

The Commercial Court of England & Wales: new Court Guide

The Commercial Court have just published a new edition of the Guide to procedures to be adopted in that Court. This Guide does not override the Civil Procedure Rules and Practice Directions (“CPR”), which apply in the Commercial Court as in any other, but is intended to provide guidance which can be adopted flexibly, as required in each case, to promote the efficient conduct of litigation.

Long Trials Working Party Recommendations: Progress

This new edition of the Guide was keenly awaited: how many of the procedures that were piloted in the Court for much of last year would be adopted permanently?

To recap, in the wake of the collapse of the BCCI and Equitable Life trials and the subsequent well publicised criticisms of the procedures used in long and complex trials, the Commercial Court set up a working party tasked with considering all aspects of the management of heavy and complex litigation in the Commercial Court, and making recommendations which would lead to more efficient conduct of such cases.

The working party concluded that the CPR contained sufficient powers but that they could be supplemented to achieve greater efficiency.

Although the working party focused initially on procedures affecting heavy and complex cases, many of their recommendations were aimed at all cases running in the Commercial Court and this approach is reflected in the new edition of the Guide, which does not differentiate between cases in its adoption of the working party recommendations.

The majority of the working party recommendations, which were used in the Commercial Court from February 2008, have been adopted. For this reason, it is unlikely that parties to litigation in the Commercial Court will notice a great deal of difference in procedures going forward.

Client accountability

The working party advocated greater client involvement in litigation. Their recommendations were intended to ensure that parties were in a better position to judge the progress of their case and be more involved in major decisions concerning the case. The first was a requirement that a senior representative of each party should sign a second Statement of Truth shortly before trial: effectively re-verifying the accuracy of the contents of the pleading. The second required that, at appropriate stages of the litigation, senior representatives of the parties sign a statement indicating whether Alternative Dispute Resolution options had been considered internally, and with the other side.

Neither of these recommendations appear in the new edition of the Guide. The judges have not explained why not but, as we cannot recall either of these points being mentioned at the feedback sessions we attended during the pilot, it may simply be that they did not have enough evidence as to whether they were useful.

Key recommendations adopted

- Statements of case should be limited to 25 pages in length, although the Court will give permission for a longer statement of case where a party gives good reasons.
- After the Defence (and any Reply) has been served, the parties' legal representatives must produce a list of the key issues in the case. The intention is that the parties should produce one, agreed list, which will be used as a tool for case management by the judges, to define what factual and expert evidence is necessary and the scope of disclosure. The list of issues caused more controversy than any other recommendation during the pilot, because of the amount of time parties were spending on ensuring that it advanced their particular case. This was due in part to the statement in the working party recommendations that, once the list of issues had been produced, the pleadings would have only secondary importance. The Court appear to have retreated from this position: the new Guide expressly states that the list "is not intended to supersede the pleadings".
- The disclosure schedule, introduced by the working party in an attempt to force the parties to deal with disclosure issues at an early stage (thereby reducing time consuming and expensive court applications for disclosure), must also be prepared at an early stage in the proceedings, after statements of case have been served. It will be used by the court considering disclosure at the first case management conference ("CMC").
- With regard to the huge increase in electronic data which has to be reviewed for Disclosure, the Guide provides for the Court to consider at the first CMC whether the burden of disclosure, in terms of time, cost and business disruption, can properly be reduced (for example by use of electronic search tools and de-duplication software). Also on use of IT, we are told to expect the judge at the CMC to consider the use of IT at trial, including electronic trial bundles.

- Judges are encouraged to exercise existing summary judgment and strike-out powers in appropriate cases; the Guide states that “active consideration” will be given at the CMC to whether any issues are suitable for summary determination. (The working party made the point that the real key here is for the Court of Appeal to support summary determinations made by Commercial Court judges; tellingly both the BCCI and the Equitable Life cases were struck out at first instance but re-instated by the appeal courts.)
- Witness statements and experts’ reports are required to be as concise as possible. The Guide states that the Court may impose a limit on their length and may restrict evidence or submissions to ensure compliance with the trial timetable.
- In terms of the trial itself, the judges have decided not to bring in a rule limiting the length of trials. Skeleton arguments for use at trial are to be limited ordinarily to 50 pages in length but no limit has been placed on the time permitted for oral opening (or closing) statements.

At the time of writing the new edition of the Guide is not accessible on the court website but we have been assured that it will be uploaded shortly:

http://www.justice.gov.uk/civil/procrules_fin/menus/court_guides.htm

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