only the relevant facts and to do so as concisely as possible. That must still be the aim of all statements of case in the Commercial Court, despite the change of name, since 1999, to "Particulars of Claim", "Defence" and "Reply". It must be emphasised to all practitioners in the Commercial Court that the court expects statements of case only to contain those facts that are needed to ensure that other parties know what case it is they have to meet[8].

47. The WP also concluded that the requirement for a summary of any statement of case over 25 pages long (para 1.4 of Practice Direction 16 and para C1.4 of the Guide) is routinely ignored. It was also noted that in a complex case the parties often fail to agree a Case Memorandum and List of Issues prior to the first CMC.

48. The collective view of the WP is that frequently almost the only time a statement of case is examined in detail by the court is when an issue arises on whether a party is entitled to raise or pursue a particular point, either in an expert's report or at trial. Then there is a minute analysis of the contents of statements of case. The WP concluded that if the sole or predominant

7 In one case, some years ago, Mr Peregrine Simon QC, as he then was, graphically described the pleadings as being longer than all the novels of Sir Walter Scott put end to end. He refrained from making a comparison of the quality of the content.

8 That is: relevant facts, not tangential material, evidence, law or argument. CPR 16.4(1)(a) provides that "Particulars of claim must include a concise statement of the facts on which the claimant relies". Para C1.1(a) of the Guide provides that "Particulars of claim, the defence and any reply must be set out in separate consecutively numbered paragraphs and be as brief and concise as possible." There is no longer a positive statement in the CPR that evidence should not be pleaded: compare RSC Ord 18, r 7(1) which provided that "every pleading must contain, and must contain only, a statement in a summary form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which those facts are to be proved, and the statement must be as brief as the nature of the case admits." However, that provision must remain the guiding principle for pleadings in Commercial Court cases.

purpose of a pleading document is to cover every conceivable issue, then something has gone wrong. However, the WP also accepted that clients will expect there to be an initial document which sets out their case clearly and succinctly, with a limited amount of detail, which will tell the opposition and the judge why that party should win.

49. The WP also concluded that steps must be taken to ensure that parties can more easily see where in a statement of case the opposition joins issue with a particular part of a party's case. At present it is often difficult to do so by trying to compare two (or more) very long documents with many paragraphs, sub-paragraphs and further sub-divisions. We have suggested a means to solve this problem.

D2. Statements of Case: Recommendations

50. The recommendations of the WP are as follows:

a. There should be a limit on the length of statements of case in the Commercial Court of 25 pages. Permission may be granted for a longer document in very exceptional cases, but a very good reason will have to be given. Brevity should lead to greater client engagement in the litigation, because the document will be more manageable and clients are more likely to be able to understand it and get to grips with it. The Guide should include a reminder of the purpose of a statement of case, viz. to put the other parties on notice of the case they have to meet. The Guide should remind parties what a statement of case should and should not contain, in addition to what is currently stated at paragraph C1.1(a)[9]. We suggest that there might be some examples in an Appendix to the Guide, which should also set out guidance on minimum line spacing, margins and minimum font sizes[10]. These rules should apply to all Commercial Court cases, not simply HCCs. The parties should provide a short summary (5 pages maximum) of each statement of case where the number of pages exceeds 25.

b. The initial statement of case could then be amplified by provision of a schedule if the court gave permission for further information to be provided[11]. The parties would be expected to discuss with each other before the first CMC whether further information should be provided, in relation to which issues, and (crucially) why, and be prepared to justify this to the court. The present situation, where "Further Information" is dotted all over the place, leads only to confusion. If there is to be "Further Information" of a party's statement of case at all, then it must be rationalised and collected in one place.

c. The Guide should emphasise to the parties that they are expected to plead a Reply only where necessary. Any Reply must be limited to

9 See footnote 8 above.
10 The WP's suggestion is a minimum of 1.5 line spacing, 1.5 cm margins and 11 point font size.
11 It was the view of the WP that parties to Commercial Court litigation frequently forget the principle that further information will only be ordered if it is really necessary because the other party does not know the case it has to meet.

those points which genuinely require a reply, rather than using it to restate a party's entire case, as is too often done at present[12].

d. The Guide should also encourage defendants to respond to the Statement of Claim, not in a separate document, but by setting out their response after each paragraph of the Statement of Claim in a single document, which the Claimant should provide electronically for this purpose if requested. This approach is not to be mandatory. An example of an "amalgamated" statement of case is set out at Appendix 1.

D3. Lists of Issues: General

51. The WP became increasingly convinced that a new style, judicially settled, "List of Issues" should become the keystone to the proper management of all Commercial Court cases, but especially HCCs. At present, lists of issues[13] are often either too short and general or too long and then often fail to distinguish between key issues and sub-issues. The result is that the present form of "Lists of Issues" is often not much use to the judge. The WP concluded that the List of Issues should be the key working document in all Commercial Court cases, whether small or large and whether involving few or many issues. The List of Issues will be based on the pleadings of the parties, but in future it should become, effectively, a Court Document. It should, once settled, be the basis on which decisions are made about the breadth and depth of disclosure, provision of witness statements, what experts will be permitted and, ultimately, the shape of any trial.

52. The Guide should be amended to require that a claimant must serve a draft List of Issues with the Reply (if any) or 21 days after a Defence. The defendant will be able to suggest modifications, in the expectation that a draft List of Issues will be settled by the parties. In all but the most complex cases the List of Issues should be 10 pages or less, although the court may permit amplification subsequently. This draft List of Issues will then be settled at the first CMC, with the active participation of the judge. Thereafter, it will be a Court Document. It will, of course, have to be updated, but only with the approval of the judge.

53. Once the List of Issues has been produced, the pleadings will have only secondary importance. They will only need to be referred to if there is a doubt about the accuracy of the List of Issues or to confirm a party's position with respect to a particular issue. Parties will be expected to take a broad view of what can be argued at a trial. This will always be upon the basis of the List of Issues. But if there is genuinely a new issue that is not embraced by an existing List of Issues, then the party wishing to introduce it will have to apply to the court to amend the List of Issues accordingly. The court will act on what is in the amended List of Issues, not what is in the pleading. "Pleading points", by which we mean the

12 Neither the Guide nor the CPR deals with this point expressly. CPR 16.7 provides that a claimant who does not file a reply to the defence shall not be taken to admit the matters raised in the defence, and that a claimant who files a reply to a defence but fails to deal with a matter raised in the defence shall be taken to require the matter to be proved. The Guide merely states (at para C1.1) that any reply should be as brief and concise as possible.

13 See para D6.1 of the Guide.

argument of a party that a particular ***fact*** is not referred to in either the formal pleading document or the List of Issues, so cannot be raised or relied upon by that party, will be actively discouraged. Pleading points will not be allowed unless an objecting party can demonstrate that it is genuinely prejudiced by the lack of reference in the List of Issues to the point concerned.

D4. Lists of Issues: Recommendations

54. The recommendations of the WP on the List of Issues, are, therefore:

a. The List of Issues should be structured and sub-divided, preferably with headings. The parties should attempt to agree it, subject to the active consideration and approval of the court at the first CMC.

b. Once settled, the List of Issues will be a Court Document. It will be a key procedural tool throughout the case.

c. The List of Issues will need to be updated if the cases of the parties change, but the List will only be amended with the court's approval.

D5. The CMC Generally

55. In Section M below, we discuss the question of the assignment of judges to hear the CMCs and other interim matters in HCCs. The WP's view is that most, if not all, HCCs will need a two judge team. Generally speaking, a two judge team should have been assigned before the first CMC. Whether or not this is so, the parties should, in good time before the CMC[14], produce an agenda for it. This must identify the areas that are agreed or in dispute between the parties. The agenda should also identify clearly what pre-reading has to be done by the judge and give an ***accurate*** estimate of the time needed for that and for the hearing itself. This agenda should be sent to the Commercial Court Listing Office at least 14 days before the first CMC, so that the judge assigned to hear it can consider it and make any orders necessary for the efficient disposal of the CMC. For instance, the judge can indicate the issues on which evidence is likely to be needed, or on what topics an Outline Argument should be produced.

56. The WP noted the increasing habit of the parties producing witness statements for use in CMCs. These often simply argue the case in favour of, or against, a particular order being made. These witness statements are often then repackaged as part of the parties' Outline Arguments. This is very wasteful of time and costs. The WP recommends that the Guide should be amended to make it clear that unless the Civil Procedure Rules require an application to be supported by evidence, witness statements must not normally be produced for a CMC. Another cost waster is the inter-solicitor correspondence bundle. The Guide should also state that it is unnecessary generally for the judge to be

14 See Section M1 below.

provided with a full set of inter-solicitor correspondence. Such correspondence must only be produced when it is needed to deal with a particular argument, and then only the relevant letters must be put before the court.

57. The WP's recommendations concerning the CMC generally, are therefore:

a. The Guide should be amended to state that, in HCCs, the parties must produce an Agenda and serve it on the court 14 days before the CMC is to be heard.

b. The Guide should be amended to state that, except where the CPR requires an application to be supported by evidence, no witness statements are to be produced for CMCs. Nor should the court be provided with a full set of inter-solicitor correspondence unless it is specifically needed for a point in issue. At all times the inter-solicitor correspondence put before the court must be kept to a minimum.

E. Disclosure

E1. Disclosure: General

58. The participants in the Symposium frequently identified disclosure as being one of the most expensive and time consuming aspects of litigation, particularly in HCCs. The burden of disclosure has grown hugely now that tape records of telephone conversations, e-mail and electronic storage of information are almost universally used in commerce.

59. The WP accepted that the common law tradition of "disclosure" of relevant documents must be retained. However, it also concluded that the disclosure weapon is often blunt. At present, it is sometimes only when Lists of Documents are exchanged that the parties discover the extent of the disclosure (large or small) which the other side is proposing to give on a "standard" basis. This may result in the automatic production of vast numbers of documents which turn out to be irrelevant or useless or it may miss vital classes of documents altogether.

60. The WP concluded that a much more "surgical" approach is needed. This is true of all cases, but particularly in HCCs where the cost and burden of disclosure can be so high.

61. The CPR already provides the court with the flexibility to make appropriate orders as to the scope of disclosure in a particular case[15]. The WP concluded that this power to make more supple orders for disclosure, if necessary issue by issue, must be utilised more often by the court. This will be done using the List of Issues, discussed above. Using a more supple approach will also entail the use of a new type of document, a disclosure schedule which will be, effectively, a "shopping list" for disclosure. The WP has produced a specimen "shopping list" in Appendix 3, adopting part of the List of Issues at Appendix 2.

62. The claimant will state succinctly on which issues in the List of Issues it contends that "standard" or other level of disclosure is needed and why. Where possible it will identify what documents or classes of document it wants, in relation to each of the Issues identified in the List of Issues and it will state why it wants them. The defendants will then respond, with reasons. The claimant can reply, if necessary. We emphasise the need for succinctness in all cases. Appendix 3 contains some examples.

63. Disclosure is an important but also delicate issue in all cases but particularly in HCCs. Therefore, the view of the WP is that the decision-making lawyers in an HCC should be present when the judge considers the scope of discovery at the CMC. If leading counsel are already involved in the case, then they should also be present, if possible, in order to assist the judge. But frequently (particularly at the early stages of a case) it is one of the solicitors rather than Leading Counsel that has a real grip of the documents. Therefore the relevant lawyer

15 See CPR 31.5 and 31.12.

must be present at the CMC and be in a position to answer any questions from the judge about disclosure.

64. The present habit of producing long witness statements in support of specific disclosure applications is costly and time consuming. The WP thinks that it is much less efficient than the method proposed above. The WP concluded that it must be cheaper and more efficient for a court to discuss disclosure for an hour or two, even with decision making lawyers present, than for the parties to spend many hours arguing about the disclosure of documents that are probably either irrelevant or marginally relevant.

65. The WP's view is that the court's approach to disclosure must be rigorous. So, as an example, if one of the Issues in the List of Issues is the proper construction of a banking document, the parties will have to justify the scope of documents said to be relevant to "the factual matrix". All too frequently large numbers of files are disclosed, produced at the trial and then ignored. This is wasteful and cannot be permitted. This point will need emphasis in the Guide.

66. The WP also concluded that there is much to commend the US system of giving each document disclosed a number by reference to the party disclosing it, such as C 101 or D(1) 2002 (a "Bates number"). Nowadays, at least in large cases, the disclosure exercise will be based on an electronic database of "documents". So identifying documents using this process should not be difficult to accomplish. We urge that this system be adopted generally in Commercial Court cases, but in particular in all HCCs.

67. Lastly, the WP considered the tendency to want too much disclosure of irrelevant documents or to foist too much disclosure on the other side. It concluded that it would be useful for the Guide to give some help on this and should perhaps contain a sample Disclosure Request document, showing what the claimant wishes to give on a topic and what the defendant claims it requires. The Guide should also make it clear that costs sanctions will be imposed if large quantities of irrelevant documents are disclosed. It should also emphasise that if a party requires what seems like "generous" disclosure, the court may be prepared to give it only on condition that the party requiring disclosure pays "up front" the costs of that exercise.

E2. Disclosure: Recommendations

68. The WP's recommendations on disclosure, which we think should apply to all Commercial Court cases, are as follows:

a. Automatic disclosure will not take place until after the CMC, which decides on the scope of disclosure. This decision will be made on the basis of the new document described below.

b. The starting-point for the scope of disclosure will remain that of "standard" disclosure. However, if the court decides at the CMC that the size or complexity of the case demands it, the parties should be

required to produce a schedule, in a specified format, to assist the court in deciding whether (and where) disclosure should be restricted or it should order disclosure beyond "standard disclosure", or whether disclosure should be advanced or delayed in whole or part. This schedule will identify, by reference to the approved List of Issues, where standard or other disclosure is required and, so far as possible, the documents which each party wishes to be produced by the other parties and the stage or stages at which it is said the documents should be disclosed. The other parties will respond to this. The first party may reply. In each case there should be very short reasons. The part of the schedule prepared by a party should be signed by the responsible solicitor to that party. A sample is produced at Appendix 3.

c. The schedule should leave space so that when the court considers these requests, the judge can put a tick or a cross or ask follow-up questions. The parties should not file either witness statements or correspondence for the court to consider in relation to its order as to disclosure, but only the schedule.

d. In HCCs, the responsible solicitor for each party, together with leading counsel (if any) and junior counsel should be required to attend the CMC at which disclosure is discussed in order to assist the court in understanding and making decisions in relation to the scope and timing of disclosure in relation to each of the issues.

e. The judge may order a different scope of disclosure in relation to particular issues as set out in the List of Issues. If the scope is less or more than that of "standard" disclosure, the judge will have to give reasons for his decision.

f. The Guide might usefully include guidance about the scope of disclosure which the court is likely to expect and/or find of assistance in relation to particular issues – for example, in relation to the "factual matrix" in relation to construction of agreements, where presently far too many documents of little or no relevance are disclosed.

g. In all HCCs, documents disclosed should be individually identified by party and a number. In other cases the use of this procedure should be considered at the CMC where disclosure is discussed.

