

Commercial Court User Group Meeting

April 2021 Meeting Minutes

Remote Meeting via Microsoft Teams *Thursday 28 April 2021 at 1645*

1. Introduction from Cockerill J

Cockerill J started by thanking participants for attending the third virtual CCUG meeting and introduced and extended a warm welcome to new members

2. Pupils, Junior advocacy and JAs

Pupils

The Commercial Court is very aware of how the pandemic has affected the learning experience for pupils this year. Cockerill J noted that she was pleased that the *Pupils in Court* scheme has been well received and expressed the hope to see plenty more of them in the rest of the year. She asked for input as to whether to keep the scheme going for next year is a question.

Junior Advocacy

Cockerill J explained that the Commercial Court is concerned about junior advocacy opportunities generally and as affected by the pandemic. She noted that:

- The new guide will flag how much the judges welcome seeing juniors in court.
- She had been in touch with COMBAR on this and had spoken to members of their working group on this. She noted that the court entirely appreciates and respects clients' rights to instruct whoever they want, but encourages leaders and solicitors to actively consider where junior advocates can get experience in commercial cases, which is in everyone's interests in the long run.

Sonia Tolaney QC spoke on behalf of COMBAR and echoed Cockerill J's remarks about the junior bar. COMBAR thinks it is vital for the future to balance the interests and discretion of clients with the interests of the junior bar.

The Chancellor asked whether COMBAR felt the advocacy opportunities had diminished as a consequence of the lockdowns in particular were solicitors conducting the shorter remote hearings themselves?

Sonia Tolaney QC: COMBAR didn't think so. They have received good feedback that the juniors have been conducting remote hearings, sometimes at the solicitors' offices. The introduction of the DRD has helped.

COMBAR raised the issue of seeing all counsel on screen in a remote hearing, even if it was only by way of introduction for the juniors. They report that there are mixed views on whether juniors would welcome being introduced and noted that it is a matter for the court's discretion.

Judicial Assistant Scheme

Cockerill J reminded everyone that the application period for 2021-2 will shortly be opening. She noted that the scheme has been well-received by the judiciary feedback from both alumni and employers is that they bring a useful judicial perspective to the office upon their return to the workplace

3. Covid 19 and remote hearings

Update

"On one level this is a "no news" story; the court has continued to hear cases either in court or remotely exactly as we would if everything was normal."

The levels of in-person hearings have been low. Between October to December 2020, there were 8 hearings, albeit some of those were multi-day hearings (including trials). In 2021 there have been 2 multi day trials in person (heard by Moulder J and Ms Mulcahy QC) and two other substantial hearings of 1 day and 1.5 days.

There are currently 5 in-person applications and 1 in-person trial pencilled in for this Term.

Future Plans

The Court , like the rest of the country, is making plans as restrictions ease.

According to Cockerill J, preliminary indications for the summer term are that in about half of trials people are positively seeking live hearings. From the middle of May 2021, the Court expects that most trials should look to be in court, whether that takes place in whole or in part (where that is feasible). That may mean we hear from witnesses by video link or that there are some hybrid elements.

Trials

The "in court trial" remains the gold standard and the Court is looking to return to that . The message is that the Court will require rather more persuasion that trials should take place remotely, but that does not mean that all hearings will be in court.

The Chancellor noted that we are only allowed a certain amount of footfall within the Rolls Building. Unless and until HMCTS relaxes its social distancing policy, there will be an issue with the number of people allowed in the building. For now, all but 2 or 3 court rooms are usable for in-person hearings. Consideration is being given to staggered start and finish times, if numbers require that.

Picken J observed that it should not be assumed that in-person hearings can be attended by every solicitor. A careful selection should be made of each team and arrangements can be made for the other members to attend via video link.

Ted Greeno of Quinn Emmanuel reminded the group about the constructive value of inter partes interaction which takes place in breaks and outside court.

Friday Hearings and Vacation

Cockerill J indicated that the Court intends to keep Fridays remote for the foreseeable future - unless there is a particular reason to be live in court.

Vacation sitting will also be substantially remote over summer.

Bundles

Cockerill J noted that she had not mentioned paper bundles quite deliberately. Paperless hearings will continue, even when live hearings resume. Andrew Baker J indicated that the new Guide would be likely to put electronic bundles as the default position.

User feedback on future plans

Cockerill J reminded the group that the Court asked users asked for feedback back in September on how we address the in-person/remote balance for the longer term. At that point, there was a very enthusiastic response for remote hearings. Cockerill J stated that she would welcome further input, possibly in the form of a questionnaire.

Sarah Garvey of Allen and Overy volunteered to assist with this and Cockerill J extended her thanks.

The Chancellor asked the group to consider the problems caused when hearing factual witness evidence remotely.

It was noted that there had been problems with witnesses giving evidence from certain jurisdictions (e.g. Germany and France). Allen and Overy have done some work on that and Ms Garvey offered to provide this data to the court.

Bruce Harris of Quadrant Chambers noted that views change according to circumstances. The initial reluctance towards remote hearings became enthusiasm. The mood has changed again. An ongoing review process is what's required.

