HM Courts & Tribunals Service

The Technology and Construction Court Guide

Second Edition

Issued 3rd October 2005, third revision with effect from 3 March 2014

Any enquiries regarding this publication should be sent to us at wilf.lusty@hmcts.gsi.gov.uk

This publication is available for download at www.justice.gov.uk

Contents

Section 1. Introduction

1.1 Purpose of Guide

1.1.1 The Technology and Construction Court ("TCC") Guide is intended to provide straightforward, practical guidance on the conduct of litigation in the TCC. Whilst it is intended to be comprehensive, it naturally concentrates on the most important aspects of such litigation. It therefore cannot cover all the procedural points that may arise. It does, however, describe the main elements of the practice that is likely to be followed in most TCC cases. This Guide does not and cannot add to or amend the CPR or the relevant practice directions. The purpose and function of this Guide is to explain how the substantive law, rules and practice directions are applied in the TCC and cannot affect their proper interpretation and effect: see *Secretary of State for Communities and Local Government v Bovale* [2009] 1 WLR 2274 at [36].

1.1.2 The Guide reflects the flexible framework within which litigation in the TCC is habitually conducted. The guidance set out in the Guide is designed to ensure effective management of proceedings in the TCC. It must always be remembered that, if parties fail to comply with these requirements, the court may impose sanctions including orders for costs and, following the implementation of the Jackson reforms, will be more ready to do so.

1.1.3 In respect of those procedural areas for which specific provision is not made in this Guide, the parties, together with their advisors, will be expected to act reasonably and in accordance with both the spirit of the Guide and the overriding objective at **CPR 1.1**

1.1.4 It is not the function of the Guide to summarise the Civil Procedure Rules ("the CPR"), and it should not be regarded as a substitute for the CPR. The parties and their advisors are expected to familiarise themselves with the CPR and, in particular, to understand the importance of the "overriding objective" of the CPR. The TCC endeavours to ensure that all its cases are dealt with justly and at proportionate cost. This includes ensuring that the parties are on an equal footing; taking all practicable steps to save expenditure; dealing with the dispute in ways which are proportionate to the size of the claim and cross-claim and the importance of the case to the parties; and managing the case throughout in a way that takes proper account of its complexity and the different financial positions of the parties. The court will also endeavour to ensure expedition, and to allot to each case an appropriate share of the court's resources.

1.1.5 The TCC Guide has been prepared in consultation with the judges of the TCC in London, Cardiff, Birmingham, Manchester and Leeds, and with the advice and support of TECBAR, TeCSA, the Society for Construction Law, the Society for Computers and Law and the TCC Users' Committees in London, Cardiff, Birmingham, Manchester, Liverpool and Leeds. The TCC Guide is published with the approval of the Head of Civil Justice and the deputy Head of Civil Justice.

1.2 The CPR

1.2.1 Proceedings in the TCC are governed by the CPR and the supplementary Practice Directions. **CPR Part 60** and its associated **Practice Direction** deal specifically with the practice and procedure of the TCC.

1.2.2 Other parts of the CPR that frequently arise in TCC cases include **Part 3** (Case Management Powers); **Part 8** (Alternative Procedure for Claims); **Parts 12 and 13** (Default Judgment and Setting Aside); **Part 17** (Amendments); **Part 20** (Counterclaims

and Other Additional Claims); **Part 24** (Summary Judgment); **Part 25** (Interim Remedies and Security for Costs); **Part 26** (Case Management); **Part 32** (Evidence); **Part 35** (Experts and Assessors); **Part 44** (Costs); and **Part 62** (Arbitration Claims).

1.3 The TCC

1.3.1 What are TCC Claims? **CPR 60.1 (2)** and **(3)** provide that a TCC claim is a claim which (i) involves technically complex issues or questions (or for which trial by a TCC judge is desirable) and (ii) has been issued in or transferred into the TCC specialist list. Paragraph 2.1 of the TCC Practice Direction identifies the following as examples of the types of claim which it may be appropriate to bring as TCC claims –

(a) building or other construction disputes, including claims for the enforcement of the decisions of adjudicators under the Housing Grants, Construction and Regeneration Act 1996;

(b) engineering disputes;

(c) claims by and against engineers, architects, surveyors, accountants and other specialised advisors relating to the services they provide;

(d) claims by and against local authorities relating to their statutory duties concerning the development of land or the construction of buildings;

(e) claims relating to the design, supply and installation of computers, computer software and related network systems;

(f) claims relating to the quality of goods sold or hired, and work done, materials supplied or services rendered;

(g) claims between landlord and tenant for breach of a repairing covenant;

(h) claims between neighbours, owners and occupiers of land in trespass, nuisance, etc.

(i) claims relating to the environment (for example, pollution cases);

(j) claims arising out of fires;

(k) claims involving taking of accounts where these are complicated; and

(l) challenges to decisions of arbitrators in construction and engineering disputes including applications for permission to appeal and appeals.

It should be noted that this list is not exhaustive and many other types of claim might well be appropriate for resolution in the TCC. In recent years the range of work in the TCC has become increasingly diverse, and many civil claims which are factually or technically complex are now heard in the TCC. This has included group actions for personal injury and public nuisance, and a number of procurement disputes arising in connection with the Public Contracts Regulations 2006. In addition, the TCC regularly deals with allegations of lawyers' negligence arising in connection with planning, property, construction and other technical disputes and with applications under the Arbitration Act 1996. However, with the exception of claims to enforce adjudicators' decisions or other claims with special features that justify a hearing before a High Court Judge, the TCC will not usually accept cases with a value of less than £250,000 (see paragraph 1.3.6 below) unless there is good

reason for it to do so. A non-exhaustive list of special features which will usually justify listing the case in the High Court is:

(a) Adjudication and arbitration cases of any value;

(b) International cases whatever their value (international cases will generally involve one or more parties resident outside the UK and/or involve an overseas project or development);

(c) Cases involving new or difficult points of law in TCC cases;

(d) Any test case or case which will be joined with others which will be treated as test cases;

(e) Public procurement cases;

(f) Part 8 claims and other claims for declarations;

(g) Complex nuisance claims brought by a number of parties, even where the sums claimed are small;

(h) Claims which cannot readily be dealt with effectively in a County Court or Civil Justice centre by a designated TCC judge;

(i) Claims for injunctions.

For further guidance, see *West Country Renovations v McDowell* [2013] 1 WLR 416.

1.3.2 The Court. Both the High Court and the County Courts deal with TCC business. TCC business is conducted by TCC judges unless a TCC judge directs otherwise: see CPR 60.1(5)(b)(ii).

TCC business in the High Court is conducted by TCC judges who are High Court judges (who sit principally in the Rolls Building), and by designated circuit judges and recorders. Circuit judges and recorders only have jurisdiction to manage and try TCC cases if they have been nominated by the Lord Chancellor pursuant to section 68(1)(a) of the Senior Courts Act 1981 or are authorised to sit in the TCC as High Court judges under section 9 of that Act.

TCC business in the County Court is conducted by TCC judges who include circuit judges and recorders. TCC business may also be conducted by certain district judges ("TCC liaison district judges") provided that: (1) a TCC judge has so directed under CPR 60.1(5)(b)(ii); (2) the designated civil judge for the court has so directed in accordance with the Practice Direction at CPR 2BPD11.1(d).