F. Witness Statements

F1. Witness Statements: General

69. The WP accepted that the exchange of witness statements after disclosure and long before trial remains the proper procedure generally for adducing evidence in chief from witnesses. It is consistent with a "cards on the table" approach to litigation and it assists possible settlement. However, as already noted, witness statements, particularly in large cases, have become a very labour intensive process and so an expensive exercise. It was the general view of the WP that often the statements are too long and insufficiently focused on the real issues on which a particular witness ***needs*** to give evidence. Inevitably, in nearly all cases the witness statements are drafted by the lawyers, although based on interviews with the witness. But this process often leads to the statements being in lawyers' language rather than the words of the witness. Also, all too frequently the statements spend far too long summarising documents that a party wishes to have in evidence and arguing the case. Not enough time is spent recording the witness's actual memories of relevant events[16].

70. Our aim, therefore, is to provide additional guidance to the existing framework of the CPR and the Guide[17]. We have concluded that this additional guidance should apply to all types of Commercial Court case, not just HCCs. In all cases, the object must be to ensure that witness statements are shorter, more focused on relevant issues on which the witness can give relevant evidence. So far as possible, the statements must genuinely be the evidence of the witness, rather than a reconstruction of events by lawyers based on the documents.

71. To this end the WP concluded that the Guide should indicate that witness statements must identify, by reference to the List of Issues, the particular issues on which that witness is giving evidence. This can best be done by having appropriately worded headings in the witness statement.

72. In order to deal with the problem of the excessive length of witness statements, the WP concluded that the Guide should state that the court will, in appropriate cases, order that witness statements be kept within a certain length. The WP concluded that the court has the power to do so, as it is a case management tool in furtherance of the "overriding objective"[18].

73. Frequently witness statements are served with accompanying bundles of so-called Exhibits, which are referred to in the witness statement. These are usually documents that have already been disclosed by one or other party. This practice leads to vast duplication of hard copy documents and it should be discontinued. The WP concluded that a more efficient way to deal with references to documents in witness statements is for a second copy of the statements to be served, with

16 This is all despite the clear terms of para H1.1 of the Guide.
17 See CPR 32.4, 32.5, 32.8 and the PD para 18; the Guide, para H.1 to H.6.
18 See eg. CPR 3.1(2)(m).

electronic references/links to disclosure where disclosure has been done electronically or with marginal references to the party's disclosure if it has been done manually. The particular method to be adopted is to be discussed at the first CMC when the judge sets the timetable for the production of witness statements.

74. The WP considered the question of whether the judge should be permitted to limit the number of witnesses that could give evidence on a particular issue in the List of Issues. The general view was that this would be too intrusive. However, the WP did conclude that judges should encourage parties to think carefully about the number of witnesses needed on a particular issue, or whether any witness was needed at all. A judge should always point out that unnecessary evidence could result in an adverse costs order at the end of the trial.

F2. Witness Statements: Recommendations

75. The recommendations that follow apply to all types of Commercial Court case. The Guide should be amended accordingly:

a. Witness statements must be as short as possible and cover only those issues on which the witness can give relevant evidence. There must be headings in witness statements that correspond to the relevant issue in the List of Issues.

b. Documents referred to in a witness statement must be given a reference by the relevant party which will usually be a disclosure reference, and there should be no hard copy exhibit with the witness statement. Where disclosure has been given electronically and it is possible to include a hyperlink to documents referred to within the witness statement, this should be done.

c. The judge should always consider whether to impose a limit on the length of witness statements. This should be discussed at the CMC setting the timetable for witness statements. Parties should be reminded that costs sanctions may follow if they serve unduly lengthy witness statements or statements which contain material which is not relevant.

d. In some cases (eg. where there are allegations of fraud) it may be of particular assistance to the judge in making findings of fact to hear a witness give evidence in chief about certain issues in his or her own words (as well as having the witness statement in evidence). The parties and the court must give consideration to this point (if relevant) at a Pre-Trial Review ("PTR")[19].

e. The court should not be afraid to dispense with the need for witness statements if the time and expense involved in their preparation would be disproportionate. In such cases, which are likely to be rare, the court may order the party wishing to call the witness to serve a short summary of the evidence which the witness is expected to give: a "gist" statement.

19 Para H1.5(b) of the present Guide states that an application for an order that evidence in chief be given viva voce should be made at the beginning of the trial. That may be convenient in short trials but in HCCs we think that the rule should be that applications should be made well before the start of the trial.

G. Expert Evidence

G1. Expert Evidence: General

76. Expert evidence is common in large cases. It is often necessary to enable the judge to decide issues in dispute. But recent large cases involving expert reports have highlighted the need for more care in deciding whether expert evidence is actually needed or will be helpful to the judge in reaching a decision. At present, the practice is usually to identify the discipline and the topics for expert evidence at the first CMC, when a general timetable to trial is laid down. However, at that stage neither disclosure nor exchange of witness statements will have taken place. The result, sometimes, is that neither the parties nor the court are able to define with sufficient precision either the disciplines to be the subject of expert evidence or the issues to be covered by it. The result is that the expert of one party in a particular discipline may cover issues A to H, but the expert of the other side may cover issues F to W. The consequence is that the judge does not have comparable expert reports at the trial.

77. The WP concluded that there are several ways that these problems can be solved. First, the parties should consider together more carefully the disciplines and precise issues to be covered by experts before the court makes any order for reports. This must be done by reference to the List of Issues. If it is impossible to give sufficient definition to the disciplines or expert issues until there has been disclosure or exchange of witness statements, then no order for expert reports can be made at the first CMC. It is better that the order be delayed rather than having to resolve at a later date (frequently close to a trial) a dispute about the scope of experts' reports, or hear an application for further experts.

78. Secondly, in HCCs the judge must take a more active part in the question of whether expert evidence is really needed on a particular topic, and if it is, the particular issues that evidence will cover. This participation will be reflected in the fact that the discipline of the experts and the issues that are to be covered by their reports will be noted, in summary form, on the List of Issues. This will be done either at the time the List of Issues is first settled, or when it is updated subsequently. But in any case it must be done only with the court's approval.

79. Thirdly, a judge should require the experts to exercise discipline in the length of their reports. It is in the interests of all parties and the judge to keep expert reports as short as possible.

80. Fourthly, the general rule should be that exchange of expert reports should be sequential, not simultaneous. Sequential exchange will help ensure that the experts in a particular discipline deal with the same issues, hopefully in the same sequence.

81. The WP considered two other aspects of expert evidence in relation to HCCs. The first was whether there is more scope for court appointed experts. The consensus was that this would neither reduce costs nor time. It was felt that, in a large case, each party would inevitably also

retain its own expert and any report of the court expert would have to be subjected to the same kind of process as now has to be conducted with the opinions of Nautical Assessors in the Admiralty Court[20].

82. Secondly, the WP noted the procedure that is sometimes followed in cases in the Technology and Construction Court. There an order is sometimes made for experts to meet and discuss matters first and then, having narrowed the contentious issues, the experts write their reports on the remaining matters in issue. That procedure may work in some Commercial Court cases, but we are not convinced that it should be adopted as the general procedural rule. If the List of Issues has been drawn up correctly in the first place, it should be much simpler to define the relevant expert issues at the time that permission is given to call expert evidence. In which case the experts should get on and write their reports for sequential service.

G2. Expert Evidence: Recommendations

83. The WP recommends:

a. Possible expert disciplines should be identified at the first CMC but permission for expert evidence should not be given until after the List of Issues has been formulated and judicially settled.

b. The List of Issues should identify, in summary form, the issues on which expert evidence is required, and permission should be limited to expert evidence in relation to those issues. These expert issues may be identified when the List of Issues is first settled or subsequently.

c. The experts' reports should be exchanged sequentially unless the court orders otherwise.

d. After sequential service of the reports there should be the usual meetings of experts, followed by the usual list of expert issues agreed or not agreed, and only at that stage should supplemental reports be exchanged.

e. The court may give directions limiting the length of experts' reports

f. No change should be made to the current position in relation to court-appointed experts

20 See Bow Spring and Manzanillo II [2005] 1 WLR 144; Global Mariner and Atlantic Crusader [2005] 1 Lloyd's Rep 669 at 702, paras 12 - 17.

H. Summary judgment/Striking Out, Submissions of "No Case to Answer"; Indications from Judges as to Merits and ADR; Preliminary Issues

H1. Summary Judgment/Striking Out: General

84. In both the BCCI case and the Equitable Life case, there had been an application to strike out the claim. The application was successful (either in whole or in part)[21] before the Commercial Judge who heard the application. In the former case, that decision was upheld in the Court of Appeal but overturned by the House of Lords. In his judgment on the issue of indemnity costs in the BCCI case, Tomlinson J demonstrated powerfully that the case pursued by the liquidators at the subsequent abortive trial bore little or no resemblance to that put before the House of Lords when they reversed the strike out decision or even to that which the liquidators had pleaded[22].

85. In his dissenting speech in the House of Lords' decision concerning the strike-out of the liquidators' claim in the BCCI case, the late Lord Hobhouse brought his wealth of experience as counsel and judge in heavy commercial cases to bear. He made the following statement:

"The volume of documentation and the complexity of the issues raised on the pleadings [in complex litigation] should be the subject of critical scrutiny and should not without more deter the judge from considering whether it is really necessary to commit the parties and the court to a lengthy trial and all the preparatory steps which that will involve. Indeed it can be submitted with force that those are just the sort of cases which most strongly cry out for the exclusion of anything that is unnecessary for the achievement of a just outcome for the parties[23]".

86. The WP wholeheartedly agrees with those views.

87. A number of participants in the Symposium argued for a change in the standard by which the court should judge whether there should be summary judgment in or a striking out of an HCC. The WP considered the present law on the test for granting summary judgment or a strike out. We concluded, without hesitation, that it would be impossible to have two standards for different types or size of case and that any attempt to create two tests would in any event be undesirable. Commercial law must be certain or it is little use to the community it seeks to serve.

88. However, whilst the tests for summary judgment and striking out of all or part of an HCC must remain as set out in the CPR[24], the WP did conclude that Lord Hobhouse's views should guide Commercial Court judges in their approach to applications for summary judgment or a

21 Clarke J (now Sir Anthony Clarke MR) struck out all of the liquidators' claim in the BCCI case. In the Equitable Life case there was an application to strike out a part of the claim. Langley J, subsequently the trial judge, acceded to that application, but that still left a claim of some £500 million.

22 Three Rivers DC v The Governor and Company of the Bank of England [2006] EWHC 816 (Comm), [2006] 5 Costs LR 714.

23 Three Rivers DC v The Governor and Company of the Bank of England (No 3) [2003] 2 AC 1, HL, at para 156.

24 CPR 24.2 and 24PD for summary judgment and CPR 3.4(2) for striking out. It is now clearly established in the ECtHR that striking out a claim is not in breach of Art. 6(1) of the ECHR if an essential element of the cause of action for a claim under domestic law is missing from the statement of case: Z v United Kingdom [2002] 34 EHRR 3.

strike out. The view of the WP is that the existing powers to consider the grant of summary judgment or to strike out a case or defence are not exercised often enough in large cases. The WP recommends that those powers be used more confidently to achieve the end to which Lord Hobhouse was referring in the passage quoted above. There may well be particular aspects of a case that can be the subject of a summary judgment application or a strike out. A judge should encourage those to be isolated and tackled. It is in none of the litigants' interests unnecessarily to prolong proceedings that are either bound to fail or bound to succeed.

89. Therefore, in appropriate cases, a judge should ask if the parties have considered any application for summary judgment or to strike out the case of the other/another party. The new List of Issues should assist the judge in deciding whether it is appropriate to enquire or not. There may be also occasions in the run up to the trial or even at the trial itself[25] when such an application should be entertained.

90. There were some who argued at the Symposium that appellate courts are far too ready to interfere with a Commercial Judge's view on whether there should be summary judgment of a claim or whether it should be struck out. But an order awarding summary judgment or to strike out a claim/defence is (subject to appeal) final. It is not like so many other orders made before trial. The WP concluded that the rules on whether permission to appeal should be granted and whether the Court of Appeal should entertain an appeal in a summary judgment/strike out application in HCCs cannot be different from other cases.

91. However, the WP considered that there are two practical ways that the Court of Appeal can assist in dealing with appeals in HCCs, in particular with applications for summary judgment or to strike out a claim (or part of it). It urges that: (a) the Court of Appeal should identify a particular Lord Justice (preferably with a Commercial Court background) who will deal with any applications to the Court of Appeal in relation a particular HCC which has been identified by the Commercial Court judge in charge of it as being an HCC likely to give rise to interim appeals; (b) the Court of Appeal hears and determines interim appeals in HCCs (particularly those concerning summary judgment and/or strike out) as quickly as possible. If necessary this should mean giving the case more than just "expedition" but hearing it within weeks of the decision of the Commercial Judge.

92. The WP notes that the Court of Appeal will not interfere with decisions of a Commercial Court judge involving a matter of discretion or a finding of fact in an interim matter, unless it is driven to find that the judge's conclusion was totally wrong. We cannot quarrel with that approach!

25 On the latter see the decision of Colman J in National Westminster Bank plc v Rabobank Nederland [2006] EWHC 2959 (Comm), [2007]1 All ER (Comm) 975. Such an application should not be made at trial unless there are exceptional circumstances.

