

**CHECK LIST**

**for the Commercial Court Judges on the implementation of the Commercial Court Long Trials Working Party (“CCLTWP”)**

The purpose of this note is to provide the Commercial Court judges and any deputies with a checklist of points which they should consider during the pilot scheme implementing the CCLTWP which starts on 1 February 2008. The note identifies not only points which the judge himself should address, but also recommendations which he should check the parties have complied with. The note is only intended to be a rough crib.

**ACTION/CHECK LIST**

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<b>1. HCC designation</b>				
B.1 26	At earliest stage	Characterisation of case as an HCC.  <i>All cases</i>	Claimant ticks box on form when starting proceedings. If defendant disagrees with characterisation, he informs claimant and court when serving defence and makes point at first CMC.  Judge checks at first CMC that case is correctly characterised.	Registry checks form on issue of proceedings that case has been designated.
<b>2. Pre-action protocol</b>				
C.1 39, 40	At pre-claim protocol stage	Letter of claim to be concise and only supply essential documents; same for defence response, which must be prompt; preferably within one month  <i>All cases</i>	Parties to comply with requirements.  Judge to check at first CMC that there has been satisfactory, prompt compliance; adverse costs order, if not.	

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<b>3. Statements of case</b>				
D.2 50(a)	At service of Statement of Case stage and at first CMC	Statements of case to be no longer than 25 pages, save with permission of the court.  If longer, then executive summary of five pages, maximum.  <i>All cases</i>	Claimant and defendant to comply.  Judge to check compliance at first CMC.	
D.2 50(d)	At service of defence case statement and at first CMC	Defendant responds on a paragraph by paragraph basis to claimant’s statement of case in electronic form.  <i>All cases</i>	Judge to check defendant’s compliance	
D.2 50(b)	Before first CMC	Statement of Case of be amplified by further information in one composite schedule if Court gives permission for further information.  <i>All cases</i>	Parties to discuss whether a schedule would be appropriate	
D.2 50(b)	At first CMC	Parties apply for permission to serve schedule of further information.  <i>All cases</i>	Judge decides whether to give permission for schedule of further information.	
D.2 50(c)	At Reply stage	Reply only to be served where necessary and must not re-state claimant’s case.  <i>All cases</i>	At first CMC judge checks that no prolix reply and makes adverse costs order where appropriate.	

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<b>4. List of Issues</b>				
D.3 51, 52, 54	At time of serving reply or 21 days after receiving defence	Claimant serves draft List of Issues, distinguishing between main issues and sub-issues; 10 pages maximum <sup>1</sup> . This will be the critical tool for future case management. It will determine the extent of disclosure, the scope of witness statements and the ambit of expert evidence.  <i>All cases</i>	Before first CMC, defendant attempts to agree draft List of Issues and suggests modifications.	
D.3 52, 53	At first, or later, CMC	<i>All cases</i>	Judge approves and settles draft List of Issues; thereafter it can only be amended with the consent of the Court. Leading counsel (if possible) and responsible solicitor to be present at CMC where List of Issues is settled by the judge.	
<b>5. CMC Generally</b>				
D.5 55-57	At least 14 days before CMC is to be heard	Agenda to be produced clearly identifying: (i) areas in dispute and agreed; (ii) matters for discussion at CMC; (iii) what is to be pre-reading for the judge; (iv) time required for judge’s pre-reading.  Normally no witness statements for a CMC; No full inter-solicitor correspondence bundles before the Court.  <i>All cases</i>	Parties to agree and serve agenda on the Court.  At least two clear days before the CMC, both/all counsel confirm that pre-reading and other time estimates remain accurate. Judge considers adverse costs orders if time estimates are unsatisfactory.	Commercial Court List Office arranges sufficient reading time for the judge in advance of CMC.  Office checks that time estimates have been confirmed by counsel.

<sup>1</sup> NB: the fact that a fact is not mentioned in a List of Issues will not be something that an opposing party will be able to rely on. Likewise, pleading points on the List of Issues are to be discouraged.