It should be noted that those circuit judges who have been nominated pursuant to section 68(1)(a) of the Senior Courts Act 1981 fall into two categories: "full time" TCC judges and "part time" TCC judges. "Full time" TCC judges spend most of their time dealing with TCC business, although they will do other work when there is no TCC business requiring their immediate attention. "Part time" TCC judges are circuit judges who are only available to sit in the TCC for part of their time. They have substantial responsibilities outside the TCC.

In respect of a court centre where there is no full time TCC judge, the term "principal TCC judge" is used in this Guide to denote the circuit judge who has principal responsibility for TCC work.

The phrase “Technology and Construction Court” or “TCC” or “the court” is used in this Guide to denote any court which deals with TCC claims**.** All of the courts which deal with TCC claims form a composite group of courts. When those courts are dealing with TCC business, **CPR Part 60, its accompanying Practice Direction and this Guide** govern the procedures of those courts. The High Court judge in charge of the TCC (“the Judge in Charge”), although based principally in London, has overall responsibility for the judicial supervision of TCC business in those courts

1.3.3 The TCC in London. The principal centre for TCC work is the High Court in London at the Rolls Building, Fetter Lane, London, EC4. 1NL. The Rolls Building is a new specialist court building off Fetter Lane. The Judge in Charge of the TCC sits principally at the Rolls Building together with other High Court judges who are TCC judges. Subject to paragraph 3.7.1 below, any communication or enquiry concerning a TCC case, which is proceeding at the Rolls Building, should be directed to the clerk of the judge who is assigned to that case and, if by email, copied to the TCC Registry. The various contact details for the judges’ clerks are set out in **Appendix D**.

The TCC judges who are based at the Rolls Building will, when appropriate, sit at court centres outside London.

TCC County Court cases in London are brought in (or transferred to) the Central London Civil Justice Centre, 13-14 Park Crescent, London W1N 4HT. This court is shortly to move into new accommodation in the Royal Courts of Justice.

1.3.4 District Registries. TCC claims can be brought in the High Court outside London in any District Registry, although the Practice Direction states that it is preferable that, wherever possible, such claims should be issued in one of the following District Registries: Birmingham, Bristol, Cardiff, Chester, Exeter, Leeds, Liverpool, Newcastle, Nottingham and Manchester. There are currently full-time TCC Judges in Birmingham, Manchester and Leeds. Contact details are again set out in **Appendix D**. There are part time TCC judges and/or recorders nominated to deal with TCC business available at most court centres throughout England and Wales.

In a number of regions a “TCC liaison district judge” has been appointed. It is the function of the TCC liaison district judge:

(a) To keep other district judges in that region well informed about the role and remit of the TCC (in order that appropriate cases may be transferred to the TCC at an early, rather than late, stage).

(b) To deal with any queries from colleagues concerning the TCC or cases which might merit transfer to the TCC.

(c) To deal with any subsidiary matter which a TCC judge directs should be determined by a district judge pursuant to rule 60.1 (5) (b) (ii).

(d) To deal with urgent applications in TCC cases pursuant to paragraph 7.2 of the Practice Direction (i.e. no TCC judge is available and the matter is of a kind that falls within the district judge’s jurisdiction).

(e) to hear TCC cases when a TCC judge has so directed under CPR 60.1(5)(b)(ii) and when the designated civil judge for the court has so directed in accordance with the Practice Direction at CPR 2BPD11.1(d).

1.3.5 County Courts outside London. TCC claims may also be brought in those county courts which are specified in the **Part 60 Practice Direction**. The specified county courts are: Birmingham, Bristol, Cardiff, Chester, Exeter, Leeds, Liverpool, Newcastle, Nottingham and Manchester. Contact details are again set out in **Appendix D**.

Where TCC proceedings are brought in a county court, statements of case and applications should be headed:

"In the … County Court

Technology and Construction Court"

1.3.6 The division between High Court and County Court TCC cases. As a general rule TCC claims for more than £250,000 are brought in the High Court, whilst claims for lower sums are brought in the County Court. However, this is not a rigid dividing line (see paragraph 1.3.1 above). The monetary threshold for High Court TCC claims tends to be higher in London than in the regions. Regard must also be had to the complexity of the case and all other circumstances. Arbitration claims and claims to enforce or challenge adjudicators' decisions are generally (but not invariably) brought in the High Court. The scale of fees differs in the High Court and the county court. This is a factor which should be borne in mind in borderline cases.

1.4 The TCC Users' Committees

1.4.1 The continuing ability of the TCC to meet the changing needs of all those involved in TCC litigation depends in large part upon a close working relationship between the TCC and its users.

1.4.2 London. The Judge in Charge chairs meetings of the London TCC Users' Committee (usually two meetings a year). The judge's clerk acts as secretary to the Committee and takes the minutes of meetings. That Committee is made up of representatives of the London TCC judges, the barristers and solicitors who regularly use the Court, the professional bodies, such as architects, engineers and arbitrators, whose members are affected by the decisions of the Court, and representatives of both employers and contractors' groups.

1.4.3 Outside London. There are similar meetings of TCC Users' Committees in Birmingham, Manchester, Liverpool, Cardiff and Leeds. Each Users' Committee is chaired by the full time TCC judge or the principal TCC judge in that location.

1.4.4 The TCC regards these channels of communication as extremely important and all those who are concerned with the work of the Court are encouraged to make full use of these meetings. Any suggestions or other correspondence raising matters for consideration by the Users' Committee should, in the first instance, be addressed to the clerk to the Judge in Charge at the Rolls Building or to the clerk to the appropriate TCC judge outside London.

1.5 Specialist Associations

1.5.1 There are a number of associations of legal representatives which are represented on the Users' Committees and which also liaise closely with the Court. These contacts ensure that the Court remains responsive to the opinions and requirements of the professional users of the Court.

1.5.2 The relevant professional organisations are the TCC Bar Association ("TECBAR") and the TCC Solicitors Association ("TeCSA"). Details of the relevant contacts at these organisations are set out on their respective websites, namely www.tecbar.org and www.tecsa.org.uk.

Section 2. Pre-Action Protocol and conduct

2.1 Introduction

2.1.1 There is a Pre-Action Protocol for Construction and Engineering Disputes. Where the dispute involves a claim against architects, engineers or quantity surveyors, this Protocol prevails over the Professional Negligence Pre-Action Protocol: see paragraph 1.1 of the Protocol for Construction and Engineering Disputes and paragraph A.1 of the Professional Negligence Pre-Action Protocol. The current version of the Construction and Engineering Pre-Action Protocol ("the Protocol") is set out in volume 1 of the White Book at section C5.

2.1.2 The purpose of the Protocol is to encourage the frank and early exchange of information about the prospective claim and any defence to it; to enable parties to avoid litigation by agreeing a settlement of the claim before the commencement of proceedings; and to support the efficient management of proceedings where litigation cannot be avoided.