H2. Submissions of No Case to Answer[26]

93. At the Symposium, one speaker raised the issue of a defendant who wished to make a submission of "no case to answer" at the end of the claimant's case if the defendant's legal team considered that the claimant's case as presented at trial was hopeless. It was pointed out at the symposium that if a defendant does wish to make such a submission, which courts are usually reluctant to entertain at all, the almost invariable rule is that the defendant must elect to call no evidence thereafter should the submission not succeed[27]. The Court of Appeal has confirmed that this remains the practice after the introduction of the CPR[28]. Two main reasons are given in the decisions of the Court of Appeal for the requirement that a defendant must elect not to call evidence if he makes a submission of "no case". They are: (i) it is not right that the judge of fact should be asked to express an opinion upon the evidence until it has been completed; (ii) if the judge dismisses the claim and that ruling is successfully appealed, then if there was no election, further evidence would have to be heard from the defendant. It may be said by the claimant that the first judge could no longer be impartial, so the whole case would have to be retried before a different judge at great inconvenience and expense.

94. The Court of Appeal has stated that exceptional circumstances may arise during the trial of a case which will enable a judge, in his discretion, to permit a submission of no case to be made without putting the defendant to his election[29]. One example of such circumstances might be if some flaw of fact or law has emerged for the first time at the trial, which makes it obvious that the claimant's case must fail. Then it would make practical sense to decide the issue and stop the trial. But the Court of Appeal has said that in those circumstances the court will not be deciding the claim on the basis of which side has won on a balance of probabilities, as if the trial had continued to the end. Instead the court would be exercising its case management powers and the applicable test is whether the claim has no real prospect of success or is bound to fail: viz. the summary judgment test under CPR Pt 34.2[30].

95. However, even in those "exceptional" circumstances, it is possible to see problems arising if a judge did permit a defendant to make an application during the trial on a Pt 24.2 basis and the judge acceded to it. What if the claimant then appealed and the Court of Appeal held that (for example) the judge was wrong on the law and so the claim did have some prospect of success? Presumably the matter would then have to be remitted to the judge, or, if he was thought to be parti pris, the whole case would have to start again before another judge.

26 The WP is very grateful to Ms Laura McNair–Wilson, pupil in Devereux Chambers, for research into the legal background to this point.

27 The practice of asking a judge to rule on a submission of "no case to answer" in a civil case where he sat without a jury, was considered in the Court of Appeal in Alexander v Rayson [1936] 1 KB 169. The issue had apparently not arisen before in such a case. The court concluded that a practice of asking the judge to rule on a submission of "no case to answer" where he was the judge of both fact and law, was new and irregular. It hoped it would not happen again.

28 See: Boyce v Wyatt Engineering [2001] EWCA Civ 692; Benham Ltd v Kythira Investments Ltd [2003] EWCA Civ 1794; Graham v Chorley Borough Council [2006] EWCA Civ 92.

29 See eg Miller v Cawley [2002] EWCA Civ 1100 at para 12 per Mance LJ; Benham Ltd v Kythira Investments Ltd (supra) at para 31 per Simon Brown LJ.

30 See: National Westminster Bank plc v Rabobank Nederland [2006] EWHC 2959 (Comm) at paras 27, per Colman J. That was a most unusual situation, where the judge was invited to strike out a part of the claimant's claim which had been introduced by an amendment in the course of the trial, which he had not allowed, but the Court of Appeal had then permitted. Two witnesses gave evidence on the facts in question and the defendants then applied to strike out. Colman J refused to entertain the application, largely because of the risks inherent in doing so when the trial and the evidence was still continuing: see paras 35 – 44 in particular.

96. Any change in the current law and practice on making a submission of no case to answer could only be made by either the House of Lords or the Rules Committee[31]. The WP has concluded that it should not recommend that the present practice concerning a submission of "no case to answer" be reconsidered. The WP accepts that there are great practical difficulties in a judge hearing such a submission in the middle of a trial in an HCC. The WP also agrees that in HCCs judges should only in exceptional cases permit a defendant to make an application to dismiss a claim at the end of the claimant's case[32] on the basis of "no realistic prospect of success". That course also can give rise to practical difficulties.

97. In some cases it may be possible for the judge to identify a particular, discrete issue of fact, expert evidence or law, which is a crucial element in the whole or a major part of the claimant's case. The judge may be able to organise matters so that evidence from both sides is heard on that issue and then he makes a decision on it after submissions. That decision may help the parties to settle the whole litigation. But if it does not then the judge will have to continue with the remaining issues in the case before the matter goes to the Court of Appeal.

H3. Summary Judgment/Striking Out/Submissions of No Case to Answer: Recommendations

98. Our conclusions are:

a. The current test for summary judgment/striking-out should not be altered but the judges should be encouraged to exercise the powers in appropriate cases.

b. The parties are more likely to apply for summary judgment/strike-out if they think that the court will make use of the wide range of potential costs orders which might be appropriate where an application for summary judgment/strike-out fails. Judges should be encouraged to use these powers more often. Possible orders are not confined to costs following the event of the application. If the Commercial Court is seen as ready, in an appropriate case, to order that costs be in the case or Claimant's/Defendant's costs in the case, then parties may be readier to use an application for summary judgment or to strike out where the application is merited but cannot be assured of success.

c. At the CMC, judges should (unless it is obviously a non–starter) always consider asking the parties whether they have considered making an application for summary judgment. The new List of Issues should facilitate this.

d. The judge in charge of the Commercial Court should identify, and ask the Court of Appeal to earmark, particular cases where there is a

31 The decisions of the Court of Appeal are, effectively, on practice and procedure, not points of substantive law, so that it would be possible to overrule them by a change in the CPR.

32 In a case where there is expert evidence, the practicalities are even more difficult to deal with. Usually witnesses of fact from all sides will be called before any expert evidence. In such a case, when would the application be made?

likelihood of a large number of interim appeals, and if possible to earmark one Lord Justice of Appeal (preferably with Commercial Court experience) to be a member of the appeal panel that will hear each of those appeals as they arise. Dealing with appeals as speedily as possible is vital. If an appeal on a summary judgment/strike–out application is likely to take several months to come on, or even more than a year in some cases, parties are less likely to make the application in the first place, which would be unfortunate.

e. It is not recommended that there be any change to the present rules of practice regarding a submission of "no case to answer" at the end of a claimant's case. Nor should a defendant be encouraged to make a submission of "no reasonable prospect of success" at that point, save in exceptional circumstances. However, there may be cases where the judge can isolate one or more important issues and hear all the evidence and submissions on them and then rule on them.

H4. Indications from Judges as to the Merits of a Case: General

99. There are four types of occasion when a judge might give a view (as opposed to a decision) on the merits of a case, whether on the facts or the law. First, at a CMC; secondly, after an application to strike out or for summary judgment; thirdly, during an early neutral evaluation ("ENE")[33], and lastly, during the trial itself. Historically, Commercial Court judges have been more prepared to give views on the merits of a case than their other High Court colleagues. This reflects the fact that the Court was set up to assist businessmen to resolve their disputes and that a pragmatic and practical approach was required for this. But, in all cases, the view expressed will only be a provisional one and the judge will be clear to say so. Here, as in many other areas, the judge must be trusted to be ready to change his view if further material or consideration warrants it. There is much to be said for a judge being quite open with an expression of view, rather than him uttering a hint or a Delphic expression, leaving the parties uncertain what view the judge is trying to convey. If comments are made at a trial, it is usually only with the express agreement of the parties themselves[34].

100. The WP considered whether more use could be made of ENE, a process which has been under-utilised since it was introduced in 1996[35]. We noted that a similar procedure is popular with the business community that uses the Delaware Court in the USA[36].

101. The other main method of enabling the parties to get an unbiased view of the merits of their cases, without having the merits judged, is by Alternative Dispute Resolution ("ADR"). By CPR Pt 1.4(2)(e) the court has a duty actively to manage cases by encouraging parties to use ADR if the court thinks that it is appropriate. The Guide also emphasises this[37].

33 See Section G2 of the Guide.
34 See remarks of Colman J in National Westminster Bank plc v Rabobank Nederland [2006] EWHC 2959 (Comm), [2007] 1 All ER (Comm) 975, at para 1. In a very long case in 1995 the same judge made comments, with the agreement of the parties, on the merits of the case of the claimants against one of the defendants. This led to that part of the case being settled.
35 Practice Statement (Commercial Cases: Alternative Dispute Resolution) (No 2)[1996] 1 WLR 1024.
36 L Strine, "'Mediation Only' filings in the Delaware Court of Chancery: can new value be added by one of America's Business Courts?" (2003) 53 Duke LJ 585.
37 See Section G1.1.

H5. Preliminary Issues: General

102. Another means by which the parties can obtain a court's decision on the merits of a particularly important part of a case is by the court agreeing to hear and determine Preliminary Issues. CPR Pt 3.1(2) specifically gives the court the power to determine part of the proceedings separately, by directing the separate trials of particular issues and also the order in which issues may be tried. Preliminary Issues are commonly ordered in Commercial Cases.

103. Over the years, appellate courts have encouraged judges at first instance to be cautious about ordering Preliminary Issues. They can be expensive and time-consuming and may not be determinative. But the WP concluded that the active identification of Preliminary Issues to be tried separately from other issues can be a most important way to enabling the parties to settle an HCC. The proposed new List of Issues should enable the court to identify key issues more easily. It will have to be done at a suitable CMC, at which leading counsel should be present, if possible, so that all the ramifications of ordering a Preliminary Issue can be discussed.

H6. Indications From Judges as to the Merits of a Case and Preliminary Issues: Recommendations

104. The conclusions reached were as follows:

a. Judges should be encouraged to give views on the merits of particular issues if it seems appropriate at CMCs and at strike out/summary judgment applications. They should also do so at trials, with the express agreement of the parties.

b. The court should not order the parties to take part in ENE but should raise awareness that this facility exists so that parties can take advantage of it if they so wish.

c. More use should be made of Preliminary Issues in HCCs, using the new List of Issues as the guide to identifying them.

I. Use of Technology: Scope for "paperless" litigation

I1. Use of Technology: General

105. HCCs produce heavy and complex disclosure and, all too frequently, heavy and complex trial bundles, many of which are not referred to at the trial at all. The WP concluded that the use of IT, properly set up, can make the conduct of HCCs more efficient and can reduce the length of trials. However, whilst there are practice directions[38] and a section in the Guide[39] requiring the parties to co-operate in the early stages of proceedings on the production and inspection of electronic documents, there is no specific Rule or guidance on the use of IT at a trial[40]. The extent to which IT is used at trials has until now generally been the result of agreement between the parties and the court, rather than a court's direction[41].

106. The allied question of the electronic issue of proceedings and electronic payment to start proceedings has become vexed. The Commercial Court has been anxious to make such a system available to the commercial community for some years. Successive judges in charge of the court have been told that there are difficulties in setting up a satisfactory "payment engine" for issue online. This argument has been very difficult to understand, given that a satisfactory system for the electronic issue of multiple claims in the county court has been in existence for years. The whole issue has now been remitted to the National Electronic Filing and Document Management Programme ("NEFDMP"). This inevitably means that there will be no early proposals or implementation of a proper electronic system for issuing and paying for proceedings in the Commercial Court online. However, the WP urges the NEFDMP to get on with this issue urgently and to use the Commercial Court for any pilot scheme it proposes.

107. As for the use of IT at a trial, the Commercial Court does not have the infrastructure to conduct paperless trials and it has no IT resources of its own. Therefore, as Section J4.3 of the Guide indicates, this means that if IT is to be used at a trial, the parties have to provide and pay for its use by the court.

108. The WP regards this as a most unsatisfactory state of affairs. The proper use of IT at criminal trials and at enquiries, such as the Hutton Inquiry and the Inquests into the deaths of Diana, Princess of Wales, and Mr Dodi Al Fayed shows how effectively IT can make proceedings more efficient. Although this whole issue is being considered by the Ministry of Justice, it seems that it is unlikely that any solutions will be found before the Commercial Court moves, together with the Chancery Division and the Technology and Construction Court, into its proposed new home in Fetter Lane.

38 CPR 31, PD para 2A.3.
39 Para E3.11 of the Guide.
40 Section J4.2 of the Guide does, however, state that the parties have an obligation to raise the issue of whether IT would assist a trial and in what respects.
41 In the BCCI litigation, Tomlinson J had to make a ruling on the extent to which the claimants could adduce evidence by electronic presentation: judgment of 18 July 2002 (unreported).

I2. Use of Technology: Recommendations

109. Given this unfortunate position, any proposals the WP has for greater use of IT or for "paperless trials" must be limited. We are conscious also of the technical nature of IT issues and the WP felt that it lacked the necessary expertise to make detailed recommendations on IT and paperless trials. That, itself, is one of the problems. The WP felt that it must be the duty of both judges and more senior lawyers (particularly leading counsel who are responsible for conducting the heaviest litigation) to get to grips with IT and to adopt a positive stance towards the use of IT in court, in particular in trials. The advent of the "paperless trial" will never occur whilst there are practitioners and judges who insist that they can only work with hard copy documents.

110. The issue of greater use of IT now and in the new building under construction in Fetter Lane does need urgent attention. The WP urges that a specialist working party be set up, to consist of those who will be in and will use the new courts in the new building. It should consider, amongst other topics:

    a. the extent to which use of IT saves time and money in trials;

    b. the training of judges to conduct paperless trials;

    c. the hardware and software that should be in place in the new Rolls Building;

    d. whether "wifi" is workable either within the new building or the RCJ generally;

    e. whether a single form of software should be chosen to train judges in the practice of (eg) marking documents, copying them into "notebooks", editing etc. At present there are a number of different systems available.

111. For the present, the WP considered that there are a number of practical steps that can be taken to reduce the amount of paper in cases generally but particularly in HCCs. Our conclusions are:

    a. The court should not be prescriptive about the use of technology in trials. However, the Guide should contain a new obligation on the parties and the court to examine the use of IT in cases, including, specifically, at the trial. The question of the use of IT should be examined with all the parties at the first CMC. Such discussion must address generally how technology might be used in that particular case to reduce the burden and cost of heavy litigation.

    b. In particular the parties and the court should consider whether to have hard copies of bundles at all or whether to prepare hard copies of only those bundles likely to be referred to reasonably frequently, with electronic copies for the remaining documents. This could avoid the need to make multiple copies of documents such as large numbers of invoices or bank statements, or background documents of limited relevance, which are rarely referred to at a trial.

c. Documents should be selected with care for the trial bundles, whether they are in hard-copy and/or electronic form. The WP emphasises that the ability to reproduce less important documents in the "trial bundles" in electronic form must not be used as an excuse for parties simply to reproduce the whole of the disclosure electronically for "trial bundles".