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<b>6. Disclosure</b>				
A.46  E.2 68 (a)-(d)	Before the first CMC, if thought desirable	Production of draft disclosure schedule. If this is not possible, or not regarded as necessary or desirable, at that stage, because of the need first to finalise the List of Issues, or some other reason, claimant so states on the agenda for the first CMC  <i>All cases</i>	Claimant serves on defendant draft disclosure schedule identifying by reference to the claimant’s draft List of Issues: (i) what standard or other disclosure is required by the claimant; (ii) what standard or other disclosure he is prepared to provide; (iii) documents claimant wants other parties to produce; (iv) and at which stage.	
	At first CMC	<i>All cases</i>	Judge decides: (i) whether disclosure schedule needed at all; if so (ii) whether the defendant should be required to respond to the disclosure schedule, so as to enable the Court to determine the extent of disclosure; and (iii) makes directions accordingly.	
E.2 68 (a)-(d) (cont’d)	Before disclosure CMC (if needed)	No witness statements to support disclosure issues.  <i>All cases</i>	Defendant responds to disclosure schedule.	
E.2 68 (d), (e)	At disclosure CMC (if needed)		Responsible solicitor, leading counsel and junior counsel are required to attend the disclosure CMC;  the judge, by reference to the List of Issues and disclosure schedule, identifies scope of disclosure;  judge to give reasons if the scope of disclosure	

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		<i>Judge to decide whether should apply to a non-HCC case.</i>	is more or less than standard disclosure;  all documents or categories of documents to have individual numbers and to be identified by party provenance.	
<b>7. Witness Statements</b>				
F.2 75 (a)-(e)	When drafting witness statements	Statements to be as short as possible; headings that correspond to the List of Issues; documents with a unique reference number; hyperlinks if possible; no hard copy documents exhibited to witness statement.  <i>All cases</i>	Parties to check compliance with recommendations at paragraph 75 when preparing witness statements.	
F.2 75 (a)-(e) (cont’d)	At CMC and/or PTR	<i>All cases</i>	Judge at CMC/PTR considers/confirms whether: (i) recommendations at paragraph 75 have been complied with; (ii) to impose a limit on length of witness statements; (iii) any witnesses should give oral evidence in chief; (iv) to dispense with need for witness statements and to order service of gist statements.	
<b>8. Experts</b>				
G.1 76, 77	At first, or more likely at a later, CMC	Possible expert disciplines to be identified at first CMC, but permission to call expert evidence should not be given until after the List of Issues has been formulated and judicially determined.	Parties to identify in, and by reference to, the List of Issues the precise issues in relation to which expert issues arise, and precise disciplines.  Judge to take a more proactive part in the	

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		List of issues to identify issues in relation to which expert evidence is required.  <i>All cases</i>	question of whether expert evidence is really needed on a particular topic. Judge to approve disciplines and issues to which expert evidence is to be addressed.  Judge, if appropriate, to limit the maximum length of experts’ reports.	
<b>9. Summary Judgment (“SJ”) and Striking Out (“SO”) Applications</b>				
H.3 98 (a)-(c)	After close of pleadings	Judge to exercise SJ/SO powers more aggressively and pro-actively. Judge to make more favourable “costs in case” orders (if appropriate) if application fails.  <i>All cases</i>	Parties to apply for SJ and/or SO in appropriate cases by reference to the List of Issues.	
H.3 98 (a)-(c) (cont’d)	At CMC	<i>All cases</i>	Judge proactively to raise with parties by reference to the List of Issues whether SJ/SO is appropriate.	
H.3 98 (d)	After SJ/SO application issued and/or after first CMC	Judge in charge of Commercial Court (“JIC”) identifies to the supervisory Commercial Court LJ in the Court of Appeal cases where there is a potential need for speedy appeals process and appeal case management.  <i>All cases</i>	See previous column.	
<b>10. Indications from Judges as to the merits of a case and preliminary issues</b>				
H.6 104(a)	At CMC and/or SJ/SO applications	Judge should be more prepared to give <u>provisional</u> views on the merits of the case.  <i>HCCs</i>	See previous column.  Parties should, where appropriate, encourage the judge to give a provisional view.	

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104(a)	At trial	Judge should, in appropriate cases (with the express agreement of the parties) during the course of the trial, be prepared to express a view as to the outcome, or the outcome of particular issues.  <i>All cases</i>	See previous column.	
104 (b)	At CMC	Judge should raise with the parties the possibility of Early Neutral Evaluation.  <i>All cases</i>	See previous column.	
	At CMC	Judge to be more proactive in identifying (by reference to the List of Issues) suitable issues for determining as preliminary issues.  <i>All cases</i>	Leading counsel to be present at CMC where judge raises preliminary issue debate to discuss ramifications of ordering preliminary issues.	
<b>11 Use of technology: “paperless litigation”</b>				
I.2 III	At first CMC	Judge and parties to examine the use of IT at the trial to reduce cost and burden of litigation.  <i>All cases</i>	Parties to put forward their proposals for use of IT in CMC skeletons.  Judge, proactively with parties, to address use of IT, e.g.:  (i) whether to have any hardcopy document bundles, and; (ii) if so, which; (iii) system for selection of relevant documents; (iv) methods of production of materials for judge; (v) facilities for annotating electronic documents.	