2.1.3 Proportionality. The overriding objective (CPR rule 1.1) applies to the pre-action period. The Protocol must not be used as a tactical device to secure advantage for one party or to generate unnecessary costs. In lower value TCC claims (such as those likely to proceed in the county court), the letter of claim and the response should be simple and the costs of both sides should be kept to a modest level. In all cases the costs incurred at the Protocol stage should be proportionate to the complexity of the case and the amount of money which is at stake. The Protocol does not impose a requirement on the parties to produce a detailed pleading as a letter of claim or response or to marshal and disclose all the supporting details and evidence or to provide witness statements or expert reports that may ultimately be required if the case proceeds to litigation. Where a party has serious concerns that the approach of the other party to the Pre-Action Protocol is not proportionate, then it is open for that party to issue a claim form and/or make an application (see **Paragraph 4.1.5** below) to seek the assistance of the court.

2.2 To Which Claims Does The Protocol Apply?

2.2.1 The court will expect all parties to have complied in substance with the provisions of the Protocol in all construction and engineering disputes. The only exceptions to this are identified in paragraph 2.3 below.

2.2.2 The court regards the Protocol as setting out normal and reasonable pre-action conduct. Accordingly, whilst the Protocol is not mandatory for a number of the claims noted by way of example in **paragraph 1.3.1** above, such as computer cases or dilapidations claims, the court would, in the absence of a specific reason to the contrary, expect the Protocol generally to be followed in such cases prior to the commencement of proceedings in the TCC.

2.3 What Are The Exceptions?

2.3.1 A claimant does not have to comply with the Protocol if his claim:

(a) is to enforce the decision of an adjudicator;

(b) is to seek an urgent declaration or injunction in relation to adjudication (whether ongoing or concluded);

(c) includes a claim for interim injunctive relief;

(d) will be the subject of a claim for summary judgment pursuant to **Part 24** of the CPR; or

(e) relates to the same or substantially the same issues as have been the subject of a recent adjudication or some other formal alternative dispute resolution procedure; or

(f) relates to a public procurement dispute.

The protocol does not contemplate an extended process and it should not be drawn out. Thus, the letter of claim should be concise and it is usually sufficient to explain the proposed claim(s), identifying key dates, so as to enable the potential defendant to understand and to investigate the allegations. Only essential documents need be supplied, and the period specified for a response should not be longer than one month without good reason. In particular, where a claim is brought by an litigant based outside the UK it will generally be appropriate to confine the steps to the time limits provided by the Protocol and, in many cases, to dispense with the meeting referred to in paragraph 5.1 of the Protocol. In any event, such a meeting is not mandatory and may be dispensed with if it would involve disproportionate time and cost or it is clear that it would be unlikely to serve any useful purpose.

2.3.2 In addition, a claimant need not comply with any part of the Protocol if, by so doing, his claim may become time-barred under the Limitation Act 1980. In those circumstances, a claimant should commence proceedings without complying with the Protocol and must, at the same time, apply for directions as to the timetable and form of procedure to be adopted. The court may order a stay of those proceedings pending completion of the steps set out in the Protocol.

2.4 What Are The Essential Ingredients Of The Protocol?

2.4.1 The Letter of Claim. The letter of claim must comply with Section 3 of the Protocol. Amongst other things, it must contain a clear and concise summary of the facts on which each claim is based; the basis on which each claim is made; and details of the relief claimed, including a breakdown showing how any damages have been quantified. The claimant must also provide the names of experts already instructed and on whom he intends to rely.

2.4.2 The Defendant's Response. The defendant has 14 days to acknowledge the letter of claim and 28 days (from receipt of the letter of claim) either to take any jurisdiction objection or to respond in substance to the letter of claim. Paragraph 4.3.1 of the Protocol enables the parties to agree an extension of the 28 day period up to a maximum of 3 months. In any case of substance it is quite usual for an extension of time to be agreed for the defendant's response. The letter of response must comply with section 4 of the Protocol. Amongst other things, it must state which claims are accepted, which claims are rejected and on what basis. It must set out any counterclaim to be advanced by the defendant. The defendant should also provide the names of experts who have been instructed and on whom he intends to rely. If the defendant fails either to acknowledge or to respond to the letter of claim in time, the claimant is entitled to commence proceedings.

2.4.3 Pre-action Meeting. The Construction and Engineering Protocol is the only Protocol under the CPR that generally requires the parties to meet, without prejudice, at least once, in order to identify the main issues and the root causes of their disagreement on those issues. The purpose of the meeting is to see whether, and if so how, those issues might be resolved without recourse to litigation or, if litigation is unavoidable, what steps should be taken to ensure that it is conducted in accordance with the overriding objective. At or as a result of the meeting, the parties should consider whether some form of alternative

dispute resolution ("ADR") would be more suitable than litigation and if so, they should endeavour to agree which form of ADR to adopt. Although the meeting is "without prejudice", any party who attended the meeting is at liberty to disclose to the Court at a later stage that the meeting took place; who attended and who refused to attend, together with the grounds for their refusal; and any agreements concluded between the parties. (See also paragraph 2.3.1 above in relation to claims brought by claimants based ouside the UK).

2.5 What Happens To The Material Generated By The Protocol?

2.5.1 The letter of claim, the defendant's response, and the information relating to attendance (or otherwise) at the meeting are not confidential or 'without prejudice' and can therefore be referred to by the parties in any subsequent litigation. The detail of any discussion at the meeting(s) and/or any note of the meeting cannot be referred to the court unless all parties agree.

2.5.2 Normally the parties should include in the bundle for the first case management conference: (a) the letter of claim, (b) the response, and (c) if the parties agree, any agreed note of the pre-action meeting: see **Section 5** below. The documents attached to or enclosed with the letter and the response should not be included in the bundle.

2.6 What If One Party Has Not Complied With The Protocol?

2.6.1 There can often be a complaint that one or other party has not complied with the Protocol. The court will consider any such complaints once proceedings have been commenced. If the court finds that the claimant has not complied with one part of the Protocol, then the court may stay the proceedings until the steps set out in the Protocol have been taken or impose such other conditions as the court thinks appropriate pursuant to **CPR 3.1(3)**.

2.6.2 **The Practice Direction in respect of Protocols** (section C of volume 1 of the White Book) makes plain that the court may make adverse costs orders against a party who has failed to comply with the Protocol. The court will exercise any sanctions available with the object of placing the innocent party in no worse a position than he would have been if the Protocol had been complied with.

2.6.3 The court is unlikely to be concerned with minor infringements of the Protocol or to engage in lengthy debates as to the precise quality of the information provided by one party to the other during the Protocol stages. The court will principally be concerned to ensure that, as a result of the Protocol stage, each party to any subsequent litigation has a clear understanding of the nature of the case that it has to meet at the commencement of those proceedings.

2.7 Costs of compliance with the Protocol.

2.7.1 If compliance with the Protocol results in settlement, the costs incurred will not be recoverable from the paying party, unless this is specifically agreed.

2.7.2 If compliance with the Protocol does not result in settlement, then the costs of the exercise cannot be recovered as costs, unless:

- those costs fall within the principles stated by Sir Robert Megarry V-C in *Re Gibson's Settlement Trusts* [1981] Ch 179; or

- the steps taken in compliance with the Protocol can properly be attributable to the conduct of the action: see the judgment of Coulson J in *Roundstone Nurseries v Stephenson* [2009] EWHC 1431 (TCC) where he held at [48]: ". . . as a matter of principle, it seems to me that costs incurred during the Pre-Action Protocol process may, in principle, be recoverable as costs incidental to the litigation: see *McGlinn v. Waltham (No. 1)* [2005] 3 All ER1126.