J. Costs

J1. Costs: General

112. The costs of large scale litigation are enormous. However, the WP recognised that the Commercial Court has a number of real advantages in relation to the recoverability of legal costs which are important factors for commercial users. The important ones are:

    a. the court itself operates a disciplined costs framework which is transparent, well recognised by users and is reasonably consistent;

    b. users know that the general rule is that costs follow success;

    c. users recognise that a reasonable proportion of costs incurred (roughly 2/3rds) will ordinarily be recovered if they are successful and the "standard" basis for costs is awarded;

    d. equally, users know that they can incur substantial costs liabilities – their own and those of their opponents – if they pursue a claim or defence which is unsuccessful;

    e. the court has costs powers which it will use to penalise those who engage in vexatious or frivolous claims or defences.

113. This regime is generally successful in discouraging vexatious litigation or the prosecution of doubtful claims or defences. The WP therefore concluded, after debate, that it should concentrate on improving the present framework rather than considering whether there should be more radical changes.

J2. Summary Assessment of Costs[42]

114. For many users, speed and certainty in ascertaining the amount of costs to be received is as important as the amount of costs awarded, within reason. Many users would prefer costs liabilities to crystallise as soon as possible in order that actual and contingent liabilities can be taken into account in deciding case strategy. The way to achieve this is by a more extensive use of the Summary Assessment procedure. The WP's view is that Commercial Judges should be encouraged to use this procedure as often as possible in all hearings other than trials where costs are to be awarded to one or other party, (rather than being "in the case"), in instances where the costs are up to £250,000. (At present the general rule of thumb is that a Commercial Judge will not make a Summary Assessment of Costs in cases where the total costs claimed are above £100,000). Where the costs claimed are in excess of £100,000, the court should be provided with a short written explanation from the solicitor who has done the bulk of the work, in addition to the schedule of costs. That solicitor should be present in court for the summary assessment and should be prepared to answer questions directly from the court, rather than answering through counsel.

115. The WP appreciated that this might lead to "rough justice" in some cases. But the practice of the judge seeing costs summaries from all sides is a very good means of ensuring both consistency and proportionality.

42 There are special provisions for dealing with costs relating to "funding arrangements": see CPR 44.3A. The WP believes that the proposals set out here could still be applied to such cases.

116. If the costs sum claimed is more than £250,000, the court should, as a general rule, give a summary award of costs on account. Members of the WP said that this practice usually encouraged the settlement of outstanding arguments on the amount of costs recoverable on a particular issue.

J3. Costs Capping

117. The WP considered the detailed and very helpful comments from the Senior Costs Judge on the issue of Costs Capping and the extent to which this might help control costs in HCCs[43]. The general view of the WP was that Costs Capping is unlikely to be useful in large scale litigation which involves (as it usually does) two or more commercial parties with roughly equal "spending power". Costs Capping is most useful where one party has much more money and other resources at its disposal than the other party and the "rich" party engages in expensive procedures and unreasonably incurs large costs as a means of forcing the other party into submission.

118. The WP concluded that if Costs Capping became more usual in commercial cases then the court would spend much more of its time assessing what a cap should be. This would, itself, be expensive and time consuming and would result in large scale "satellite litigation". Inevitably the Commercial Judge concerned would have to call in the expertise of a Costs Judge. Overall, we decided that this would not be helpful in reducing costs in most HCCs.

119. However, the existing power to apply to the court for a costs capping order should be used when it appears that one party is behaving unreasonably and disproportionately, eg. by overloading the team with solicitors/counsel in order to intimidate the other parties, or "churning" – ie. engaging in unnecessary but expensive work on a case. The WP concluded that a judge should not hesitate to express disapproval if he thought that such conduct was occurring and to warn that there would be cost consequences. In that way, other parties should be encouraged to have a self-imposed costs capping regime.

J4. Costs Estimates

120. The court has power to demand that parties provide it with costs estimates[44]. The WP concluded that the court should, as a general rule, ask for costs estimates to be updated regularly throughout the case. It should also ask for written confirmation that the responsible person in the client organisation has seen the estimates for both sides.

J5. Personal Award of Costs against Counsel and Solicitors

121. There are occasions when legal advisers cross the line between appropriate steps in representing their clients and abuse of court processes. These occasions are rare in the Commercial Court both generally and in heavy and complex litigation in particular. Nonetheless the WP considered

43 The court's power to impose cost capping orders derives from CPR 3.1(2)(ll). See the discussion at Note 3.1.8 at page 89 of Vol 1 of Civil Procedure 2007 ("the White Book").

44 See para 6.3 of the Costs Practice Direction , supplementing CPR Pts 43 to 48.

whether it was within its terms of reference to consider whether the court should make a more active use of the wasted costs sanctions[45] against individual lawyers if the circumstances demand it, as well as or instead of an award of indemnity costs. The WP concluded that this subject was probably outside the scope of its terms of reference. However, it noted that, unfortunately, these sanctions are cumbersome and are themselves costly and time consuming. The WP concluded that, in the vast majority of cases, a better way of making sure that legal advisors do not overstep the mark is to state plainly, when making an adverse costs order, that it is the result of inappropriate action (or inaction) by one or other of the party's legal advisers. In many cases it may be impossible (given legal professional privilege) to identify precisely the perpetrator and refer the matter to the relevant professional body. But if this can be done then this deterrent should be used to discourage abuses of the court's procedures.

J6. Daily Trial Fees

122. During the time the WP was meeting, the Ministry of Justice was considering whether to introduce a "pilot scheme" of daily trial fees in the Commercial Court. In August 2007 the Ministry announced that this proposal had been postponed. The WP was pleased to read this. It is our strong view that daily trial fees would be an active discouragement to overseas clients of the Court, who would take their litigation to other commercial centres by putting jurisdiction clauses into their contracts which would nominate another court, whether in New York, Paris, Hong Kong or elsewhere, instead of London, to determine disputes. In turn and in time there could be damage to the position of English law as the international commercial law of choice, with attendant serious implications for the use of London and therefore for the UK economy as a whole. Daily fees would also take away one of the main cost differences between litigation and arbitration, so the introduction of daily fees would also encourage others to go to arbitration rather than court to resolve their disputes. Whilst the WP fully recognises the importance of arbitration for the resolution of commercial disputes, it is equally important to maintain a strong development of English commercial law through public litigation and the public decisions that result. The robustness and certainty of English commercial law has always been recognised as one of the main reasons why London has flourished as an international trade centre over the last 200 years.

123. The risk created by the introduction of daily fees cannot be measured or evaluated in advance. However, given the importance of the Commercial Court to the City of London as a financial centre and therefore to the United Kingdom both in terms of the development of commercial law and legal certainty (which is not advanced by private arbitration) and in terms of "invisible earnings", it would be foolhardy in the extreme to run the risk by introducing the fees. Once the damage has been done to the reputation of the Commercial Court, particularly overseas, it is likely to be impossible

45 See s 51(6) of the Supreme Court Act 1981, CPR Pt 48.7 and para 53 of the Costs Practice Direction.

to undo it. The WP notes that this idea is still under consideration by the Ministry of Justice[46]. The WP urges the Ministry to drop it altogether.

J7. Costs: Recommendations

124. Our conclusions on costs are:

a. There is an obvious risk that introducing daily court fees will deter parties from litigating in the Commercial Court in favour of litigation overseas or arbitration, and have an impact on the choice of law and jurisdiction clauses included in commercial contracts. Therefore the WP urges this idea be dropped.

b. For many users of the Commercial Court, speed and certainty are as important as the quantum of any costs award. The court should be prepared to make a summary assessment of costs in all instances where the gross sum of costs claimed is £250,000 or less. Where the costs claimed are in excess of £100,000, the court should be provided with a short explanation from the solicitor who has done the work, in addition to the schedule of costs. That solicitor should be present in court for the summary assessment and be prepared to answer questions directly from the court (rather than through counsel).

c. If the sums claimed are too high for summary assessment the court should always consider ordering a payment on account, as experience shows that this facilitates settlement of the outstanding costs issues.

d. Wasted costs orders against barristers and solicitors as a discrete subject is outside the WP's terms of reference. However, the court should be encouraged to assist the parties in scrutinising the conduct of their own legal teams by making it clear in rulings and judgments (if it be the case) that the way in which the case has been conducted has led to the making of an adverse costs order.

e. The court should use its power to award costs to discourage the parties from behaving unreasonably, for example by awarding costs on an indemnity basis, where an allegation of fraud is abandoned. If possible these costs should be assessed summarily and be made payable forthwith.

f. The court should be provided with costs updates from the parties for consideration at each CMC or PTR so that issues of proportionality can be borne in mind in relation to the cost of particular issues or stages of preparation.

g. Costs capping should not be a normal feature of litigation in the Commercial Court but the court should exercise its power to make a costs capping order where one party is behaving unreasonably or disproportionately. The court should draw the existence of the power to the attention of the parties in appropriate cases in order to encourage applications to be made if it seems a suitable case.

46 On 25 July 2007 the Lord Chancellor and Secretary of State for Justice stated in the House of Commons that "the proposal to pilot daily hearing fees in the specialist commercial jurisdictions in 2008 has met with opposition from respondents representing the views of legal practitioners and the judiciary of those Courts. We therefore propose to review the scope proposed, to then be the subject of a target consultation. As a result any introduction of a scheme is unlikely to take place before 2009".

K. Management of the Pre-Trial Timetable and the Trial

K1. General

125. If the proposals of the WP are adopted, then by the time of the first CMC the parties and the court will have very concise statements of case, generally limited to 25 pages per party. As a result of the first CMC, the court will have a judicially settled List of Issues in the case, which will be amended (at the court's direction) as the case develops. The List of Issues will determine the extent of disclosure, the scope of witness statements and the ambit of expert evidence. In the course of subsequent CMCs the court will have considered and (if necessary) disposed of any strike-out or summary judgment applications.

K2. The Pre-Trial Timetable

126. An important aspect of the management of HCCs is setting the appropriate pace for the pre-trial timetable. If it is too fast, then the parties will get behind, or there will be insufficient time for reflection on the merits of the parties' respective cases, or no suitable window for ADR. If it is too slow, the impetus will be lost, too much money will be spent on the litigation and the parties may get into entrenched positions as a consequence.

127. The WP considered that, in HCCs, the court needs help in order to set an appropriate pace in the pre-trial timetable. Therefore, so far as possible[47], at the first CMC the parties should submit careful estimates of each piece of work needed, such as disclosure, witness statements, expert evidence or trial document preparation. They should be prepared for discussion with the judge about these estimates.

128. At present the practice is to set the whole of a pre-trial timetable, the date for a trial and the trial time estimate at the first CMC. With very large cases this is largely guesswork. Therefore, it is inevitable that the pre-trial timetable and time estimates for various pre-trial procedures and the trial itself are subject to frequent reviews. This is disruptive for the court's own timetable and may result in other, shorter, cases being delayed unnecessarily[48]. The WP decided that, for HCCs (and probably also for any cases that might result in a trial of about three weeks or more), it would be better to recognise that it is not possible to set the whole of the pre-trial and trial timetable at the first CMC. Instead, the timetable for the later stages of preparation (eg. expert reports) and the trial itself should be delayed until a second or (if necessary) later CMC.

129. The WP appreciated, of course, that parties and their advisers like to work to deadlines and that witnesses and senior management prefer to have dates fixed in diaries at the earliest opportunity. Generally speaking, parties also like to have a trial date fixed as soon as possible. But the WP decided, on balance, that it is always better to fix realistic timetables. It is important that other users of

47 Some estimates, such as how long it will take to prepare an expert report, may be impossible at this early stage.

48 Eg. at the first CMC of an HCC the trial is fixed for October 2008 to run for 20 weeks. At the second CMC the parties say they have fallen behind and will not be ready for trial until April 2009. Meanwhile, because the 20 week trial was fixed for October 2008, there is no room in the Court list for three smaller cases until April 2009, even though they would be ready for trial in October 2008. If the HCC is put back to April 2009 that may lead to further knock–on delays.

the Commercial Court should not suffer because of an unrealistic hope that the timetable of an HCC will be maintained.

K3. Trial Estimate

130. A further problem is the trial estimate itself. At present an estimate is usually reached by an early "top down" method of calculation, ie. by judging the likely number of witnesses, the possible number of bundles and by using a litigators' general hunch about how long a particular case will take. This hunch is sometimes right, but it can go spectacularly wrong, with the result that the parties will underestimate the costs of trial considerably and the court's own timetable will be much affected.

131. The WP proposes that, in general, no trial in the Commercial Court involving two parties should ever ordinarily be estimated to exceed 3 months or 13 weeks, excluding judicial reading time before the trial and judgment writing time at the end of it. This limit should not necessarily apply where there are multi-parties, although in all cases any estimate above the 13 week limit would need to be justified.

132. At the first CMC, if the court comes to the conclusion that this case is likely to be an HCC, then a maximum estimate of 13 weeks will be given for the trial, unless it is multi-party. A trial date may be given then, or it may be that it cannot be given until a subsequent CMC. As counsel (leaders if possible) will have to be involved at the first CMC to settle the List of Issues with the judge, then the question of when the case is to be fixed for trial can be discussed with counsel, solicitors and, in the vast majority of cases the client, all being present. If a decision is taken that it is too early to fix a trial date, then it is imperative that senior counsel, solicitors and the clients are present at the subsequent CMC when the trial date is fixed.

133. There are several advantages to a general rule that no trial should be longer than 13 weeks. First and foremost, it will concentrate the minds of litigants in getting through the case as efficiently as possible. Secondly, it will contain the costs of trial. Thirdly, if 13 weeks is obviously too short for all issues in dispute to be tried out, it should make the parties consider whether crucial issues should be dealt with first and if so in what order, in the hope that the matter can then be settled. Lastly, this limit should mean that even if the court hears and decides certain issues ahead of others within that period, the parties should not need to go to the Court of Appeal before all the trial issues have been decided. This should also help contain costs and keep up the pace of the litigation and prevent too much delay.

134. In all cases, the parties and the court should be considering, at successive CMCs, the order in which issues are to be tried and how best to try them. The trial estimate can, if necessary, be reduced, or possibly enlarged, although if that means going above 13 weeks, this should be done only in exceptional cases.