4. Covid Business Insurance List

As indicated at the last meeting, the court has a Covid Business Interruption list which is being supervised by Butcher J. So far, there has not been a lot of business but Cockerill J heard *Rockcliffe Hall v Travelers Insurance Company* [2021] EWHC 412 in Newcastle Circuit Commercial Court earlier this year.

Jon Turnbull explained that his email to the court was sent by way of messenger. There are issues of concern to insurers/brokers and the insured and cases are in the pipeline.

Butcher J observed that there have been very few Covid insurance cases though a query from Jon Turnbull suggests that there may be cases waiting in the wings. Butcher J would be obliged if users could keep us updated via Mr Tame. The objective as a court is to be as much assistance as we can be. Cockerill J noted that the same applies to Brexit cases. If a tsunami of work is on its way, we would appreciate a heads-up, so that we can plan accordingly.

Butcher J reminded the group that communication about work in the pipeline need not be formal.

Laura Feldman of Freshfields observed a lack of information about the cases which are currently with the court, if only to confirm that the cases are limited and address only certain issues.

Butcher J was only aware of a limited number of cases, none of which seem to raise any issues of public importance. The judge will consider whether a bulletin would assist.

5. Listing update

Cockerill J introduced the Senior Listing Officer, Mr Tame and extended her thanks to Michael and his team for all they do.

Mr Tame confirmed that a meeting had taken place with Barristers' clerks on 15 April 2021 which was well received. The list office proposes to hold a similar meeting with solicitors' firms and would welcome feedback from LSLA and CLLS as to the best way to put this together.

Court use: 28 out of 31 can be used in compliance with social distancing regulations. 25 of these are equipped with audio and video kit to facilitate remote hearings.

The list office is listing in the normal manner and will be contacting all parties who have cases in June.

Mr Tame also noted that small change accumulates - and that anything which contributes to a lower email count is welcomed. For example (i) users should not CE File and send a duplicate email to Listing (ii) chasing emails are rarely helpful – all emails are looked at as quickly as business allows and (iii) Court users should not feel the need to send thank you emails. Fewer emails into Listing will enable quicker response times.

Cockerill J introduced Francesca Girardot who has joined the Commercial Court under a pilot scheme as its first lawyer. She comes on secondment from the Administrative Court Office and is working closely with the judges and the list office.

6. Statistics

Annual Report 2019-2020

Cockerill J reminded the CCUG that they had been given the 2019-2020 stats in the last meeting. The annual report's publication has been held up by larger national events such as the death of Prince Philip and election purdah. The report will be appearing on the court's webpages once those restrictions are over. Cockerill J wanted to relay her gratitude to Henshaw J and Angela Fraser for the fantastic job done in compiling the best report we have ever produced.

Progress Report 2020-2021

Cockerill J then gave an illustrative snapshot of how things are going in the 2020- 2021 year:-

i. Commercial

(The following figures do not include arbitration claims which are dealt with separately below)

a) Claims

- So far, 430 claims have been issued. This is in broadly similar balance to last year. Of these, about 1/3 arbitration, with a good number of frauds, aviation and shipping cases.
- There appears to be a slight uptick in insurance cases which is perhaps not entirely surprising. To date the court has nearly as many insurance cases as for the whole of last year
- There are quite a lot of low value claims – approx 50 under £300k. The Court is starting to look carefully at cases and whether they do properly belong here. Cockerill J confirmed that a similar approach has been adopted by HHJ Pelling in the London Circuit Commercial Court.

b) Applications

- On notice – 453 + 29 injunctions
- Without notice - 28 + 46 injunctions
- Ignoring the 29 injunctions which were on notice but expedited, that is 74 urgent hearings. That this is considerably up on the number of injunctions which the court has seen in previous years. This seems to be borne out by stats for 2018-2019 where 40 injunction applications were heard in the whole year.

c) Paper apps

The judges have dealt with about 1500. (This figure does not include arbitration paper apps).

a) Hearings

Since October:

- listed 704 applications and 83 trials.
- Of those, 497 applications were heard and 24 trials were heard.

ii. Arbitration

Cockerill J extended her thanks to Shirley Sweeney, the court's arbitration clerk, for providing these figures:-

a) Claims

114 claims so far of which :-

- 20 section 69s – most still awaiting service/completion of all parties submissions,
 - of those which have progressed, 1 grant, 5 refused, 2 discontinued
- 15 section 68s, 3 already dismissed on paper
- 10 section 67s
- 14 s 44 injunctions

b) Costs

Cockerill J confirmed that she and Shirley have been looking at costs in substantive hearings. There are some very sensible amounts for section 69s – £25k is not an uncommon figure.

However, section 67s are often £175k and some section 68s at £250 k or even higher

Given those costs and rarity of successful section 68's, the Court is making sure a judge reviews all applications, even where an application for summary dismissal is not made by the respondent.

7. Commercial Court Guide and Witness Statement PD updates

Andrew Baker J spoke about the forthcoming Guide which we he will be out by the end of the year. The judge has formed a small editorial team and is working with Conall Patton QC of 1 Essex Court, Laura Feldman of Freshfields and Francesca Girardot.