Section 3. Commencement and transfer

3.1 Claim Forms

3.1.1 All proceedings must be started using a claim form under **CPR Part 7** or **CPR Part 8** or an arbitration claim form under **CPR Part 62**: see **paragraph 10.1** below. All claims allocated to the TCC are assigned to the Multi-Track: see **CPR 60.6(1)**.

3.2 Part 7 Claims

3.2.1 The **Part 7** claim form must be marked "Technology and Construction Court" in the appropriate place on the form.

3.2.2 Particulars of Claim may be served with the claim form, but this is not a mandatory requirement. If the Particulars of Claim are not contained in or served with the claim form, they must be served within **14 days** after service of the claim form.

3.2.3 A claim form must be verified by a statement of truth, and this includes any amendment to a claim form, unless the court otherwise orders.

3.3 Part 8 Claims

3.3.1 The **Part 8** claim form must be marked "Technology and Construction Court" in the appropriate place on the form.

3.3.2 A **Part 8** claim form will normally be used where there is no substantial dispute of fact, such as the situation where the dispute turns on the construction of the contract or the interpretation of statute. For example, claims challenging the jurisdiction of an adjudicator or the validity of his decision are sometimes brought under **Part 8**. In those cases the relevant primary facts are often not in dispute. **Part 8** claims will generally be disposed of on written evidence and oral submissions.

3.3.3 It is important that, where a claimant uses the **Part 8** procedure, his claim form states that **Part 8** applies and that the claimant wishes the claim to proceed under **Part 8**.

3.3.4 A statement of truth is again required on a **Part 8** claim form.

3.4 Service

3.4.1 Claim forms issued in the TCC at the Rolls Building in London are to be served by the claimant, not by the Registry. In some other court centres claim forms are served by the court, unless the claimant specifically requests otherwise.

3.4.2 The different methods of service are set out in **CPR Part 6** and the accompanying Practice Direction.

3.4.3 Applications for an extension of time in which to serve a claim form are governed by **CPR 7.6** and there are only limited grounds on which such extensions of time are granted. The evidence required on an application for an extension of time is set out in **paragraph 8.2 of Practice Direction A supplementing CPR Part 7.**

3.4.4 When the claimant has served the claim form, he must file a certificate of service: **CPR 6.17 (2)**. This is necessary if, for instance, the claimant wishes to obtain judgment in default (**CPR Part 12**).

3.4.5 Applications for permission to serve a claim form out of the jurisdiction are subject to **CPR 6.30-6.47** inclusive.

3.5 Acknowledgment of Service

3.5.1 A defendant must file an acknowledgment of service in response to both **Part 7** and **Part 8** claims**.** Save in the special circumstances that arise when the claim form has been served out of the jurisdiction, the period for filing an acknowledgment of service is **14 days** after service of the claim form.

3.6 Transfer

3.6.1 Proceedings may be transferred from any Division of the High Court or from any specialist list to the TCC pursuant to **CPR 30.5**. The order made by the transferring court should be expressed as being subject to the approval of a TCC judge. The decision whether to accept such a transfer must be made by a TCC judge: see **CPR 30.5 (3)**. Many of these applications are uncontested, and may conveniently be dealt with on paper. Transfers from the TCC to other Divisions of the High Court or other specialist lists are also governed by **CPR 30.5**. In London there are sometimes transfers between the Chancery Division, the Commercial Court and the TCC, in order to ensure that cases are dealt with by the most appropriate judge. Outside London there are quite often transfers between the TCC and the mercantile and chancery lists. It should be noted that transfers from the Chancery Division may become subject to a requirement for permission from the Chancellor.

3.6.2 A TCC claim may be transferred from the High Court to a County Court or a County Court hearing centre, and from any County Court or County Court hearing centre to the High Court, if the criteria stated in **CPR 30.3** are satisfied. In ordinary circumstances, proceedings will be transferred from the TCC in the High Court to the TCC in an appropriate County Court if the amount of the claim does not exceed £250,000.

3.6.3 Where no TCC judge is available to deal with a TCC claim which has been issued in a district registry or one of the county courts noted above, the claim may be transferred to another district registry or county court or to the High Court TCC in London (depending upon which court is appropriate).

3.6.4 On an application to transfer the case to the TCC from another court or Division of the High Court, there are a number of relevant considerations:

(a) Is the claim broadly one of the types of claim identified in paragraph 2.1 of the Part 60 Practice Direction?

(b) Is the financial value of the claim and/or its complexity such that, in accordance with the overriding objective, the case should be transferred into the TCC?

(c) What effect would transfer have on the likely costs, the speed with which the matter can be resolved, and any other broader questions of convenience for the parties?

3.6.5 On an application to transfer into the TCC, when considering the relative appropriateness of different courts or divisions, the judge will ascertain where and in what areas of judicial expertise and experience the bulk or preponderance of the issues may lie. If there was little significant difference between the appropriateness of the two venues, and the claimant, having started in one court or division, was anxious to remain there, then the application to transfer in by another party is likely to be unsuccessful.

3.6.6 Where a TCC Claim is proceeding in a District Registry and it becomes apparent that the case would merit case management or trial before a High Court judge, the matter should be raised with the TCC judge at the District Registry who will consult the Judge in Charge: see paragraph 3.7.3 below. If the case does merit the involvement of a High Court judge it is not necessary for the case to be transferred to London but rather a High Court judge can in appropriate cases sit outside London to deal with the case in the District Registry.

3.7 Assignment

3.7.1 Where a claim has been issued at or transferred to the TCC in London, the Judge in Charge of the TCC ("the Judge in Charge") shall assign it to a particular TCC judge.

3.7.2 In general the assigned TCC judge who case manages a case will also try that case. Although this continuity of judge is regarded as important, it is sometimes necessary for there to be a change of assigned judge to case manage or try a case because all High Court Judges in the Queen's Bench Division have other judicial duties.

3.7.3 (a) When a TCC case has been assigned to a named High Court judge, all communications about case management should be made to the assigned High Court judge's clerk with email communications copied to the TCC Registry at tcc@hmcourts-service.gsi.gov.uk.

(b) All communications in respect of the issue of claims or applications and all communications about fees, however, should be sent to the TCC Registry.

(c) All statements of case and applications should be marked with the name of the assigned judge.

3.7.4 There are currently full time TCC judges at Birmingham, Manchester and Leeds. There are principal TCC judges at other court centres outside London. TCC cases at these court centres are assigned to judges either (a) by direction of the full time or principal TCC judge or (b) by operation of a rota. It will not generally be appropriate for the Judge in Charge (who is based in London) to consider TCC cases which are commenced in, or transferred to, court centres outside London. Nevertheless, if any TCC case brought in a court centre outside London appears to require management and trial by a High Court judge, then the full time or principal TCC judge at that court centre should refer the case to the Judge in Charge for a decision as to its future management and trial.

3.7.5 When a TCC case has been assigned to a named circuit judge at a court centre other than in London, all communications to the court about the case (save for communications in respect of fees) shall be made to that judge's clerk. All communications in respect of fees should be sent to the relevant registry. All statements of case and applications should be marked with the name of the assigned judge.

3.8 Electronic Working in London

3.8.1 At the time of writing this guide claims in the TCC and Commercial Court Registry in London cannot be issued electronically.

3.8.2 It is planned that eworking in the TCC will be resumed in the near future when suitable software becomes available and that it will then be extended to courts outside London.