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<b>12. Summary assessment of costs</b>				
J.2 114; J.7 124(b)	All hearings other than trials	Judges to make more extensive use of summary assessment procedures in cases where costs are up to £250k.  <i>All cases</i>	See previous column.  Where the costs claimed are in excess of £100k, the judge should be provided with a short written explanation from the solicitor who has done the bulk of the work in addition to the schedule. He should be present in court for the summary assessment and be prepared himself to answer questions directly from the court.	
J.2 116; J.7 124(c)		If costs claimed are more than £250k, the judge should, as a general rule, make a summary award on account.  <i>All cases</i>	See previous column.	
J.2 112; J.7 124(e)	At any stage where the Court considers that a party has behaved unreasonably	Judge should use his powers to award costs to discourage a party from behaving unreasonably. If possible these should be assessed summarily and paid forthwith.  <i>All cases</i>	See previous column.	
<b>13. Costs capping</b>				
J.3 119; J.7 124(g)	At any stage	Judge should not hesitate to express disapproval if he thinks that a party is behaving unreasonably and disproportionately by overloading costs or “churning”.  <i>All cases</i>	Judge warns party that he considers overloading/churning taking place, and that costs capping order may result.	

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		Judge to draw other party’s attention to the existence of power to cap, to encourage an application in suitable cases. (But costs capping not to be a normal feature of litigation.)  <i>All cases</i>	Party (where appropriate, but see 118) applies for costs capping order.	
<b>14. Costs estimates</b>				
J.4 20; J.7 (f)	At each CMC	Judge to ask for: (i) costs estimates to be updated regularly throughout the case; and (ii) for written confirmation that the responsible person had seen the estimates for both sides.  <i>All cases</i>	See previous column  Parties to provide court with costs updates at every CMC and PTR so that issues of proportionality can be borne in mind	
<b>15. Management of the pre-trial timetable and the trial</b>				
K.1 – K.18 125-159  159(b)  159(e)         159(j)	At first and subsequent CMCs/PTRs	The timetabling and management recommendations (too lengthy to summarise here) are set out at paragraph 159(a)-(t)  Salient points from this list are: (i) no trial of a two-party case should ordinarily run for more than 13 weeks; (ii) Progress Monitoring Information Sheets (“PMIS”) in HCC to be referred to a judge by the Registry; judge in cases of default to make order on paper or reconvene CMC; (iii) provision for judge “teach-ins” on expert issues;		PMIS in HCC to be provided to judge.  Need for Registry to provide for adequate pre-reading time for judge.

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159(c) and (q)  159(m)  159(a), (d), (g) and (k)		(iv) limits on length of opening and closing arguments; arguments to be related to the issues as defined in the List of Issues; (v) two-day limit on each party for opening and closing submissions; (vi) need for proactive judge management of timetabling issues;  <i>All cases</i>		
<b>16. Client accountability and responsibility for litigation</b>				
L.2 162(a)	Shortly before trial	Senior representatives of the parties to sign fresh statements of truth shortly before trial, verifying the original statements of case.  <i>All cases</i>		Form to be signed and lodged confirming that this has been done.
162(b)	(i) at the first CMC; and (ii) after exchange of expert reports	Senior representatives of the parties to confirm that ADR has been considered internally.  <i>All cases</i>	Judge may ask the questions at any oral hearing as to whether ADR has been considered	Form to be signed and lodged confirming this has been done.
<b>17. Judicial Resource Management</b>				
M.2 176(c)	Before or at first CMC	Guide should be amended to place an obligation on the claimant in an HCC to write to the JIC to inform him of any case where the claimant thinks a two-judge team will be needed.  <i>HCCs</i>	Claimant specifies on CMC fixing sheet whether case is an HCC and whether a two-judge team is required.  JIC assigns two judges (if he thinks it appropriate)	Registry checks on CMC fixing sheet whether case has been designated as an HCC and whether a two-judge team has been requested.

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176(d)	At first CMC	<i>HCCs</i>	If the above has not been done by first CMC then, if appropriate, judge orders that case will have two judges and he informs JIC, who then assigns a two-judge team to the case.	
176(e)	in all two-judge cases	<i>HCCs</i>	JIC informs Vice-President of Queen’s Bench Division of the identity of two judges, so that one of them is always available to hear CMCs/applications.	
176(g)	in all two-judge cases	Arrangements put in place to ensure informal communication between judge and legal representatives. <i>HCCs</i>		
176(h)	in all two-judge cases	Two-judge teams should be able to discuss between themselves issues of management, but no decision that affects the parties should be made without the parties’ involvement. <i>HCCs</i>		
176(i)	in suitable cases	Ability for the judge to enlist a judicial assistant. <i>HCCs</i>	Judge raises with the parties how this assistant is to be paid for.	