K4. The Progress Monitoring Information Sheet[49]

135. The Progress Monitoring Information Sheet ("PMIS") is an important document in all commercial cases. It is intended to show the court whether the parties have fulfilled all the orders that the court has made at various CMCs. At present a PMIS is not usually shown to judges of the Commercial Court. If a party has failed to fulfil an order made at a previous CMC, it is either left to the other party to apply to ensure that this is done, or the Commercial Court Registry deals with the issue. The WP considers that this is most unsatisfactory for all cases, but particularly in the case of HCCs. It therefore proposes that if a certain case has been designated an HCC (and, in the view of the WP, in some other large cases, which can be identified at the first CMC), then the PMISs of the parties must be referred by the Commercial Court Registry to one of the judges in the two judge team that has been nominated[50] – preferably the judge who is to be the trial judge. The judge can then see what (if anything) has not been done as it should have been and can make orders accordingly. This can either be done on paper or, if the matter is sufficiently serious, by ordering that the CMC be reconvened.

K5. The Pre–Trial Review ("PTR")

136. The Guide provides[51] that the court will order a PTR in any case which it considers it is appropriate to do so. It stipulates that the PTR will normally be held between 4-8 weeks before the trial itself and "whenever possible" this will be conducted by the trial judge. The Guide also says that the PTR should be attended by counsel who are to conduct the trial itself. At the PTR, *"the judge may set a timetable for the trial and give such other directions for trial as he considers appropriate"*[52].

137. In the view of the WP, in HCCs there must always be a PTR and it must be conducted by the trial judge. If there is to be sensible planning of the trial timetable then the PTR must be conducted at least 9 weeks ahead of the trial. In many cases it ought to be more, because the bundles (hard copy or electronic) will have to be produced and all pre-trial procedures completed in good time for the judge to start to read into the case. For most HCCs the reading time will be at least 2 weeks and frequently longer.

138. At the PTR, the court must review the List of Issues and the various aspects of the trial timetable. The structure of the judge's pre-reading also has to be determined. We elaborate on this below.

K6. Judicial Pre–Reading

139. At present the Guide provides for a single reading list approved by all advocates, to be lodged 2 clear days before any trial, together with an estimate of the time required for reading[53]. This therefore assumes that any

49 See the Guide, para D12 and Appendix 12.
50 If the case does not have a two judge team nominated, then the PMISs will probably have to be referred to the Judge in charge of the List or one of the two judges who are dealing with paper applications that week.
51 Para D18.1–4 in particular.
52 Guide, para D18.4.
53 See section J5.1

judicial reading will be done after the start-date of the trial. In all HCCs it is obviously impractical for the judge to be presented with a monolithic reading list and then to be expected to get on with it so as to be ready to cope with an oral opening in due course. The WP recommends that in any case which has been identified as an HCC, the judicial reading for the trial must be discussed and either entirely determined at the PTR, or at least the principal topics for reading should be identified, so that the parties can produce a single reading list soon afterwards. The WP suggests this approach will be good practice for all but the shortest of cases.

140. Timetabling of the reading and the content of the list must depend on the case itself. In some cases the judge may need the parties to give "mini–presentations" on particular issues, such as expert issues, before or during any reading. Or the judge may wish to ask questions as reading progresses and for that a small team from each side will have to attend court.

K7. Written Opening Arguments

141. The WP noted that nowadays, even in small cases, so-called "Skeleton" Arguments are formidable documents. They frequently run to over 30 pages in length and sometimes much more, whether the documents are produced for interlocutory matters or the trial itself. In most cases the Skeleton Arguments are fully developed written submissions, with footnote references to the underlying documents and the relevant cases. In this respect the injunctions set out in Appendix 9, para 2 of the Guide are more honoured in the breach than the observance.

142. The WP considers that in HCCs the length, structure, and exchange of written arguments (perhaps more appropriately called Outline Arguments) must be determined at the PTR. In general it is not helpful to the court to have a book of an Outline Argument to read in advance of the trial. Therefore the general rule in a two party case should be that an Outline Argument prepared for a trial will not exceed 50 pages. The court's permission will be needed for a longer document. Of course, where there are more parties or Part 20 claims and so more issues to deal with, longer documents may be necessary. In all cases the Outline Argument should be structured in accordance with the List of Issues and the order of their determination as settled by the court at the PTR. The exchange of Outline Arguments should be sequential and should be completed before the judge starts the pre-trial reading.

143. At some stage, which may be after the Outline Arguments have been exchanged but must be in good time before the start of the trial, the parties must agree a list of matters that are "common ground" between them. In cases where there are more than two parties, it is possible that some issues are common ground between parties A and B, but not C. All matters that are "common ground" between at least two parties should be set out in a document for the judge.

K8. Chronologies

144. Chronologies are very important documents in large trials. The requirements of paragraph 2 of Appendix 9 to the Guide are as imperative in HCCs as in all others and must be obeyed. The tendency for parties to quarrel over the way events are described in chronologies has led to delays in their production in some cases, or even to the production of two chronologies. This cannot be permitted. One obvious way to avoid these problems is to ensure that no parties quote contentious evidence in a chronology. If there are any issues regarding the Chronology, they must be resolved at the PTR. For instance, a decision may have to be made on whether the chronology is short, referring to key events only, or longer, with full cross-references to evidence relied on by the parties. The court and the parties must also always consider whether there should be hyperlinks from the e-version of the chronology to other key materials, such as relevant paragraphs in witness statements or core documents.

K9. Oral Openings at Trial

145. The Guide notes[54] that even in very heavy cases, oral openings may be very short and no longer than the circumstances require. If the WP's suggested pattern of pre-reading is adopted, this guide can be followed even in the heaviest of cases, with hardly any exceptions. The WP proposes that, as a rule, no oral openings in the Commercial Court should exceed 2 days, unless there are very special reasons. Any longer period will have to be justified at the PTR. The time allowed for each party's oral openings is to be set at the PTR and all parties will be expected to stick to the limit.

K10. Sitting Times in HCCs

146. The general rule should be that the court will sit Monday to Thursdays[55]. However, the WP thinks that sitting times must always be discussed between the parties and the court well in advance of the trial. The general pattern should be laid down at the PTR. Sitting times do not have to be 10.30 to 4.30 on each day. The parties and the court must be prepared to sit so as to dispose of the case in the shortest and most efficient way possible. The Commercial Court has always been prepared to adjust its sitting times to assist witnesses and other businessmen involved in a trial, whose interests are ultimately at the heart of the service provided by the Court.

K11. Adducing Documents in Evidence other than through a Witness

147. It is noted in the Guide[56] that documents that are in a trial bundle are not automatically thereby put in evidence in the trial. The WP agrees that this rule should remain. Therefore documents have to be put in evidence by some means. The parties can agree specific documents are to be treated as

54 Para J8.1.
55 See para J7 of the Guide.
56 See para J8.1 and Appendix 10

being in evidence (subject to cross-examination of witnesses and comment in submissions, of course). A list of such documents will be prepared by the parties and submitted to the judge by the time of pre-reading. We recommend that this is adopted as the general rule for the trials of all cases in the Commercial Court.

148. Paragraph J8.1 of the Guide suggests that it may be efficient for documents to be adduced in evidence by being read in the course of an oral opening by counsel. The WP accepts that it will be necessary for counsel to refer to one or two key documents in an oral opening. However, it is the WP's view that the general rule must be that swathes of documents are never read extensively in court. It is a waste of time and, with the assembled teams of lawyers and clients all in court, a great waste of money.

K12. Time Limits for Examination and Cross-examination of Witnesses

149. It is now accepted that the court has power to impose a time-limit for examination and cross-examination of witnesses[57]. The WP recommends that this should become the rule in all Commercial Court trials, but it is particularly important in long trials. Cross examination of witnesses may be tiring and stressful for counsel; it is many more times more tiring and stressful for the witness. There should be strict limits to the amount of questioning a witness has to put up with, even one that is alleged to be dishonest.

150. Therefore the WP recommends that at PTRs the parties and the trial judge should set down time limits for the cross-examination of each of the principal witnesses. If there is to be any oral examination-in-chief this too should be the subject of a time limit.

151. In a recent very long case this procedure was adopted very successfully. There was also a system of "reversible demurrage and despatch", ie if a party went over the limit for cross-examination with one witness, it thereby reduced the amount of time available on the remainder; but if time was saved on one witness then that time was available with others. Whether such a system is used in a particular trial should be determined at the PTR.

K13. Applications in the Course of Trial

152. These must be kept to a minimum. It may be convenient to hold an application over until a Friday rather than interrupt the flow of a trial.

K14. Closing Submissions

153. The Guide provides[58] that all parties will be expected to make oral closing submissions and that in a more substantial trial the court will normally require closing submissions in writing before oral closing submissions. The Guide contemplates that in such a case the court will normally allow an

57 This falls within the case management power set out at CPR 3.1(2)(m), which provides that the court may "take any other step or make any other order for the purposes of managing the case and furthering the overriding objective".

58 Para J.10 – 11.

appropriate time after the conclusion of evidence to allow for the preparation of these submissions[59]. Nowadays written closing submissions are almost universal in Commercial Court cases, even in short trials. The tendency has been for the submissions to become full written arguments. Judges strongly discourage the oral repetition of these submissions.

154. The WP believes that the time has come for the Guide to recognise fully this change in practice. The WP therefore recommends that there be changes in the Guide so that the normal procedure in all cases, but in particular HCCs, is that the judge and the parties will, at a convenient time during the trial, discuss and decide on: (i) the scope of issues to be dealt with in the closing written submissions; (ii) the order in which issues are to be dealt with[60]; (iii) the maximum length of the written submissions; (iv) timing of their exchange; and (v) the time to be allowed for oral argument by each side. It should be recognised that the prime object of oral closing argument is for the parties to deal with questions from the judge on issues on which he indicates that he needs elaboration or explanation. Oral argument should not be used to reiterate what is already in writing. However, there may be brief oral submissions on any matters that it has not been possible to deal with in the written closing submissions. No oral submissions of a party in the Commercial Court should ever ordinarily be more than 2 days, even in a long case[61].

155. If this process is to be efficiently managed, it will be imperative for the judge and the parties to identify, at an appropriate point in the trial, which issues are no longer pursued, which facts are now agreed and where the key remaining disputes lie. Parties will be expected to give the earliest possible indication of which facts or legal issues are agreed or are not being pursued. If they do not, they will face costs consequences. The old habit of only announcing in the course of a closing submission that a particular argument is no longer to be pursued is much to be discouraged.

K15. Appeals in the Course of the Pre-Trial Timetable or During Trial

156. As we have already noted, the WP recognises that it is common to have appeals in HCCs in the course of the interim process and even during the trial itself. As we have also indicated, these are to be discouraged. But we emphasise again that it is important for the Court of Appeal to be informed that there are certain cases where there may be interlocutory appeals and that, if possible, a constitution of the Court of Appeal with at least the same ex-Commercial Court judge in it should be used for all appeals in that case. Appeals from the decision at trial are, of course, a different matter.

K16. Courtesy and Cooperation

157. Courtesy and cooperation are essential in the conduct of any case and they are particularly important for the efficient and expeditious disposition of HCCs. Discourtesy between counsel or solicitors frequently ends in arguments and

59 Para J11.1(b).
60 It is much easier for the judge if each side deals with the relevant issues in the same order.
61 In one case which lasted from January – November 1995, the submissions of the three remaining parties lasted 1.5 days in total. The judge had full written submissions from all parties and the submissions were confined to highlights and questions from the judge.

then a reluctance to cooperate. Unnecessary non-cooperation simply wastes time and money. It must be recognised that if a lack of courtesy or cooperation results in trial time being lost, such behaviour will be viewed very seriously by the Commercial Court and costs sanctions may follow.

K17. Review of Case Management Practice

158. The WP concluded that it would be sensible for the Commercial Court and its user to keep Case Management Practice under review. We think that this can best be done by creating a standing sub-committee of the Commercial Court Users' Committee with up to 4 members – but no more – (eg a judge, barrister, solicitor, and client representative) whose remit would be to receive ideas about case management issues, including trial management, as these become identified in future cases. This sub-committee could then make proposals for further procedural improvements on case management. However, the sub-committee would not consider individual cases. There are already adequate procedures for dealing with any complaints about individual judges or their management of cases or trials.

K18. Management of the Pre-Trial Timetable and the Trial: Recommendations

159. Our recommendations on management of the pre-trial timetable and the trial are therefore:

a. In an HCC the court should be ready to fix later parts of the pre-trial timetable and the trial date (or "not before date") at a second CMC, because it may be difficult to fix with confidence the whole timetable at the first CMC. In deciding whether to defer fixing the trial date or to fix it provisionally subject to review, the court should consider the needs of the parties, including the need for witnesses in senior positions to manage their diaries and the potential delay which might occur if no trial date is fixed for a long period.

b. No trial of a two-party case in the Commercial Court should ordinarily be listed for more than 13 weeks. If the parties estimate that more than 13 weeks will be required, this should be discussed with the court at the CMC at which the trial is fixed, and a longer estimate will only be given if it is clearly justified.

c. In order to set provisional timings in the pre-trial timetable the parties should (a) be required to submit careful estimates for each piece of work, (b) build a sensible contingency into each estimate, and (c) be able to explain how the estimate is arrived at. The court will pay close regard to these estimates and will expect the provisional time limit ultimately set to be adhered to.

d. The court should make more use of its existing powers (a) to decide the order in which issues are taken and (b) to take certain issues to the point of decision before moving onto the next issues[62]. Where this is done, the court

62 CPR 3.1(2)(j), (k) and (l).

may decide to grant permission to appeal in relation to an issue on terms that the appeal should not be prosecuted until after judgment has been given in relation to some or all of the other issues to be decided at the trial.

e. In HCCs (and other cases which should be identified by the judge at a CMC), the Commercial Court Registry should ensure that the PMIS is referred to a judge. If a two judge team has been assigned then it must be to one of those judges, preferably the assigned trial judge. If necessary, the judge may then make an order on paper or direct that the CMC be reconvened to discuss progress (or the lack of it) in the case.

f. In HCCs there will be a PTR which must be conducted by the trial judge. At the PTR the List of Issues will be reviewed and the judge will set provisional time limits for various aspects of the trial (see below). The PTR must normally be at least 9 weeks before the date fixed for trial and should be attended by the partner responsible from each firm of solicitors and all advocates (including the most senior trial advocate for each party).

g. Provisional time limits should be set for every component of the trial, ie. openings, the examination-in-chief (if any), cross-examination of all witnesses and closing speeches. A contingency of 2 hours each week should be allowed for general matters, and an overall allowance for re-examination by each party should be built in.