Section 4. Access to the court

4.1 General Approach

4.1.1 There may be a number of stages during the case management phase when the parties will make applications to the court for particular orders: see **Section 6** below. There will also be the need for the court to give or vary directions, so as to enable the case to progress to trial.

4.1.2 The court is acutely aware of the costs that may be incurred when both parties prepare for an oral hearing in respect of such interlocutory matters and is always prepared to consider alternative, and less expensive, ways in which the parties may seek the court's assistance.

4.1.3 There are certain stages in the case management phase when it will generally be better for the parties to appear before the assigned judge. Those are identified at **Section 4.2** below. But there are other stages, and/or particular applications which a party may wish to make, which could conveniently be dealt with by way of a telephone hearing (**Section 4.3** below) or by way of a paper application (**Section 4.4** below).

4.1.4 Access prior to the issue of proceedings. Under **paragraph 4.1 of the Practice Direction supplementing CPR Part 60** it is provided that a party who intends to issue a TCC claim must make any application before the claim form is issued to a TCC judge. This provision allows a party, for instance, to issue an application for pre-action disclosure.

4.1.5 As a party will have issued a TCC claim in circumstances where **paragraph 6 of the Pre-Action Protocol for Construction and Engineering Disputes** applies (limitation or time bar by complying with the pre-action protocol), this provision does not apply to that situation. The court might however be persuaded to deal with an application concerned with the pre-action protocol process under this provision although it may be necessary to insist on a claim form being issued.

4.1.6 Sometimes parties wish to use the TCC procedures for **Early Neutral Evaluation (see section 7.5)** or the **Court Settlement Process (see section 7.6)** prior to issuing a TCC claim, often as part of the pre-action protocol. The court will seek to accommodate the parties' wishes but again may have to insist on a claim form being issued.

4.2 Hearings in Court

4.2.1 First Case Management Conference. The court will normally require the parties to attend an oral hearing for the purposes of the first Case Management Conference. This is because there may be matters which the judge would wish to raise with the parties arising out of the answers to the case management information sheets and the parties' proposed directions: see section 5.4 below. Even in circumstances where the directions and the case management timetable may be capable of being agreed by the parties and the court, the assigned judge may still wish to consider a range of case management matters face-to-face with the parties, including cost budgeting and ADR. See **paragraphs 7.2.3**, **7.3.2**, **8.1.3**, **11.1-11.2.4**, **13.3**, **13.4**, **15.4.2** and **16.3.2** below. For these reasons **CPR 29.4** may be applied more sparingly in the TCC.

4.2.2 Whilst the previous paragraph sets out the ideal position, it is recognised that in low value cases the benefits of personal attendance might be outweighed by the costs involved. This is particularly so at court centres outside London, where the parties may have to travel substantial distances to court. Ultimately, the question whether personal attendance

should be dispensed with at any particular case management conference must be decided by the judge, after considering any representations made and the circumstances of that particular case.

4.2.3 Pre-trial Review. It will normally be helpful for the parties to attend before the judge on a Pre-trial Review ("PTR"). It is always preferable for Counsel or other advocates who will be appearing at the trial to attend the PTR. Again, even if the parties can agree beforehand any outstanding directions and the detailed requirements for the management of the trial, it is still of assistance for the judge to raise matters of detailed trial management with the parties at an oral hearing. In appropriate cases, e.g. where the amount in issue is disproportionate to the costs of a full trial, the judge may wish to consider with the parties whether there are other ways in which the dispute might be resolved. See **paragraphs 14.1 to 14.5** below for detailed provisions relating to the PTR.

4.2.4 Interim Applications. Whether or not other interim applications require an oral hearing will depend on the nature and effect of the application being made. Disputed applications for interim payments, summary judgment and security for costs will almost always require an oral hearing. Likewise, the resolution of a contested application to enforce an adjudicator's decision will normally be heard orally. At the other end of the scale, applications for extensions of time for the service of pleadings or to comply with other orders of the court can almost always be dealt with by way of a telephone hearing or in writing and, indeed, orders sometimes expressly provide for this.

4.3 Telephone Hearings

4.3.1 Depending on the nature of the application and the extent of any dispute between the parties, the Court is content to deal with many case management matters and other interlocutory applications by way of a telephone conference.

4.3.2 Whilst it is not possible to lay down mandatory rules as to what applications should be dealt with in this way (rather than by way of an oral hearing in court), it may be helpful to identify certain situations which commonly arise and which can conveniently be dealt with by way of a telephone conference.

(a) If the location of the court is inconvenient for one or more of the parties then the CMC and the PTR could, in the alternative to the procedure set out in **Section 4.2** above, take place by way of a telephone conference. The judge's permission for such a procedure must be sought in advance.

(b) If the parties are broadly agreed on the orders to be made by the court, but they are in dispute in respect of one or two particular matters, then a telephone hearing is a convenient way in which those outstanding matters can be dealt with by the parties and the assigned judge.

(c) Similarly, specific arguments about costs, once a substantive application has been disposed of, or arguments consequential on a particular judgment or order having been handed down, may also conveniently be dealt with by way of telephone hearing.

(d) Other applications which, depending on their size and importance, may conveniently be dealt with by way of a telephone hearing include limited applications in respect of disclosure and specific applications as to the scope and content of factual or expert evidence exchanged by the parties.

4.3.3 Telephone hearings are not generally suitable for matters which are likely to last for more than an hour (although the judge may be prepared, in an appropriate case, to list a longer application for a telephone hearing) or which require extensive reference to documents.

4.3.4 Practical matters. Telephone hearings can be listed at any time between 8.30 a.m. and 5.30 pm, subject to the convenience of the parties and the availability of the judge. It is not essential that all parties are on the telephone when those that are not find it more convenient to come to court. Any party, who wishes to have an application dealt with by telephone, should make such request by letter or e-mail to the judge's clerk, sending copies to all other parties. Except in cases of urgency, the judge will allow a period of two working days for the other parties to comment upon that request before deciding whether to deal with the application by telephone.

4.3.5 If permission is given for a telephone hearing, the court will normally indicate which party is to make all the necessary arrangements. In most cases, it will be the applicant. The procedure to be followed in setting up and holding a telephone hearing is generally that set out in **section 6 of the Practice Direction 23A supplementing CPR Part 23** and the TCC in London and at Regional Centres are "telephone conference enabled courts" for the purposes of that section. The party making arrangements for the telephone hearing must ensure that all parties and the judge have a bundle for that hearing with identical pagination.

It is vital that the judge has all the necessary papers, in good time before the telephone conference, in order that it can be conducted efficiently and effectively. Save in very simple cases involving no or only minimal amounts of documentation, it is usually essential that any bundle provided be paginated for a telephone hearing, failing which the judge may cancel it.

4.4 Paper Applications

4.4.1 **CPR 23.8 and paragraphs 11.1-11.2 of Practice Direction 23A** enable certain applications to be dealt with in writing. Parties in a TCC case are encouraged to deal with applications in writing, whenever practicable. Applications for abridgments of time, extensions of time and to reduce the trial time estimate can generally be dealt with in writing, as well as all other variations to existing directions which are wholly or largely agreed. Disputes over particular aspects of disclosure and evidence may also be capable of being resolved in this way.

