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Update to the Commercial Court Guide: 11th Edition

By Reanne MacKenzie & Hazel Jackson

The 11th Edition of the Commercial Court Guide ("the Guide") was published on 3 February 2022. In this alerter, Reanne MacKenzie and Hazel Jackson summarise some of the key changes that have been brought in. The Guide has been produced by members of the Court who have been familiar with the guide throughout their professional careers and there is an emphasis on ensuring that the Guide is workable and grounded in the realities of litigation. The Guide also reflects the practical changes to the Court's processes brought in by the Covid-19 pandemic. The Guide is one of a number of specialist court guides that sit under the Business and Property Courts umbrella. Other updated specialist court guides will be published in due course. The expectation is for harmonisation between these guides, with many of the changes set out below finding expression in updated versions of other specialist guides, such as the Chancery Guide and TCC Guide.

INTRODUCTION

1. A full copy of the 11th Edition of the Commercial Court Guide (can be found here).

2. An introduction to the Guide prepared by The Hon. Mrs Justice Cockerill and The Hon. Mr Justice Andrew Baker, respectively the Judges in Charge of the Commercial and Admiralty Courts, sets out the rationale for changes made to the Guide and some of the new areas of emphasis.

3. The changes are many and various and this note is only a summary of some of the important ones. We draw out some of the themes as follows:

i. Active case analysis at an early stage;
ii. Encouragement of more junior advocacy;
iii. A focus on pragmatism and only putting before the Court material needed to resolve the dispute – an objective in which the parties are expected to cooperate;
iv. Disciplined use of court time; and
v. Further steps towards paperless practice.

4. References in **bold** below are to the sections of the Guide.

1) Active case analysis at an early stage

5. Underpinning many of the changes made is the need to ensure the litigation process is driven by a close analysis of case logic and what is required to efficiently manage each case as best it can be, stripping out what is unnecessary. Understandably, the rationale is to avoid unnecessary time and cost.

6. This is reflected in requirements for pleading practice. Only "primary allegations" should be pleaded, now defined as "*factual allegations necessary to establish a cause of action, defence, or point of reply being advanced… to enable the other party to know what case it has to meet."* General factual narrative is discouraged as *"neither required or helpful"* (**C1.1(e)**).

7. The page limit for statements of case has been increased from 25 to 40 pages (**C1.2**). Any pleading longer than 40 pages requires the permission of the Court. 12-point font and 1.5 spacing remain as standard. 40 pages is a limit and not an obligation.

8. The test for grant of permission for a longer pleading is whether there is a good reason for it and the fact that a case is complex or of high value is not sufficient (**C1.2(d)**).

9. In several parts of the updated Guide, renewed emphasis is placed on the need to consider and obtain advice on evidence at all significant stages of the case. The rationale for this is to ensure efficient trial preparation, but also to harmonise the Guide with the Disclosure Pilot and PD57AC. This is understood to require close examination of: (i) the real issues in dispute; (ii) the method of proof required; (iii) the likely volume of documentation; and (iv) what witness and/or expert evidence will be required. The close of pleadings is identified as an important stage for consideration of these matters in order to inform case management (**C6.2**).

10. To ensure effective case management, parties are required to consider "*what reasonable steps will be sufficient for a fair trial of the case*" (**D2.1**). This requirement does not allow for every possible pre-trial step to be taken; rather parties are to focus on what is sufficient (emphasis added).

11. It will also be a key feature in normal Part 7 claims for a 'List of Common Ground and Issues' to be prepared at an early stage (**D2.1(d)**) and updated throughout the life of the case. The Guide sets out how and when this is to be drawn up, as a list of issues of fact and law for trial and a matrix of common ground, and made available for case management purposes at the first CMC (**D.5.1-5.2**). The parties are required to turn their mind to this promptly at close of pleadings (**C6.1**).

12. The Guide is premised upon the Disclosure Pilot (PD51U) remaining in force (see **E.2**) and the Guide makes clear that a List of Common Ground and Issues will be used as a tool to consider what factual and expert evidence is necessary and the

scope of disclosure. The Guide incorporates and refers to aspects of PD51U, and clarifies the appropriate approach. If a case is not subject to PD51U then guidance is found in **Appendix 15**.

