

Strike back

Is the Commercial Court striking back? asks **Khawar Qureshi QC**

In the aftermath of the Woolf Reforms of 1998, civil litigation before the High Court has suffered a steep decline. Various reasons have been suggested for this, such as the “front loading” of costs pursuant to the Civil Procedure Rules (CPR), litigation aversion, excessive legal costs and the increase in alternative dispute resolution (ADR) (mediation as well as arbitration).

Whatever the reasons for the decline in civil litigation, there was a strong perception among many that the collapse of the *Equitable Life* and *BCCI* cases in 2006 after lengthy, expensive, and protracted litigation would act as an even stronger disincentive to parties locating their disputes before the Commercial Court.

“The legal profession and the Commercial Court must respond and cater to the needs of the business community”

It was plain from these cases that “active case management” and “proportionality” were concepts which had yet to find real root in the approach of judiciary as well as the legal profession.

For the judiciary, the desire to allow the adversarial process to take its course coupled with the lack of resources to engage in “hands-on” case management is seen as a powerful explanation in this regard. For the

legal profession, the perceived need to “leave no stone unturned” and “out-gun the opposition”, as well as the imperative to bill fees is perceived by some as having led to “churning” and colossal billing.

The net result is that parties who would otherwise have seen London and the English Commercial Court as the obvious and only choice for commercial dispute resolution are now considering a wider range of options, including venues such as Singapore, Hong Kong and Dubai.

While it is true to say that international arbitration in London has seen an increase over recent years, that is also being infected with the ills of litigation—cost and delay.

WORKING PARTY

The Commercial Court Users Committee set up a working party in January 2007, with the objective of focusing upon the management of heavy and complex litigation in the Commercial Court.

The working party was chaired by Mr Justice Aikens and included commercially experienced barristers and solicitors, as well as client/user representation. While essentially established as a response to the cases, the working party reviewed the CPR, the Commercial Court Guide (the guide), as well as the conduct of commercial litigation more generally.

Around 50% of all Commercial Court



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cases involve all non-UK parties. Around 80% of such cases involve at least one non-UK party. Thus, it is vital to ensure that an evaluation of the English approach to Commercial Court litigation is mindful of the perception among non-UK parties. Likewise approximately 70% of cases settle before the start of the trial. This figure is not very different from the pre-CPR days and might suggest that parties are still resorting to “brinkmanship”, and/or legal fees are being generated when matters could otherwise be resolved earlier by settlement.

The working party met eight times and delivered its 81-page report on 6 December 2007, *Report and Recommendations of the Commercial Court Long Trials Working Party*. The proposals and recommendations contained in the report will be put into practice for a trial period from 1 February to 31 July 2008. Anyone who intends to engage in proceedings before the Commercial Court during this period will ignore the report at their peril.

The working party made observations and proposals under 11 subject headings. These include:

COSTS

The court’s powers in respect of awards of costs were a strong incentive for parties litigating before the Commercial Court. Daily court fees (which were to be introduced by the government from August 2007, but were suspended in the face of overwhelming opposition and are unfortunately still being considered) would put the Commercial Court and the use/development of English commercial law at a significant

KEY POINTS

The Commercial Court Users Committee Working Party: general observations and principles:

- The existing CPR could be used more effectively by enhancing the guide.
- The guide should contain specific provision dealing with IT issues. Hard copy documents should only be provided for those bundles likely to be referred to reasonably frequently at trial. E-copies of the remainder should be available at court.
- The pre-action protocol regime should be complied with in a compact and concise manner, without resorting to lengthy letters before action or appointment of experts.
- Steps to ensure greater client accountability and responsibility for litigation include requiring a senior client representative to sign a fresh statement of truth shortly before trial verifying the statement of case. Likewise, written confirmation as to consideration of ADR should be provided to the court at certain stages in the litigation.



COURT PROCEDURE

disclosure. Disclosure should be effected with reference to the list of issues. Appendix 3 to the report provides a model disclosure schedule.

EVIDENCE

- Witness statements should be limited in length and use headings and contents which are referable to the list of issues.
- There may be cases in which witness statement can be dispensed with and a written “gist” of evidence served and/or limited examination in chief permitted.
- To reduce the length and complexity of expert reports, the relevant expert disciplines and issues to be addressed should be defined with reference to the list of issues. Expert reports should be exchanged sequentially.

JUDICIAL ROLE

- The list of issues should be used by judges to actively promote a consideration of whether particular issues were appropriate for summary judgment or strike out applications.
- In large cases which might generate interim appeals, a Court of Appeal judge with a Commercial Court background should sit on any appeal hearing, which should take place as soon as possible.
- Judges should be encouraged to give provisional views on the merits of particular issues, if done openly, with the consent of the parties and (save where a ruling is being made) on the express basis that the view expressed is provisional.
- Early neutral evaluation should be promoted, as should the determination of preliminary issues where possible.
- Where a “heavy and complex” case is concerned, two judges of the Commercial Court should be assigned to the matter to ensure that one of the judges is available to deal with interim matters or the trial.

TIME AND PAGE LIMITS

- No two party trial should ordinarily be listed for more than 13 weeks.
- Timetables/time limits should be set for pre-trial procedure and aspects of the trial, with an appropriate contingency being built in.
- Agreed matters must be listed (updated regularly), “skeleton arguments” should be called “outline opening arguments”, and be of no more than 50 pages whose content is referable to the list of issues.
- Opening speeches should be no more than two days in length.
- Time limits should be set for examination of witnesses, oral closing submissions should not exceed two days and page limits should be set on written closing submissions.

disadvantage. Summary assessment of costs should take place where costs claimed were £250,000 or less, as should greater use be made of payment on account of costs and costs orders to reflect/discourage unreasonable behaviour by parties.

PLEADINGS AND LISTS OF ISSUES

Statements of case should not set out detailed background facts and evidence together with law and argument. They should normally be no more than 25 pages in length and identify the key aspects of a case (including a short summary at the beginning). Appendix 1 to the report provides an example of a statement of case/defence.

At the first case management conference (CMC) the court should settle the list of key issues from a draft provided by the parties. The list of issues will be a court document and become a reference point for proceedings thereafter (vis-à-vis disclosure, witness statements, experts’ reports, preliminary issues). Appendix 2 to the report provides a model list of issues.

DISCLOSURE

Automatic disclosure should not take place before the CMC which should deal with


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IMPORTANT REMINDER

The working party represents the most important post CPR consideration of procedure and practice before the Commercial Court. At a time when commercial parties are increasingly able and willing to choose between different fora and methods of dispute resolution, the report provides an important reminder that the legal profession and the Commercial Court must respond and cater to the needs of the business community if London is to maintain its position of pre-eminence in this regard.

Khawar Qureshi QC is a barrister at Serle Court Chambers, specialising in commercial litigation and international arbitration

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BIOMARK FORENSICS LTD.
 PO Box 3538, Slough, Berkshire, SL3 3BP
 Tel.: 01753 583682
 Fax: 01753 583684
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