4.4.2 If a party wishes to make an application to the court, it should ask itself the question: "Can this application be conveniently dealt with in writing?" If it can, then the party should issue the application and make its (short) written submissions both in support of its application and why it should be dealt with on paper. The application, any supporting evidence and the written submissions should be provided to all parties, as well as the court. These must include a draft of the precise order sought. There are some paper applications which can be made without notice to the other party or parties: see **CPR 23.4(2), 23.9 and 23.10**.

4.4.3 The party against whom the application is made, and any other interested party, should respond within **3 days** dealing both with the substantive application and the request for it to be dealt with in writing.

4.4.4 The court can then decide whether or not to deal with the application in writing. If the parties are agreed that the court should deal with it in writing, it will be rare for the court to take a different view. If the parties disagree as to whether or not the application should be dealt with in writing, the court can decide that issue and, if it decides to deal with it in

writing can go on to resolve the substantive point on the basis of the parties' written submissions.

4.4.5 Further guidance in respect of paper applications is set out in **Section 6.7** below.

4.4.6 It is important for the parties to ensure that all documents provided to the court are also provided to all the other parties, so as to ensure that both the court and the parties are working on the basis of the same documentation. The pagination of any bundle which is provided to the court and the parties must be identical.

4.5 E-mail Communications

4.5.1 Electronic Working under the provisions of CPR Part 5, Practice Direction 5C is not currently available.

4.5.2 The judges' clerks all have e-mail addresses identified in **Appendix D**. They welcome communication from the parties electronically. In addition, by agreement with the judge's clerk, it is also possible to provide documents to the Court electronically. However, it should be noted that HM Court Service imposes a restriction on the size of any e-mail, including its attachments. Larger attachments can be submitted by CD/DVD. Further, the provision of substantial documents electronically is to be used only with the permission of the judge and when time is short. The Court Service is not to be used as an outsource for printing.

4.5.3 Depending on the particular circumstances of an individual trial, the assigned judge may ask for an e-mail contact address for each of the parties and may send e-mail communications to that address. In addition, the judge may provide a direct contact e-mail address so that the parties can communicate directly with him out of court hours. In such circumstances, the judge and the parties should agree the times at which the respective e-mail addresses can be used.

4.5.4 Every e-mail communication to and from the court or a judge must be copied simultaneously to all the other parties. The subject line of every e-mail should include the name of the case (abbreviated if necessary) and the claim number.

4.6 Video Conferencing

4.6.1 In appropriate cases, particularly where there are important matters in dispute and the parties' representatives are a long distance from one another and/or the court, the hearing may be conducted by way of a Video Conference ("VC"). Prior arrangements will be necessary for any such hearing.

4.6.2 In London, a VC can be arranged through the VC facilities in the Rolls Building, but there is significant demand for these, so parties must notify the court well ahead In some cases, it may be possible to use Skype or other commercially viable software as a suitable alternative to VC facilities (but the parties must bear in mind that such software usually only provides an insecure link, and it will be essential in any event to ensure that all of the parties and the judge in question have access to the software and a relevant account).

4.6.3 Outside London, a VC can be arranged at the following TCC courts with the requisite facilities: Birmingham, Bristol, Cardiff, Central London, Chester, Exeter, Leeds, Liverpool, Newcastle-upon-Tyne, Nottingham, Manchester and Winchester.

4.7 Contacting the court out of hours

4.7.1 Occasionally it is necessary to contact a TCC judge out of hours. For example, it may be necessary to apply for an injunction to prevent the commencement of building works which will damage adjoining property; or for an order to preserve evidence. A case may have settled and it may be necessary to inform the judge, before he/she spends an evening or a weekend reading the papers.

4.7.2 At the Rolls Building. RCJ Security has been provided with the telephone numbers and other contact information of all the clerks to the TCC judges based at the Rolls Building and and their clerks and of the court manager. If contact is required with a judge out of hours, the initial approach should be to RCJ Security on 020-7947-6000. Security will then contact the judge's clerk and/or the court manager and pass on the message or other information. If direct contact with the judge or court manager is sought, RCJ Security must be provided with an appropriate contact number. This number will then be passed to the judge's clerk and/or the court manager, who will seek directions from the judge whether it is appropriate for the judge to speak directly with the contacting party.

4.7.3 At other court centres. At the Central London Civil Justice Centre and at all court centres outside London there is a court officer who deals with out of hours applications.

4.8 Lodging documents

4.8.1 In general documents should be lodged in hard copy only and not sent by email or fax. This causes unnecessary duplication as well as additional work for hard-pressed court staff. Fax communication with the court, in particular, is discouraged. If the court or judge's clerk agrees, some documents may be sent by email but otherwise only if matters are urgent may documents be sent by either email or fax, with a hard copy sent by way of confirmation and marked as such. In certain cases, the court may ask for documents to be submitted in electronic form by email or otherwise, where that is appropriate. The judge may ask for certain documents to be lodged in a particular form, such as pdf or Microsoft Word or Excel.

Section 5. Costs and Case management and the first CMC

5.1 General

5.1.1 The general approach of the TCC to costs and case management is to give directions at the outset for the conduct of the case, up to trial, and then throughout the proceedings to serve the overriding objective of dealing with cases justly and at proportionate cost. Since the introduction of costs management the control of costs will be an important factor in how cases are managed from the outset: the parties must read this section in conjunction with **Section 16**, which concerns costs management and cost capping. The judge to whom the case has been assigned has wide case management powers, which will be exercised to ensure that:

- the real issues are identified early on and remain the focus of the ongoing proceedings;
- a realistic timetable is ordered which will allow for the fair and prompt resolution of the action;
- appropriate steps are taken to ensure that there is in place a suitable protocol for conducting e-disclosure (this should have been discussed by the parties at an early stage in the litigation and the parties may wish to use the TeCSA e-disclosure protocol (which can be found on its website).
- in document heavy cases the parties will be invited to consider the use of an electronic document management system; it is important that this is considered at an early stage because it will be closely linked to e-disclosure;
- costs are properly controlled and reflect the value of the issues to the parties and their respective financial positions. In cases commenced before 22 April 2014 and below the value set by the relevant Practice Direction (£2 million), this will be done by way of Costs Management Orders. For cases commenced after 22 April 2014, this limit is increased to £10 million by **CPR 3.12** (as amended). The attention of the parties is drawn to the amended rule.

5.1.2 In order to assist the judge in the exercise of his costs and case management functions, the parties will be expected to co-operate with one another at all times. See **CPR 1.3**. Costs sanctions may be applied, if the judge concludes that one party is not reasonably co-operating with the other parties.

5.1.3 A hearing at which the judge gives general procedural directions is a case management conference ("CMC"). CMCs are relatively informal and business-like occasions. Representatives may sit when addressing the judge.

5.1.4 The following procedures apply in order to facilitate effective case management:

- Upon commencement of a case in the TCC, it is allocated automatically to the multi-track. The provisions of **CPR Part 29** apply to all TCC cases (but see paragraph 4.2.1 above).

- The TCC encourages a structured exchange of proposals and submissions for CMCs in advance of the hearing, including costs budgets, so as to enable the parties to respond on an informed basis to proposals made.

- The judges of the TCC operate pro-active case management. In order to avoid the parties being taken by surprise by any judicial initiative, the judge will consider giving prior notification of specific or unusual case management proposals to be raised at a case management conference.