13. The taking of advice on the evidence is again encouraged after disclosure has taken place (**E5.1**) and the parties at all times should give careful thought to how they will prove their factual case at trial or refute the other side's factual case.

2) Encouraging junior advocacy

14. The Commercial Court has indicated its encouragement of the development of junior advocates and **D7.1** makes clear that the experience of the Court is that on many case management issues, junior advocates within a team may be well placed to assist the Court. The CMC no longer needs to be attended by the advocate who will conduct the trial. Many CMCs will require Leading Counsel, but there will be others, for example dealing with costs budgets or aspects of the parties' Disclosure Review Document, where Junior Counsel closest to the subject matter will be best placed to represent the parties.

3) A focus on pragmatism

15. There are various revisions in the Guide that have been made with an emphasis on pragmatism and working practices. A selection of these are set out below.

<u>Updated CMC orders</u>

16. Under **D7.8** an updated draft CMC order can now be filed by 4pm on the working day before the CMC if there has been movement between the parties in the 24 hours before the CMC. This appears to acknowledge the reality of late negotiation of the proposed order(s) before a CMC and will ensure that Court time is not wasted on matters that have been agreed in the interim.

Expert evidence on Foreign Law

17. **H3** makes certain changes to the manner in which expert evidence of foreign law is to be received by Court, allowing flexibility to the Court as to how the content of foreign law is to be proven at trial. The parties are required to consider this at the CMC stage, and a list of approaches is set out in **H3.3**. **H3.4** sets out the various factors to consider when deciding which approach to follow.

18. It is thought that this change will avoid the reflex of instructing expert witnesses in all instances, in place of which there should be careful identification of the issues of foreign law, their sources and the extent to which they need to be proven in a given case. This has not changed the rule of English law that the content of foreign law is a matter of fact that must be proved; rather, it recognises appropriate procedure and practice.

Disclosure

19. As above, the requirements of PD51U are baked into the Guide. **E2.2** to **E2.4** deal with the List of Issues for Disclosure and Models. It is made clear that the List of Issues for Disclosure should be shorter, and may be much shorter, than the list of issues in the List of Common Ground and Issues and that the Court may disallow the costs of unnecessarily lengthy or complex Disclosure Review Documents ("DRDs") (**E2.2**).

20. The emphasis here is on keeping DRDs simple and concise and the list of Issues for Disclosure narrow and focussed on issues upon which the parties actually need documentary disclosure. Further discipline is imposed by reference to a indicated time limit for dealing with DRDs at CMCs.

21. PD51U allows for a more streamlined process under Appendix 5 in "Less Complex Claims." **E2.5** of the Guide states that parties should give careful consideration to whether their case may properly be treated as a Less Complex Claim, whatever the general complexity or financial value.

22. **E2.6** emphasises co-operation as key: settling the DRD should not become contentious, time-consuming, or expensive and disclosure guidance should be sought wherever practicable.

Agreed factual narrative at trial

23. **J6.5** introduces a requirement that the parties consider with each other, and with the Court at the PTR (if there is one), whether an 'agreed detailed narrative' document should be prepared prior to filing and exchange of skeleton arguments for trial. This is intended to be comprised of "*uncontentious, relevant facts, set out chronologically, or in a logical structure of chapters*" which skeleton arguments for trial should take as read so as to avoid large chronologies.

24. Guidance is given on the approach to be taken and parties are discouraged from using this document for a further round of adversarial argument and are encouraged to be as constructive as possible.

25. **J6.5(c)** makes clear that these agreed facts do not need to be dealt with in the skeleton arguments. The purpose of the skeleton is to summarise: (i) contentious matters of fact; (ii) how the law works; and (iii) how the relevant party's case will be put at trial (i.e. your case theory explaining why you win). This will mean that skeletons can be more concise and streamlined, mindful of the limit of 50 pages (**J6.4**). It remains to be seen how far agreement of detailed narratives is possible in particularly acrimonious disputes.

4) Disciplined use of Court time

Trial time tabling

26. **D16.1** requires parties to seek to agree trial time estimates at an early stage, the position as to which it intended to align more closely with current listing practice and accommodate changes brought in by Practice Direction 57AC.

27. Various steps are to be taken by, or by a defined period prior to, "the start of the trial", which is the first date of the trial listing (**J3.1**) or the first date of trial reading time where the trial was fixed with allocated pre-trial reading (**J3.2**).