The editorial team has been reviewing the guide and making constructive changes. There will be a degree of further harmonisation with the Chancery Guide.

The focus of the guide is to look constructively at how we litigate trials, with an emphasis on the importance of the oral presentation of the case from documents by advocacy.

Andrew Baker J confirmed that the Witness Statement PD updates appear in the new White Book. These updates have been approved by the CPRC and come into effect on 1 October. This brings the rules into alignment with the rest of the court.

Duncan Matthews of Twenty Essex sought guidance as to the application of the PD updates to witness statements in s67, 68 and 69 Arbitration Act 1996. Andrew Baker J confirmed that witness statements are not proper vehicles for legal argument. Such argument should be advanced in a skeleton.

8. Foreign law

Foxton J updated the group in relation to the Court's approach to expert evidence of foreign law.

He reminded users that as regards interim applications differing views had been expressed as to the need for permission and noted that for reasons of good case management parties seeking to deploy expert evidence of foreign law should seek permission of the Court and enable it to set directions.

At the trial stage Foxton J noted divergences of practice across different tribunals and jurisdictions internationally as to how the content of foreign law should be established. He advised that the Commercial Court had taken the view that there should be a greater consideration at the CMC of the range of options open to the court under the CPR as to how to establish the content of foreign law to enable the court to direct the best approach. Those options ranged from direct submissions based on the foreign law legal materials to the more conventional approach of obtaining formal reports and having experts cross examined. Parties could also use this stage to consider whether it was really necessary to instruct an independent foreign expert if they already have an appropriately qualified lawyer retained.

Andrew Baker observed that some guidance already exists in the White Book. There is plenty of flexibility for coming up with a cost-effective and fair solution. That will be the steer of the next Commercial Court Guide.

The Chancellor endorsed this approach, particularly in the context of common law jurisdictions where calling 2 experts can be using a sledgehammer to crack a nut. He suggested that parties should work towards narrowing down the situations/issues where full formal written and oral expert evidence was needed.

9. Disclosure Pilot

Robin Knowles J spoke about the useful contributions which have allowed the Disclosure Pilot Group to identify a range of refinements to the rules. The Pilot will try to reflect a lighter touch approach for smaller claims and there will be more guidance in relation to Model C and the list of issues. Experience has also enabled the working group to adjust timetables and it looks to extend collaborative Disclosure Review hearings. The principles have all gone to drafting and subject to the Chancellor's approval will go to the CPRC.

Ed Crosse of Simmons and Simmons reported that the substantive and extensive feedback had been very helpful. There had been a lot of feedback from Manchester. The biggest area for review was lower value claims. Mr Crosse reported that the draft rules should go to the CPRC with a hope that they are in force by October 2021.

The Chancellor echoed Mr Crosse's comments about the extremely helpful feedback about the disclosure pilot.

10. Standing Forum of International Courts 3rd Meeting Report

Robin Knowles J was happy to report that SIFoCC had recently held its 3rd meeting which was hosted (remotely) by Singapore. The objectives of the forum are for the world's commercial judiciary to work together and share best practice. Developing jurisdictions are given support and assistance by the forum. Membership now extends to 40 countries over every continent bar 1. There are a range of members from established jurisdictions in Europe, Financial Centres, Offshore Centres, the Middle East, Asia, the Americas and Commonwealth as well as a number of jurisdictions in the African continent. Members from 36 jurisdictions attended the last meeting, 17 of whom were led by their Chief Justice. This shows the significance attached to the work of the forum. Our delegation included the Lord Chief

Justice, the Master of the Rolls, the Chancellor as well as the Judge in charge of the Commercial Court. Topics include *Technology for the Future* and the Challenges of Dealing with Commerce Transacted via Technology Media. Also discussed was meeting the needs of court users as well as the development of commercial litigation funding (particularly in the world of arbitration). Expert guests included Susan Dunn of Harbour Litigation Funding and Audley Sheppard QC of Clifford Chance. The round table discussions can be viewed on YouTube. There is also published work which will be valuable for all.

SIFoCC's agreed principles Now include:

- Principles of case management
- There are 2 papers on use of technology in the wake of Covid and use of technology we've encountered for the future
- A second edition of a multilateral memorandum for enforcement of judgments (which are not dependent on the enforcement of treaties)

SIFoCC works with the Commonwealth Lawyers Association, The Commonwealth Judges Association and Commonwealth Judges' Associations and will give a seminar as part of London International Disputes Week.

The secretariat of SIFoCC is based at the Rolls Building and it is a privilege that by consensus we have an organisational lead. Anybody with any ideas should not hesitate to contact Ronin Knowles J (via his clerk Rachel Guy Rachel.guy@justice.gov.uk) or Grace Karrass at the Secretariat to SIFoCC grace.karrass1@judiciary.co.uk.

11. AOB

On a final note, Cockerill J flagged up a concern that there had been no uptake for the Pro Bono Assistance Scheme which had been set up for LiP's in the court and the LCCC and wondered if members were aware of any feedback, particularly from those who had dealt with a LiP on the other side? It would be useful to get an understanding of why LIPS are not using this excellent scheme.