h. The idea of transferable time limits for questioning of witnesses should be discussed between the judge and the parties at the PTR.

i. The parties should agree a list of matters of common ground (within the List of Issues) and update it as preparation for trial progresses. If possible, a full list of matters of common ground should be produced by the PTR, but the list must be produced, at the latest, after the exchange of Outline Arguments prior to the trial.

j. In HCCs the preparation of a reading list and the timing of pre-reading will have been discussed at the PTR. This practice may be adopted in other cases. Timetabling of the reading list and the reading itself should meet the requirements of the case. In an HCC it is likely that the judge will have to do some reading but extensive unguided pre-reading is unlikely to assist the court. Therefore, reading lists should generally be limited to the opening outlines, essential documents, and the parts of witness statements and expert reports that are likely to assist the court at this stage. It is unlikely that pre-reading of full details of experts' reports will be helpful at that stage, although the judge will need to read what is and is not in issue between the experts. The judge may require the advocates or the experts (with only a small team in attendance in order to save costs) to come to court at one or more points in the pre-reading in order that the judge may ask questions or seek other assistance, such as a "teach–in" on expert issues.

k. In HCCs the timetable for the chronology should always be discussed at the PTR and the chronology ordered should meet the requirements of the case. In some cases one or more issue-specific chronologies may be useful. However there must never be one chronology per party. The parties should

always follow Part 2 of Appendix 9 of the Guide. In addition, the Judge might usefully discuss with the parties whether a more concise (eg key events only without cross-referencing to evidence) or a more detailed (eg all significant events cross-referenced to evidence) chronology, or perhaps one of each, would be more useful in the particular case.

l. The Guide makes plain that "skeleton arguments" should be concise, and should avoid arguing the case at length (Appendix 9, para 2). As regards law, the Guide makes plain that this should be dealt with in skeleton arguments by stating propositions relied on with references to the relevant authorities. (Appendix 9, para 2). It is particularly important that these principles be adhered to in HCCs. Even in such cases an opening Outline Argument should not normally exceed 50 pages in a two-party case. Permission will be needed for longer documents. The Outline Argument should be structured to take the issues in the order in which they appear in the List of Issues.

m. No opening speech in the Commercial Court should ever ordinarily be estimated to exceed two days, unless there are very special reasons. A longer opening will have to be justified at the PTR.

n. After consultation with the parties, and having regard to the needs of those involved in the trial (including advocates, solicitors, client representatives, witnesses, court staff and shorthand writers) the judge may direct that the Court will sit during particular hours for all or part of the trial. The guide must be: what is most efficient and helpful to the parties, although the needs of court staff must always be borne in mind.

o. With regard to adducing documents in evidence, the general rule must be that documents will not be read extensively by advocates or witnesses in court. If the Judge is given sufficient pre-reading time, then relevant parts of documents in Outline Arguments and chronologies can be read in advance. Those documents should be treated as being in evidence unless the position is expressly reserved by one or other of the parties. A list of documents put in evidence in this way should be prepared. Advocates should be discouraged from reading documents to the Court simply for this purpose. The position is of course different where reference to a document is necessary in the course of cross-examination or submissions.

p. Applications in the course of trial must be kept to a minimum. It may be convenient, depending on their nature, to hold applications over until the afternoon of a sitting day, or to a Friday, rather than interrupt the flow or schedule of the trial.

q. The parties should expect the court to impose a page limit (and sometimes an issue-by-issue page limit) on written closing arguments. Closing arguments will be linked to those issues which remain "live" and each party must deal with them in the same order, as agreed with the judge. A provisional time limit on oral closing argument will have been directed in the trial timetable set at the PTR. That will be confirmed during the course of the trial.

r. Ordinarily the court should allow a period between the delivery of written closing arguments and oral closing submissions, so as to ensure that the

judge will have been able to study fully the written closing arguments. Oral closing submissions will generally be confined to dealing with questions from the judge where clarification or further explanation of an argument is needed. Even in long cases, the total time taken by the closing addresses of the parties should not exceed 2 days.

s. The need for courtesy and co-operation in the conduct of a case, and the potential impact on costs of parties' failure to co-operate should need no emphasis to all who practise in the Commercial Court. In particular, it is obviously essential to the efficient and effective conduct of HCCs.

t. A standing sub-committee of the Commercial Court Users' Committee should be set up, with no more than 4 members, to receive and consider ideas on improving case management and, if needed, for making proposals for alteration of the Guide.

L. Client Accountability and Responsibility for Litigation

L1. Client Accountability and Responsibility: General

160. The WP regarded this as a most important issue. The WP concluded that one of the big dangers in heavy and complex litigation is that it can run out of the control of the senior management of one of the parties. However, because it is senior management that is ultimately responsible to shareholders or others for the time and cost spent on litigation, it is important that responsibility for the management of heavy and complex litigation is kept with senior management where it belongs. The WP recognised that the senior management of a party engaged in litigation will be busy carrying on the proper business of the enterprise concerned during the litigation. Because of this and because heavy litigation in England has, to an extent, become so sophisticated, it is difficult for senior management to remain actively involved in the progress of litigation and assert responsibility for it. Therefore there is a danger that if a complicated dispute arises, it becomes the preserve of in–house legal departments and independent lawyers who are engaged to conduct any litigation that ensues. As examples: procedural documents, such as Statements of Case, are themselves often long, complex and expressed in stylised, not to say rebarbative, language; that makes it difficult for non-lawyers to follow them. Or the senior management may not have been asked to consider ADR or other possible means of settlement of the dispute. All this makes it more difficult for senior management to be accountable for the litigation that is being carried on in its name. The WP concluded that it was important to make it easier for senior management to be able to follow what is going on in cases so it can effectively exercise the ultimate responsibility that it must.

L2. Client Accountability and Responsibility: Recommendations

161. The CPR[63] already provide that a court can require a party to attend court. Furthermore, the CPR[64] already provide that various documents must be verified by a Statement of Truth by a party. The CPR also give the court a power to require verification of documents and other evidence[65]. The WP took the view that these powers are useful but need to be more fully invoked and supported by complementary arrangements, to ensure that clients are properly accountable for large scale litigation. More involvement is needed to ensure that they can judge the progress of a case and be involved in major decisions concerning it.

162. Therefore the WP recommends:

    a. Senior representatives of the parties[66] should be required to sign a fresh statement of truth shortly before trial verifying statements of case (but not responses to requests for further information or witness statements), in order to reaffirm the statement of truth verifying the original statement of

63 CPR 3.1(1)(c)
64 CPR 22.1
65 CPR 32.1
66 Senior representatives are persons "holding a senior position in the company or corporation" within the meaning of Practice Direction 22, paragraphs 3.4–3.5.

case, which may have been filed some time previously, are understood, sustained and remain accurate.

b. At present parties have to make a statement indicating whether ADR has been considered internally[67]. Senior representatives of the parties should be required to sign this statement and also whether ADR has been considered with their opposite number. This process should occur automatically at two stages: (i) at the first CMC, and (ii) after exchange of expert reports, or of witness statements if there are no expert reports. In addition, the judge may of course ask the question at any oral hearing at which he considers it appropriate (see also Section D above).

c. The Guide should be amended to emphasise the judge's power to require senior representatives to be present in court, by video link if necessary, if the judge considers it will assist in case management or resolution of the dispute. Examples of where the participation of senior management may be useful during discussions between the judge and parties are: (i) on the scale of the case; (ii) the cost of the litigation; or (iii) any indication of how difficult a particular issue might be for one side or the other. However, the WP recognised that care must be taken not to deter foreign clients from litigating in London by requiring their attendance when not really necessary.

67 Para 10.7 of the Practice Direction, supplementing CPR Pt 58, together with paragraph D8.5 of the Guide require all parties attending a CMC to complete a Case Management Information Sheet ("CMIS"), in a form set out in Appendix 6 of the Guide. Paragraph 15 of the CMIS asks the party answering the Case Management Information Sheet whether ADR has been considered.

M. Judicial Resource Management: Generally and for HCCs

M1. Judicial Resource Management: General

163. This topic has been left until last because the judicial resources needed depend heavily on the WP's recommendations on the way Commercial Court cases and HCCs in particular should be managed in the future. It will be clear from all that has gone before that the WP's proposals will mean much more judicial involvement in case management generally, not just in the case of for HCCs. There is no doubt that this will put a further strain on judicial resources, which are already stretched.

164. A review of the work of Queen's Bench judges which was carried out in 2005 by the Vice President of the Queen's Bench[68] concluded that the Commercial Court needed nine judges sitting at any one time to conduct its business efficiently. This report indicated that a good argument could be made for ten judges and concluded that eight was too few. Since this review was conducted the work of the Commercial Court has increased again. Yet it has proved almost impossible to provide nine judges to sit in the court, because of the demands of other areas of work undertaken by Queen's Bench judges; in particular, that of serious criminal trials and the Administrative Court. The WP appreciates that it cannot do anything about this state of affairs. But it wishes to emphasise that if insufficient judges are provided for the Commercial Court, then it will not be able to conduct heavy cases efficiently. This will lead to further criticisms of the Court and its procedures. The WP sincerely hopes that this can be avoided.

165. One argument, which has been made for years by some users of the Commercial Court, is that Commercial Court judges should not be deployed to do other types of Queen's Bench work (particularly criminal trials), but should be used solely in the Commercial Court. It is argued that this would enable the court to operate a "docket" system, whereby each case would be assigned to a particular judge, who could maintain continuous and close management over it.

166. This idea has certain attractions. The WP considered carefully whether it should recommend this, but decided it should not do so. First, the Commercial Judges themselves have always been against the notion of being confined to commercial cases. The Commercial Judges believe, rightly or wrongly, that it is better for the Commercial Court and for the system generally if they have experience in other areas of the law, perhaps particularly the criminal law. Secondly, there is no need to confine the judges to Commercial Court work, provided that sufficient judges are allocated to the court overall. The only real problems arise in relation to HCCs, if a judge who is new to the case has to grapple with heavy facts and a procedural history for the first time when the proceedings are already well advanced. That exercise takes time both before and during court hearings and so costs money.

68 The Vice–President of the Queen's Bench, currently May LJ, is responsible for the deployment of all QB judges, including judges who have been nominated as Commercial Court judges.

167. The WP also considered whether it should recommend that, once a judge has been assigned to an HCC, that judge should remain in the Commercial Court for the duration of the case. Again this has attractions, but there are too many potential HCCs[69] for it to be practical, given the present position where there are so many calls on the High Court Judges of the Queen's Bench Division.

168. The WP's answer is to ensure that there is a much more effective use of the two judge team system, which is already provided for in the Guide, but which is not being properly used at present. The Guide states[70] that applications for a two judge team are to be made to the judge in charge of the Commercial Court at the time when the first CMC is fixed. Then if an order is made, one or other of the two designated judges will preside at all subsequent pre-trial CMCs/interim hearings and the trial itself.

169. To the knowledge of the WP, the two judge system has not been properly used in at least three recent very large cases. The WP's recommendation is that when the pleadings have closed, ie. with service of the Reply (or when a claimant decides it is not going to serve one), the claimant should be obliged to write to the judge in charge of the Commercial Court, if it thinks that the case is an HCC and needs a two judge team. As we have already indicated, there is no single test to determine whether this is so. But, broadly, if a claimant thinks that the case is likely to last more than 8 weeks, it should write to the judge in charge. If the judge in charge, having considered the matter, agrees that it is a suitable case, then a two judge team ought to be assigned to it automatically.

170. The WP recognises that there will be other cases which grow and become HCCs. The question of whether a case is one such and whether it needs a two judge team, must be considered at the first and all subsequent CMCs. If the judge hearing the CMC thinks that it has become a two judge case, then he should be entitled to order that it will have a two judge team assigned to it.

171. There are two further problems which have arisen in the past. First, the Commercial Court Listing Office has not always been able to ensure that one of the two assigned judges takes a CMC or other interim hearing. This may well be because of the other problem, which is that both assigned judges may be sitting elsewhere than in the Commercial Court when a CMC/interim hearing is due.

172. The WP's solutions to these problems are, first, that the Commercial Court Listing Office must ensure, on the INTER Comm electronic listing system, that a case is marked as being one with a two judge team, so that CMCs/interim applications can be heard by one of the assigned judges. Secondly, the judge in charge of the Commercial Court must immediately inform the Vice President of the Queen's Bench that a two judge team has been assigned to a particular HCC. It will be the responsibility of the judge in charge and the two judges assigned to the case to ensure that, at all times, one or other is sitting in the Commercial Court and so is able to deal

69 At present (autumn 2007) two very long cases are just finishing. Three cases of over 13 weeks are listed for 2008.
70 D1 and D2.

with a CMC/interim application. Further, once a trial date is fixed, it must be the responsibility of the judge in charge, together with the Commercial Court Listing Office, to ensure that one or other of the judges assigned is available to try the case.

173. Even with a two judge team, there may be occasions when both judges are not immediately available, particularly during the Long Vacation. However, it is in the nature of HCCs that work on them does not stop for vacations. The WP considered that a facility should be provided to allow parties (through the judge's clerk or the Listing Office) to be able to contact one or other of the judges by telephone or email if an urgent point arises. Further, the WP considered that it would be more efficient if, even when an assigned judge is sitting in the Commercial Court, there should be a facility for the parties to contact the judge (through the Listing Office or the judge's clerk) via email or telephone for guidance on procedure. Prime examples are where the parties might ask whether a judge would deal with a matter on paper or needs an oral hearing, whether formal evidence (in the form of a witness statement) is needed for a particular application or what the timetable should be for the exchange of Outline Arguments for an interim hearing. Of course, this facility could not be used by one party alone without giving notice to the others.

174. The WP recognised that this facility could be abused and the judge could be bombarded with emails by the parties. However, if it is made clear that this facility is only to be used when really necessary and it is emphasised that the judge is not simply to be copied in on all correspondence between the parties, then the WP is confident that this would be a useful way to keep costs down and advance cases efficiently.

175. The WP also considered that there are advantages in a two judge team because the judges can discuss issues concerning the management of an HCC between themselves. Clearly, care is needed when doing this, to ensure that no decisions are taken which affect the parties without them being involved in it. But it was felt that it would be important to ensure that both judges know what decisions are being taken, particularly if they affect the future trial of the action.