5.1.5 The TCC's aim is to ensure that where possible the trial of each case takes place before the judge who has managed the case since the first CMC. Whilst continuity of judge is not always possible, because of the need to double- or triple-book judges and the need for High Court Judges to be deployed on other duties, or because cases can sometimes overrun their estimated length through no fault of the parties, this remains an aspiration of case management within the TCC.

5.1.6 To ensure that costs are properly controlled the judge will consider at all stages of case management whether there are ways in which costs can be reduced. If the judge considers that any particular aspect has unnecessarily increased costs, such as prolix pleadings or witness statements, the judge may make a costs order disallowing costs or ordering costs to be paid, either on the basis of a summary assessment, or by giving a direction to the costs judge as to what costs should be disallowed or paid on a detailed assessment: see also **paragraph 5.5.5** below.

5.2 The Fixing of the First CMC

5.2.1 Where a claim has been started in the TCC, or where it has been transferred into the TCC, **paragraph 8.1 of the Part 60 Practice Direction** requires the court within **14 days** of the earliest of

- the filing by the defendant of an acknowledgement of service, or

- the filing by the defendant of the defence, or

- the date of the order transferring the case to the TCC

to fix the first CMC.

If some defendants but not others are served with proceedings, the claimant's solicitors should so inform the court and liaise about the fixing of the first CMC. See also **paragraph 4.2.1** above.

5.2.2 The first CMC will usually be fixed sufficiently far ahead to allow the parties time to discuss both e-disclosure and costs budgets. If any of the parties wishes to delay the first CMC for any reason, it can write to the judge's clerk explaining why a delayed CMC is appropriate (for example, in cases where the CMC would not otherwise take place until after service of the defence or the defences, it may be appropriate to postpone the first CMC until these are available). If such a request is agreed by the other party or parties, it is likely that the judge will grant the request.

5.3 The Case Management Information Sheet and Other Documents

It should be noted that for proceedings in the TCC, being a specialist court, the standard directions that can be found on line are not always appropriate.

5.3.1 All parties are expected to complete a detailed response to the case management information sheet sent out by the Registry when the case is commenced/transferred. A copy of a blank case management information sheet is attached as **Appendix A**. It is important that all parts of the form are completed, particularly those sections (eg. concerned with estimated costs) that enable the judge to give directions in accordance with the overriding objective.

5.3.2 The Registry will also send out a blank standard directions form to each party. A copy is attached at **Appendix B**. This provides an example of the usual directions made on the first CMC. The parties may either fill it in, indicating the directions and timetable sought, or, preferably, provide draft directions in a similar format. The parties should return both the questionnaire and the proposed directions to the court, so that the areas (if any) of potential debate at the CMC can be identified. The parties are encouraged to exchange proposals for directions and the timetable sought, with a view to agreeing the same before the CMC for consideration by the court. The parties should note that **CPR 31.5** requires the parties no less than 14 days before the first CMC to file and serve a disclosure report and no less than 7 days before to discuss and seek to agree proposals for disclosure and file costs budgets. Failure to do the last may result in a party's recoverable costs being limited to the court fee.

5.3.3 If the case is large or complex, it is helpful for the advocates to prepare a Note to be provided to the judge the day before the CMC which can address the issues in the case, the suggested directions, and the principal areas of dispute between the parties. If such a Note is provided, it is unnecessary for the claimant also to prepare a Case Summary as well.

5.3.4 In smaller cases, a Case Summary for the CMC, explaining briefly the likely issues, can be helpful. Such Case Summaries should be non-contentious and should (if this is possible without incurring disproportionate cost) be agreed /between the parties in advance of the hearing.

5.4 Checklist of Matters likely to be considered at the first CMC

5.4.1 The following checklist identifies the matters which the judge is likely to want to consider at the first CMC, although it is not exhaustive:

- The need for, and content of, any further statements of case to be served. This is dealt with in **Section 5.5** below.
- The outcome of the Protocol process, and the possible further need for ADR. ADR is dealt with in **Section 7** below.
- The desirability of dealing with particular disputes by way of a Preliminary Issue hearing. This is dealt with in **Section 8** below.
- The court may require a list of issues to be provided and updated during the course of the procedural steps, but this is often left to the pre-trial review.
- Whether the trial should be in stages (eg. stage 1 liability and causation, stage 2 quantum). In very heavy cases this may be necessary in order to make the trial manageable. In more modest cases, where the quantum evidence will be extensive, a staged trial may be in the interest of all parties.
- The appropriate orders in respect of the disclosure of documents and for a protocol to manage e-disclosure. This is dealt with in **Section 11** below.

- The appropriate orders as to the exchange of written witness statements. This is dealt with in **Section 12** below. It should be noted that, although it is normal for evidence-in-chief to be given by way of the written statements in the TCC, the judge may direct that evidence about particular disputes (such as what was said at an important meeting) should be given orally without reference to such statements.

- Whether it is appropriate for the parties to rely on expert evidence and, if so, what disciplines of experts should give evidence, on what issues, and whether any issues can be conveniently dealt with by single joint experts. This may be coupled with an order relating to the carrying out of inspections, the obtaining of samples, the conducting of experiments, or the performance of calculations. Considerations relating to expert evidence are dealt with in **Section 13** below. The parties must be aware that, in accordance with the overriding objective, the judge will only give the parties permission to rely on expert evidence if it is both necessary and appropriate, and, even then, will wish to ensure that the scope of any such evidence is limited as far as possible.

- Review of the parties' costs budgets and the making of a Costs Management Order (subject to any financial threshold relevant to the case). In certain cases there is the possibility of making a costs capping order. See **section 16.3** below.

- Whether there will be any additional claims under Part 20. See section 5.5.4 below.

- The appropriate timetable for the taking of the various interim steps noted above, and the fixing of dates for both the PTR and the trial itself (subject to **paragraph 5.4.2** below). The parties will therefore need to provide the judge with an estimate for the length of the trial, assuming all issues remain in dispute. Unless there is good reason not to, the trial date will generally be fixed at the first CMC (although this may be more difficult at court centres with only one TCC judge). Therefore, to the extent that there are any relevant concerns as to availability of either witnesses or legal representatives, they need to be brought to the attention of the court on that occasion. The length of time fixed for the trial will depend on the parties' estimates, and also the judge's own view. If the parties' estimate of trial length subsequently changes, they should inform the clerk of the assigned judge immediately.

5.4.2 The fixing of the trial date at the CMC is usually as a provisional fixture. Therefore no trial fee is payable at this stage. The court should at the same time specify a date upon which the fixture will cease to be "provisional" and, therefore, the trial fee will become payable. This should ordinarily be two months before the trial date. It should be noted that:

- if the trial fee is not paid within 14 days of the due date, then the whole claim will be struck out: see **CPR 3.7 (1) (a) and (4)**;

- if the court is notified at least 14 days before the trial date that the case is settled or discontinued, then the trial fee, which has been paid, shall be refunded: see **fee 2.2 in Schedule 1 to the Civil Proceedings Fees Order 2004**.

For all purposes other than payment of the trial fee, the provisional date fixed at the CMC shall be regarded as a firm date.

5.4.3 Essentially, the judge's aim at the first CMC is to set down a detailed timetable which, in the majority of cases, will ensure that the parties need not return to court until the PTR.