28. Going forward,[1] at CMCs, trial time estimates will not be given as (e.g.) "21 days, plus 3 days pre-reading time"; rather, trials will be listed by reference to the start of trial and a time estimate that is to be inclusive of any reading time (e.g.) "24 days".

29. The parties, in dialogue with the Court, should decide upon the best use of that block of time for each specific case. This may include, for example, initial judicial reading of skeleton arguments and key contractual documents, followed by oral openings on the documents, with allowance for further reading time before witnesses are called. This has to be considered by advocates as early as the CMC stage, but at least by the PTR (if there is one).

30. If there is no listed PTR then the parties should take steps to correspond on the trial timetable and allocation of time at the time when a PTR would be taking place (i.e. 6 to 8 weeks before trial).

[1] The change to listing came in by Practice Note on 16 December 2021: https://www.judiciary.uk/wp-content/uploads/2021/12/Practice-Note-Trial-Listing.pdf

31. **J5** contains further requirements with respect to reading lists for trial and the trial timetable to which closer reference is recommended. **J5.1** explicitly states that reading lists should be broken down so as to identify what the Judge should read: (a) prior to oral openings; (b) (if necessary) after oral openings and before the first witness is called; (c) (if necessary) during the later stages of the trial.

Urgent applications

32. The Guide re-emphasises the need for a (certified) explanation as to why applications are said to be urgent (**F2.2**), and that this is a matter distinct from the question whether it is appropriate to make the application without notice.

Out of hours applications

33. If a party is thinking of going to Court 37 and the Queen's Bench out of hours judge (**P2.2**), that party is to stop and ask why. They must further ask themselves what they will say when they are asked why this cannot wait until the next sitting day to be dealt with by the Commercial Court. There is a special out of hours form and the applicant will be required to demonstrate extreme urgency.

34. If you cannot demonstrate extreme urgency then you could end up in the *Hamid* jurisdiction (**P2.2(c)**). This is an unpleasant place to be. It is part of the court's powers to govern its own procedure and to ensure that legal practitioners abide by their duties to the court and otherwise conduct themselves according to the proper standards of behaviour. This jurisdiction is engaged when a case is advanced in a professionally improper manner and is not confined to immigration cases. The *Hamid* jurisdiction applies across the board to those who abuse the out of hours system. As it is now referred to in the Guide there will be no excuses next time round.

Time estimates for applications

35. **F5.3-F5.4** relate to time estimates for applications. These are not changing in the same way that trial estimates are. Half a day means 2.5 hours (**F6.1**) and must include time for judgment and costs. Therefore, unless both sides can argue the application in 1.5 hours, it is not a half day application. It should not be in the Friday list of "ordinary applications" and the time estimate must be for longer than half a day.

36. **F5.5** contains updated maximum hearing times for different types of applications. If a party needs more time than they will need to write a letter justifying why more time is needed (**F5.5(b)**). Also note that skeletons and bundles are now due at 12pm the day before and not at 1pm (**F6.5**).

Citation of authorities and authorities bundles

37. **F12.1** to **F12.4** relate to the use of authorities and the 2012 Practice Note on the Citation of Authorities is incorporated.[2] Parties should only cite those authorities that contain a principle of law relevant to the issue. They should not cite first instance decisions that show the application of those principles. Skeleton arguments should only cite the proposition relied on and extensive quotes are to be avoided.

38. Any authorities bundle should include only those authorities the Judge is likely to be taken to at the hearing or asked to read. If the proposition contained in the authority is uncontentious then the authority does not need to be included in the bundle (**F12.4**).

[2] https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Practice+Directions/lcj-pract-dir-citation-authorities-2012.pdf

5) Going paperless

39. At sections **J2.1** to **J2.2** the Guide sets out the approach to IT and paperless trials. The Guide explicitly asks the parties to seek to minimise their use of paper at trial. The Court will not expect any hardcopy bundles unless these have been specifically asked for.
40. At **J4.3** it is reiterated that trial bundles should only contain those documents needed for trial i.e. documents you will take the Judge and/or witnesses to. It is not a re-organised version of disclosure. If a party includes documents in the trial bundle unnecessarily, they may be asked to explain this inclusion to the Judge and may be penalised in costs if there is no satisfactory explanation.

Reanne MacKenzie and Hazel Jackson
Henderson Chambers
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