M2. Judicial Resource Management: Recommendations

176. Our conclusions and recommendations on judicial resource management are, therefore:

    a. The WP does not recommend any change in the current arrangements whereby Commercial Court judges are available for general duties as Queen's Bench judges, outside the Commercial Court.

    b. Therefore, the current "two judge team" system should remain in place for suitable HCCs.

    c. The Guide should be amended so as to place an obligation on a claimant, if it considers that the action is an HCC and needs a two judge team, to write to the judge in charge of the Commercial Court at the close of pleadings, to inform the judge of this view. That will enable the

judge in charge to decide whether to assign a two judge team to the case and, if so, to designate the two judges.

d. If this has not been done at the time of the first CMC, then the judge that hears that CMC should have the power to order that the case will have a two judge team. In such instances, the judge in charge must be informed and he will designate the two judge team for the case.

e. In all cases it will be the responsibility of the judge in charge of the Commercial Court to inform the Vice President of the Queen's Bench the identity of the two judges concerned, so that at all times one or other of them is available to sit in the Commercial Court to deal with CMCs/interim matters in that case and/or the trial.

f. It will be the responsibility of the Commercial Court Listing Office to ensure that all CMCs/interim applications are listed before one or other of the two judge team.

g. Arrangements should be put in place to enable the parties to an HCC with a two judge team to contact one or other of the two judge team informally (ie by telephone or email, via the clerk or the Listing Office), to deal with urgent matters or to seek guidance on procedural points. This facility is to be used only when the normal channels for communication will not be quick enough or when a judge is not otherwise available, eg during the vacations.

h. The two judge team should be able to discuss issues of management of the HCC assigned to them, whilst ensuring that no decisions that affect the parties are made without the parties' involvement.

i. In suitable cases, the trial judge of an HCC should be able to enlist the help of a "judicial assistant" in the period immediately before the trial, during it and afterwards when writing the judgment.

Postscript by the Chairman of the WP

177. In this report the WP has taken solicitors, counsel and experts to task, complaining that pleadings, witness statements, expert reports and written submissions are all too long and insisting that they must become shorter. In return it has been pointed out that judgments are frequently long, are getting longer and ought to be shorter. It is a fair point. However, when parties and their legal teams put forward careful and detailed arguments on all the points that they decide must be covered by them in their submissions, it is often difficult to keep a judgment short. One answer may be to have a kind of Executive Summary Judgment, with references to appendices which set out detailed reasons for conclusions on particular factual or expert issues or legal points. That system could enable the interested person to explore the minutiae of a factual or legal issue if desired, whilst others need only refer to the summary to see the judge's main conclusions. This topic needs further discussion both amongst the judges and with others that use the Commercial Court.

December 2007

Appendix 1: Example of Statements of Case

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

SEABANKS SHIPPING SA

Claimant

– and –

MAJESTIC INSURANCE COMPANY LIMITED[1]

Defendant

DEFENCE
(INCORPORATING PARTICULARS OF CLAIM[2])

C1. By a policy of marine insurance, reference number XY1001, dated 1 June 2007 ("the Policy") the Defendant agreed to insure 6,000 metric tonnes cotton cloth ("the Goods") against the perils enumerated in the policy, including perils of the sea, for a voyage from Bombay to Hamburg on board the motor vessel "Starcruiser" ("the Vessel") to take place in July 2007.

D1. C1 is admitted.

C2. The Claimant is and was at all material times the owner of the Goods and fully interested in the Policy, a copy of which is attached as Annex A to these Particulars of Claim, to which reference will be made for its full terms, meaning and effect.

D2. C2 is admitted.

C3. The Policy incorporated the Institute Cargo Clauses (A) (a copy of which is attached as Annex B). Clause 1 provides:
"This insurance covers all risks of loss of or damage to the subject-matter insured except as provided in Clauses 4, 5, 6 and 7 below …"

D3. C3 is admitted.

1 Any reasonable method of distinguishing the Particulars of Claim from the Defence may be adopted by the Defendant, such as using bold text or a colour or adding headings (as is commonly done with a response to a Request for Further Information), or identifying the Defendant within the paragraph numbering (D1/1, D1/2, D1/3 and D2/1, D2/2, D2/3, etc). In a case with multiple Defendants, one document should be prepared by the Claimant incorporating all of the Defences once they have been served. Any Reply should be incorporated in the same manner.

2 The factual scenario and allegations are based on a precedent from Bullen & Leake & Jacob's Precedents of Pleadings (15th Edition, 2004).

C4. Further, Clause 16 of the Institute Cargo Clauses (A) provides:
"It is the duty of the Assured and their servants and agents in respect of loss recoverable hereunder

16.1 to take such measures as may be reasonable for the purpose of averting or minimising such loss, and
16.2 to ensure that all rights against carriers, bailees or other third parties are properly preserved and exercised

and the Underwriters will, in addition to any loss recoverable hereunder, reimburse the Assured for any charges properly and reasonably incurred in pursuance of these duties."

D4. C4 is admitted. Further,
(a) Coverage under the Policy was subject to the General Exclusion Clause 4 of the Institute Cargo Clauses (A) which provided that,

"4. In no case shall this insurance cover
....

"4.3 loss damage or expense caused by insufficiency or unsuitability of packing or preparation of the subject matter insured (for the purpose of this Clause 4.3 "packing" shall be deemed to include storage in a container or liftvan but only when such stowage is carried out prior to attachment of this insurance or by the Assured or their servants.)

4.4 loss damage or expense caused by inherent vice or nature of the subject matter insured.
...."
(b) Further, section 55(2)(c) of the Marine Insurance Act 1906 provides,

"55. Included and excluded losses
(1) Subject to the provisions of this Act, and unless the policy otherwise provides, the insurer is liable for any loss proximately caused by a peril insured against, but, subject as aforesaid, he is not liable for any loss which is not proximately caused by a peril insured against.
(2) In particular –
....
(c) Unless the policy otherwise provides, the insurer is not liable for ordinary wear and tear, ordinary leakage and breakage, inherent vice or nature of the subject-matter insured, or for any loss proximately caused by rats or vermin, or for any injury to machinery not proximately caused by maritime perils."

C5. The Goods were shipped on board the Vessel at Bombay on or about 15 July 2007 and packed in bales of 400 bags each.

D5. C5 is admitted. There had been heavy rain at the port in Bombay between 11 and 15 July 2007.

C6. On or about 8 August 2007, the Vessel arrived at Hamburg where the Goods were discharged. During the course of the voyage and/or discharge, a number of bales in which the Goods were packed, broke and a large quantity of the Goods became loose in the Vessel's holds and in lighters.

D6. C6 is admitted to the extent that the Vessel arrived in Hamburg on 3 August 2007 and that the Goods were found to have suffered some damage and the packaging had failed causing Goods to spill.

C7. Further, on discharge, it was discovered that 1,000 bales of the Goods stowed in Nos 1 and 2 holds had been damaged by wetting. These damaged goods had a market value of US$50,000 as particularised in Annex C to the Particulars of Claim.

D7. No admissions are made as to C7.

C8. The damage of the Goods occurred during the currency of the policy by reason of a peril or perils insured against, namely perils of the seas.

PARTICULARS

(a) On 22 July 2007, the Vessel encountered extremely heavy weather with storm force winds of up to force 12 on the Beaufort Scale and high, rough and pounding seas.
(b) The damaged cargo was situated in and beneath the hatch coamings and ventilator openings and was damaged by the inflow of sea water forced into the holds by the heavy weather.
(c) Further or alternatively, rainwater entered the holds when the Vessel was berthed at Bombay during loading on 12 July 2007.

D8. C8 is denied:
(a) No admissions are made as to the weather conditions there referred to.
(b) The Goods were shipped on board wetted by rain before loading.

C9. The Claimants arranged for the Goods which were not damaged to be rebaled and thereby incurred expense, amounting to US$100,000 in respect of the cost of such rebaling and of the additional handling and landing charges incurred by reason of the condition of the Goods, together with additional storage costs, particulars of which are set out in Annex C to these Particulars of Claim.

D9. No admissions are made to the expenses referred to in C9.

C10. Accordingly, the Claimant is entitled to recover

(a) the sum of US$50,000 being the value of those of the Goods damaged by wetting in transit as a result of a peril insured against;

(b) the further sum of US$100,000, pursuant to clause 16 of the Institute of Cargo Clauses (A), being the expenditure incurred by them in taking steps to safeguard and/or preserve the Goods insured and to avoid what would otherwise have been loss or damage within the terms of the policy for which the Defendant would have had to indemnify them.

D10. C10 is denied:

(a) Damage by wetting was caused by exposure of the Goods to rain prior to loading;

(b) Further, the Goods were packed in bales which were defective and inadequate to withstand the ordinary incidents of the insured voyage in that the bale straps (being made of paper) were too weak to keep the bales and their contents secure, during ordinary and necessary handling and carriage.

(c) Accordingly,

(i) It is denied that any loss or damage to the Goods was suffered by the Claimant as a result of any insured peril. The Goods as shipped were suffering from inherent vice.

(ii) If (which is not admitted) the Claimant incurred e xpenditure in respect of the rebaling and/or additional handling and landing charges, and/or additional storage costs referred to in Annex C to the Particulars of Claim, the same was due to inherent vice of the cargo and/or the insufficiency or unsuitability/inadequacy of its packing and the Defendant is not liable to the Claimant as alleged or at all by virtue of s.55(2)(c) of the Marine Insurance Act 1906 and/or the exclusion of liability under clauses 4.3 and 4.4 of the Institute Cargo Clauses (A).

(iii) Further or alternatively, these expenses were not incurred by the Claimant in order to avert any loss or damage to or in and about the safeguard or preservation of the Goods. The expenses were incurred in order to discharge the Goods or to discharge the same more easily and from the Vessel. Accordingly, such expenditure was not incurred for the purpose of averting or minimising the loss and does not fall within Clause 16 (Minimising Losses) of the Institute Cargo Clauses (A).

C11. Wrongfully and in breach of contract the Defendant has failed and/or refused to pay the sum of US$100,000 and the sum of US$50,000 or any part thereof.

D11. It is admitted that the Defendant has refused to pay the sums demanded by the Claimant as alleged in C11 but it is denied that it was in breach of contract in doing so.

C12. As at the date of this statement of case, the sterling equivalent of US$150,000 is £75,000 calculated at an exchange rate of £1 = $2.

D12. C12 is admitted.

C13. The Claimant claims interest at the rate of 1% above Bank of England base rate on all sums found to be due pursuant to section 35A of the Supreme Court Act 1981.
AND the Claimant claims:
(1) Under paragraph 8, US$100,000 alternatively damages.
(2) Under paragraph 11, US$50,000 alternatively damages.
(3) Interest on (1) and (2) above.

D13. In the premises, the Defendant denies liability as alleged or at all.

Appendix 2: Example of List of Issues

IN THE HIGH COURT OF JUSTICE **CLAIM NO. 2007 FOLIO [ ]**
QUEEN'S BENCH DIVISION
COMMERCIAL COURT BETWEEN:

CLAIMANT A

Claimant

- and -

(1) DEFENDANT B
(2) DEFENDANT C

Defendants

THIRD PARTY D

Third Party

[In this model:
Claimant A is the purchaser of the shares in the "Business";
Defendant B is the vendor of the shares in the Business;
Defendant C is the investment banker retained by Defendant B
Third Party D is the accountant retained by Defendant C]

LIST OF ISSUES

This List identifies in broad terms the principal issues in the case. It does not prescribe the correct legal test for any issue and does not restrict submissions on the law. The order of issues does not convey the relative importance of the issues or bind the Court as to the manner in which evidence is to be adduced in relation thereto or indicate the order in which the issues are to be considered and/or determined at trial.

(A) Claims In Negligence/Negligent Misreprentation (I) By Claimant A Against Defendants B And/Or C, And (Ii) By Defendant C Against Third Party D

Alleged duties of care

1. What **duties of care**, if any, **were owed** by the Defendants to the Claimant, or by Third Party D to the Defendant C? In particular:
   (1) Did (i) Defendant B and/or (ii) Defendant C owe a **duty of care** to Claimant A to exercise reasonable skill and care in relation to the following matters (or any of them):

(a) to carry out due diligence to ensure the accuracy of the contents of the Sale Memorandum;
(b) to carry out due diligence to ensure the reliability of the Management Accounts as at completion of the sale of the Business's shares to Claimant A;
(c) to carry out due diligence to ensure the fitness for purpose of the Management Accounts in the sense that the liabilities built into them accurately reflected the nature of the Business's liabilities;
(d) to carry out due diligence to ensure that the terms and conditions of the Business's contracts with its suppliers were properly reflected in the liabilities in the Management Accounts?

(2) Did Third Party D owe a duty of care to Defendant C to exercise reasonable care and skill in relation to the following matters (or any of them):
(a) the matters stated in (1) above;
(b) to inform Defendant C of disputes and differences as to the interpretation of the Business's contracts with its suppliers?

Alleged duties of care

2. What (if any) actionable representations were made? In particular:
(1) **Were actionable representations made** by Defendant B to Claimant A in one or more of the following ways: [identify the alleged written/oral representations; e.g. as follows:]
(a) Did Defendant B represent to Claimant A:
(i) by giving the signed Sale Memorandum to Claimant A on [date];
(ii) by its emails to Claimant A dated [specify dates] referring to the Sale Memorandum;
(iii) by giving the Management Accounts to Claimant A on [date];
(iv) by its emails and letters to Claimant A dated [specify dates] referring to the Management Accounts; and/or
(v) by the statement made by Defendant B's finance director, Mr X, to Mr Y, the managing director of Claimant A, in a telephone call on [date] to the effect that: "the Management Accounts were meticulously over-cautious in recording the liabilities of the Business to its suppliers" ("the X Representation");
(a) that the contents of the Sale Memorandum were accurate and/or reliable (the "Sale Memorandum Representations");
(b) that the Management Accounts were fit for purpose in the sense that the liabilities built into them accurately reflected the nature of the Business's liabilities (the "Management Accounts Representations"); and/or
(c) that due diligence had been carried out on the terms and conditions of the Business's contracts with its suppliers to ensure that they were properly reflected

in the liabilities in the Management Accounts (the "Due Diligence Representations")?

(2) **Were actionable representations made** by Defendant C to Claimant A in one or more of the following ways:
   (a) [identify the alleged written/oral representations as with Defendant B, and define, if appropriate];
   (b) ....

(3) **Were actionable representations made** by Third Party D to Defendant C in one or more of the following way
   (a) [identify the alleged written/oral representations as with Defendant B, and define if appropriate]

Effect of exclusion clauses in contractual documentation

3. **Are the terms of the exclusion clause** in the Sale Memorandum **effective,** as against Claimant A, **to negate** the making of any actionable representation by Defendant B and/or Defendant C and/or to absolve Defendant B and/or Defendant C from any responsibility or liability for alleged negligence and/or negligent misrepresentation for any loss arising from or in connection with it?
4. **Are the terms of the retainer letter** [dated] between Defendant C and Third Party D **effective** as against Defendant C **to negate** the making of any actionable representation by Third Party D and/or to absolve Third Party D from any responsibility or liability for alleged negligence and/or alleged misrepresentation for any loss arising from any use of or in connection with it the management accounts?

Falsity of alleged representations

5. If any actionable representations were made, **were they false** and, if so, to what extent? In particular:
   (1) Were the **Sale Memorandum Representations** made by Defendant B and/or Defendant C to Claimant A **false**, on the grounds that the Sale Memorandum was inaccurate in the following respects;
      (a) [identify inaccuracies]?
   (2) **Were the Management Accounts Representations made** by Defendant B and/or Defendant C to Claimant A **false** , on the grounds that the liabilities built into the Accounts did not accurately reflect the nature of the business liabilities in the following respects;
      (a) [identify inaccuracies]?
   (3) **Were the Due Diligence Representations made** by Defendant B and/or Defendant C to Claimant A **false**, on the grounds that no due diligence had in fact been carried out with suppliers and accordingly the following liabilities were not properly reflected in the Management Accounts:
      (a) [identify liabilities and respects in which they were not reflected]?
   (4) Were the **Sale Memorandum Representations** made by Third Party D to Defendant C **false**, on the grounds that the Sale

Memorandum was inaccurate in the following respects;
(a) [identify inaccuracies]?

(5) **Were the Management Accounts Representations made** by Third Party D to Defendant C **false**, on the grounds that the liabilities built into the Accounts did not accurately reflect the nature of the business liabilities in the following respects:
(a) [identify inaccuracies]?

(6) **Was the Due Diligence Representation made** on [date] by Third Party D to Defendant C **false**, on the grounds that no due diligence had in fact been carried out with suppliers and accordingly the following liabilities were not properly reflected in the Management Accounts:
(a) [identify liabilities and respects in which they were not reflected]?

Knowledge of Falsity

6. Did Mr X know that, or was he reckless as to whether, the X Representation was false?
7. Did any one or more of Defendants B and C and Third Party D know that, or were they reckless as to whether: (i) the Sale Memorandum Representations were false; (ii) the Management Accounts Representations and/or the Due Diligence Representations were false?

Alleged negligence

8. In relation to the allegations of negligence:
   (1) Did Defendant B act negligently and in breach of its duty of care towards Claimant A:
      (a) by not taking action [on date] to [state details];
      (b) by doing [this or that on date];
      (c) by disregarding the statement made by Mr Z in an email to Mr X [dated]?
   (2) Did Defendant B make negligent misrepresentations to the Claimant A by:
      (a) making the X representations;
      (b) making the Sale Memorandum Representations;
      (c) making the Management Accounts Representations;
      (d) making the Due Diligence Representations?
   (3) Did Defendant C act negligently and in breach of its duty of care towards Claimant A:
      (a) by not taking action [on date] to [state details];
      (b) by doing [this or that on date];
      (c) by disregarding the statement made by Mr Z in an email to Mr X [dated]?
   (4) Did Defendant C make negligent misrepresentations to the Claimant A by:
      (a) making the Sale Memorandum Representations;
      (b) making the Management Accounts Representations;
      (c) making the Due Diligence Representations?

(5) Did Third Party D act negligently and in breach of its duty of care towards Defendant C:
   (a) by not taking action [on date] to [state details];
   (b) by doing [this or that on date];
   (c) by disregarding the statement made by Mr Z in an email to Mr X [dated]?

(6) Did Third Party D make negligent misrepresentations to the Defendant C by:
   (a) making the Sale Memorandum Representations;
   (b) making the Management Accounts Representations;
   (c) making the Due Diligence Representations?

9. In particular, in the circumstances of the case including market and accounting practice (if any, as determined), were: Defendant B and/or Defendant C negligent toward Claimant A, and was Third Party D negligent toward Defendant C in relation to the Sale Memorandum or the Management Accounts. In particular:
   (1) Was it negligent for any, and, if so, which of them, to include, or allow the inclusion of, the following assumptions in the management accounts:
      (a) Assumption 1 [set out and define];
      (b) Assumption 2 [set out and define];
      (c) Assumption 3 [set out and define];
      (d) Assumption 4 [set out and define]?
   (2) Was it negligent for any, and, if so, which of them, to have failed to identify and/or report the dispute between the Business and it suppliers with respect to the terms and conditions of the following contracts:
      (a) Supplier contract X [set out and define];
      (b) Supplier contract Y [set out and define];
      (c) Supplier contract Z [set out and define]?

Alleged reliance

10. Did Claimant A [through Mr G, H or I] rely on any actionable misrepresentations which may be found to have been made to it by Defendant B and/or Defendant C?
11. Did Claimant A [through Mr G, H or I] rely on Defendant B and/or Defendant C having exercised the care and skill referred to in paragraph
    1 above, in entering into the agreement to purchase the shares in the Business from Defendant B?
12. (If it be relevant in law) was any such reliance by Claimant A reasonable?
13. Was Claimant A induced by any alleged misrepresentations to purchase the shares?
14. Did Defendant C rely on any actionable misrepresentations, which may be found to have been made to it by Third Party D?
15. (If it be relevant in law) was any reliance by Defendant C reasonable?
16. If so, was Defendant C induced by any alleged misrepresentations to act as it did, and, in particular [identify Defendant C's acts]?

(B) Claimant A's Claim Against Defendant B Under The Misrepresentation Act 1967

17. Prior to the purchase of the Business's shares by Claimant A from Defendant B on [date], did Defendant B make any actionable representations to Claimant A within the meaning of the Misrepresentation Act 1967; and in particular did Defendant B make:
    (1) the Sale Memorandum Representations;
    (2)the Management Accounts Representations;
    (3)the Due Diligence Representations?
18. Do the terms of the Sale Memorandum exclude any liability of Defendant B for any actionable misrepresentations?
19. If any actionable representations were made, were any or all of them false?
20. If so, did Defendant B have reasonable grounds for believing that any representations made were true?
21. Did Claimant A rely on any actionable misrepresentations in entering into the agreement with Defendant B to purchase the shares?
22. If it be relevant in law, was any reliance by Claimant A reasonable?
23. Was Claimant A induced by any alleged misrepresentations to purchase the shares?

(B) Remedies

Alleged Recoverable Loss of Claimant A

24. What recoverable loss (if any) was suffered by Claimant A in consequence of its purchase of the shares in reliance upon any negligence or negligent representations by Defendant B and/or by Defendant C?
25. What other remedies (if any) does Claimant A have against Defendant B under the Misrepresentation Act 1967?

Alleged contributory negligence and/or failure to mitigate of Claimant A

26. In relation to its claims in negligence, did Claimant A cause or contribute to its own alleged losses and, if so, to what extent? In particular, did the following acts by Claimant A cause or contribute to its alleged losses
    (1) [identify];
    (2)[identify]?
27. Did Claimant A unreasonably fail to mitigate its alleged losses (and, if so, to what extent) because of the circumstances surrounding either or both of:-
    (1) Claimant A's dealings with the suppliers in the period between completion and the reorganisation of the Business in June 2005;
    (2)The sale by Claimant A of the Business's European subsidiaries in October 2005?

Quantum of Claimant A's alleged losses

28. What is the quantum of Claimant A's alleged losses? In particular, in calculating any losses it has suffered, is Claimant A entitled to take account of the following expenses which it has incurred:
    (1) interest charges incurred on loans from its banks in the period to [date] to fund losses incurred by the Business;
    (2) lost management time incurred by directors and employees of Claimant A in resolving problems of the Business?

Alleged contributory negligence of Defendant C

29. Did Defendant C cause or contribute to its own alleged losses, and, if so, to what extent? In particular, did the following acts by Defendant C cause or contribute to its alleged losses:
    (1) [identify];
    (2) [identify]?

Indemnity and contribution issues between the Defendants

30. How is any liability for Claimant A's recoverable loss (if any) to be apportioned between the Defendants after taking account of any contributory negligence by Claimant A?
31. To what contribution and/or indemnity are Defendants B and C entitled as against each other and on what basis?

(B) Expert evidence

32. Expert evidence from an investment banker as to:
    (1) the roles and responsibilities of an investment banker retained by the vendor in respect of a sale of shares; and
    (2) the function of a Sale Memorandum prepared with the assistance of such an adviser:

may be relevant to the determination of issue 1 (existence of a duty of care owed by Defendant C to Claimant A) and/or issue 2 (were actionable representations made by Defendant C by production of the Sale Memorandum). However Claimant A contends that such evidence is not admissible on the facts of this case**.**

[**Add**: [The following issues are not in dispute:] or [There is common ground between the parties on the following issues:] at the beginning or end of this List of Issues (see Commercial Court Guide at D6.1 and PD10.8(2)]

Appendix 3: Example of Disclosure Schedule

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT
BETWEEN:

Claim No. 2007 Folio [ ]

CLAIMANT A - v - (1) DEFENDANT B, (2) DEFENDANT C AND THIRD PARTY D

DISCLOSURE SCHEDULE

Issues	Claimant A	Defendant B	Defendant C	Third party D	Order
(A) Claims in negligence/ negligent misreprentation (i) by claimant a against defendantsB and/or C, and (ii) by defendant C against third party D					
Alleged duties of care 1. What **duties of care**, if any, were owed by the Defendants to the Claimant, or by Third Party D to the Defendant C? In particular:	See 1(1)(a) to (d) below	See 1(1)(a) to (d) below	See 1(1)(a) to (d) below	See 1(2)(a) and (b) below	See below
(1) Did (i) Defendant B and/or (ii) Defendant C owe a duty of care to Claimant A to exercise reasonable skill and care in relation to the following matters (or any of them):	See 1(1)(a) to (d) below	See 1(1)(a) to (d) below	See 1(1)(a) to (d) below	See 1(2)(a) and (b) below	See below

Issues	Claimant A	Defendant B	Defendant C	Third party D	Order
(a) to carry out due diligence to ensure the accuracy of the contents of the Sale Memorandum;	Claimant A seeks disclosure of both Defendants' documents relating to work on and communications in relation to the preparation and settling of the sale memorandum.	Defendant B contends that this is too wide for the purposes of the issue relating to duty, but is prepared to agree to the requested disclosure in order to deal with the other issues referred to below. However, Defendant B's email records prior to 1 January 2006 were largely held on a live server and therefore will need to be reinstated with back-up data. Defendant B considers that an attempt to restore such data would be disproportionately expensive (and is able to serve evidence on this if required).	Defendant C agrees with the position of Defendant B but has no difficulty in disclosing email records. Defendant C seeks the same disclosure from Third Party D as is sought by Claimant A.	Third party D is content with the disclosure sought by Claimant A, on the basis indicated by Defendant B. However, Third Party D believes that Defendant B's email records may be an important source of information identifying the extent to which Defendant C relied on Defendant B in relation to matters where Defendant C alleges reliance on Third Party D. Third Party D is, however, content to review the email disclosure given by Defendant C without prejudice to its right subsequently to request Defendant B to restore its electronic records.	All parties to disclose documents relevant to work on and communications in relation to the preparation and/or settling of the sale memorandum, limited in the case of Defendant B to electronic documents dated on or after 1 January 2006, with liberty to apply for disclosure of earlier electronic records.

Issues	Claimant A	Defendant B	Defendant C	Third party D	Order
(b) to carry out due diligence to ensure the reliability of the Management Accounts as at completion of the sale of the Business's shares to Claimant A;	Claimant A seeks disclosure of both Defendants documents relevant to the preparation and settling of the Management Accounts.	Defendant B addresses this on the wider basis arising from issues 1 and 5 (falsity), 6 (knowledge of falsity) and 8 (alleged negligence) below. Even on that basis Defendant B contends that the disclosure should be limited to documents relevant to the Management Accounts and the preceding year's management accounts and further limited to matters relating to the X Representation and the Management Accounts Representation Referred to in issue 2(1)(a)(v)(a) and (b) below. Defendant B proposes disclosure on that basis with the same limitation as to electronic records arising in relation to issue (a) above.	Defendant C is content with the disclosure requested by Claimant A.	Third Party D adopts the contentions of Defendant B subject to two points: (a) There is no allegation that it had any responsibility for the Management Accounts of the Business beyond the specific Management Accounts given to Claimant A. Third Party D presently considers that it had very little in the way of relevant communication with Defendant D with respect to Defendant D's prior year's management accounts. It therefore wishes to ensure that its disclosure obligation is limited only to disclosure in relation to the Management Accounts given to the Claimant. (b) If this limitation is not accepted, then Third Party D would wish to see all Defendant B's and Defendant C's prior years' email records as stated above, as these are likely to show the limited extent to which Defendant B or Defendant C relied on Third Party D with respect to any management accounts of the business.	All parties to disclose documents relevant to preparation and settling of the Management Accounts limited [in the manner sought by Defendant B] and, in the case of Defendant C and Third Party D, further limited to documents prepared directly in relation to the Management accounts given to the Claimant and not, for the avoidance of doubt, in relation to any preceding year management accounts, with liberty to apply for disclosure of Defendant B's electronic records dated on or after 1 January 2006.

Issues	Claimant A	Defendant B	Defendant C	Third party D	Order
(c) to carry out due diligence to ensure the fitness for purpose of the Management Accounts in the sense that the liabilities built into them accurately reflected the nature of the Business's liabilities;					
(d) to carry out due diligence to ensure that the terms and conditions of the Business's contracts with its suppliers were properly reflected in the liabilities in the Management Accounts?					
(2) Did Third Party **D owe a duty of care** to Defendant C to exercise reasonable care and skill in relation to the following matters (or any of them):					
(a) the matters stated in (1) above;					

Issues	Claimant A	Defendant B	Defendant C	Third party D	Order
(b) to inform Defendant C of disputes and differences as to the interpretation of the Business's contracts with its suppliers?					
Alleged representations 2. What (if any) actionable representations were made? In particular:					
contd.					
contd.					
contd.					
contd.					