5.5 Further statements of case

5.5.1 Defence. If no defence has been served prior to the first CMC, then (except in cases where judgment in default is appropriate) the court will usually make an order for service of the defence within a specified period. The defendant must plead its positive case. Bare denials and non-admissions are, save in exceptional circumstances, unacceptable.

5.5.2 Further Information. If the defendant wants to request further information of the Particulars of Claim, the request should, if possible, be formulated prior to the first CMC, so that it can be considered on that occasion. All requests for further information should be kept within reasonable limits, and concentrate on the important parts of the case.

5.5.3 Reply. A reply to the defence is not always necessary. However, where the defendant has raised a positive defence on a particular issue, it may be appropriate for the claimant to set out in a reply how it answers such a defence. If the defendant makes a counterclaim, the claimant's defence to counterclaim and its reply (if any) should be in the same document.

5.5.4 Additional or Part 20 Claims. The defendant should, at the first CMC, indicate (so far as possible) any additional (Part 20) claims that it is proposing to make, whether against the claimant or any other party. Additional (Part 20) claims are required to be pleaded in the same detail as the original claim. They are a very common feature of TCC cases, because the widespread use of sub-contractors in the UK construction industry often makes it necessary to pass claims down a contractual chain. Defendants are encouraged to start any necessary Part 20 proceedings to join additional parties as soon as possible. It is undesirable for applications to join additional defendants to be made late in the proceedings.

5.5.5 Costs. If at any stage the judge considers that the way in which the case has been pleaded, particularly through the inclusion of extensive irrelevant material or obscurity, is likely to lead or has led to inefficiency in the conduct of the proceedings or to unnecessary time or costs being spent, the judge may order that the party should re-plead the whole or part of the case and may make a costs order disallowing costs or ordering costs to be paid, either on the basis of a summary assessment or by giving a direction to the costs judge as to what costs should be disallowed or paid on a detailed assessment: see also **paragraph 5.1.6** above and **paragraph 12.1.4** below.

5.6 Scott Schedules

5.6.1 It can sometimes be appropriate for elements of the claim, or any additional (Part 20) claim, to be set out by way of a Scott Schedule (ie. by a table, often in landscape format, in which the Claimant's case on liability and quantum is set out item by item in the first few columns and the Defendant's response is set out in the adjacent columns). For example, claims involving a final account or numerous alleged defects or items of disrepair, may be best formulated in this way, which then allows for a detailed response from the defendant. Sometimes, even where all the damage has been caused by one event, such as a fire, it can be helpful for the individual items of loss and damage to be set out in a Scott Schedule. The secret of an effective Scott Schedule lies in the information that is to be provided and its brevity: excessive repetition is to be avoided. This is defined by the column headings. The judge may give directions for the relevant column headings for any Schedule ordered by the court. It is important that the defendant's responses to any such Schedule are as detailed as possible. Each party's entries on a Scott Schedule should be supported by a statement of truth.

5.6.2 Nevertheless, before any order is made or agreement is reached for the preparation of a Scott Schedule, both the parties and the court should consider whether this course (a) will genuinely lead to a saving of cost and time or (b) will lead to a wastage of costs and effort (because the Scott Schedule will simply be duplicating earlier schedules, pleadings or expert reports). A Scott Schedule should only be ordered by the court, or agreed by the parties, in those cases where it is appropriate and proportionate.

5.6.3 When a Scott Schedule is ordered by the court or agreed by the parties, the format must always be specified. The parties must co-operate in the physical task of preparation. Electronic transfer between the parties of their respective entries in the columns will enable a clear and user-friendly Scott Schedule to be prepared, for the benefit of all involved in the trial.

5.7 Agreement Between the Parties

5.7.1 Many, perhaps most, of the required directions at the first CMC may be agreed by the parties. If so, the judge will endeavour to make orders in the terms which have been agreed pursuant to **CPR 29.4**, unless he considers that the agreed terms fail to take into account important features of the case as a whole, or the principles of the CPR. The agreed terms will always, at the very least, form the starting-point of the judge's consideration of the orders to be made at the CMC. If the agreed terms are submitted to the judge 3 days in advance of the hearing date, it may be possible to avoid the need for a hearing altogether, although it is normally necessary for the Court to consider the case with the parties (either at an oral hearing or by way of a telephone conference) in any event.

5.7.2 The approach outlined in **paragraph 5.7.1** above is equally applicable to all other occasions when the parties come before the court with a draft order that is wholly or partly agreed.

5.8 Drawing Up of Orders

5.8.1 Unless the court itself draws up the order, it may direct one party (usually the claimant or applicant) to do so within a specified time. If no such direction is given, then the advocate appearing for the Claimant (or applicant) must prepare and seek to agree a draft order and submit it for the judge's approval within 7 days of the conclusion of the hearing. This is to ensure that the draft is presented to the court whilst the case is still fresh in the judge's mind and he can satisfy himself that the draft is accurate to carry his order into effect. The party charged with drawing up the order must draw up the order and lodge it with the court for approval. Once approved, the order will be stamped by the court and returned to that party for service upon all other parties. The order should refer to the date on which the order was made by stating "Date order made: [date]". Orders should be referred to by this date, rather than later dates which reflect the process of submission of the draft order, approval by the judge and sealing by the court.

5.8.2 In exceptional cases where the parties cannot agree a minute of order (whether within the specified time or at all), then the party with carriage of the order should submit the order, so far as it has been agreed, to the judge together with a summary of those elements of those parts of the order which are not agreed, and setting out any rival wording proposed by the other side, within the specified time. That communication must be in an agreed form as far as possible stating neutrally the other parties' objections, and it must be copied to the other parties when it is submitted to the court. The court heavily discourages extended satellite correspondence over the precise form of order. If, exceptionally, the judge wishes to hear further submissions on the draft form of order before he approves it he will ask for those submissions. Unilateral further submissions to the court as to the

minute of order are only to be made in exceptional circumstances (eg. where a party considers that there is a real risk that the court is being misled or its position is being seriously misrepresented). Parties who unreasonably refuse to agree a minute of order, or who take up court time arguing over the precise form of minute can expect to have costs orders made against them.

5.8.3 It is often the case that the parties, after the hearing, decide that it is sensible to include other directions in the draft order by consent, or to vary the timetable to accommodate such matters. Any such agreement must be clearly indicated in both the draft order (eg. by adding in the matters under a separate heading stating that such matters are being made "By Consent") and in an explanatory note for the judge submitted with the proposed order.

5.9 Further CMC

5.9.1 In an appropriate case, the judge will fix a review CMC, to take place part way through the timetable that has been set down, in order to allow the court to review progress, and to allow the parties to raise any matters arising out of the steps that have been taken up to that point. However, this will not be ordered automatically and will be confined to cases of significant complexity.

5.9.2 Each party will be required to give notice in writing to the other parties and the court of any directions which it will be seeking at the review CMC, two days in advance of the hearing.

5.10 The Permanent Case Management Bundle

5.10.1 In conjunction with the judge's clerk, the claimant's solicitor is responsible for ensuring that, for the first CMC and at all times thereafter, there is a permanent bundle of copy documents available to the judge, which contains:

- any relevant documents resulting from the Pre-Action Protocol;
- the claim form and all statements of case;
- all orders;
- all completed case management information sheets;
- all costs budgets;
- any proposed protocol for e-disclosure (if agreed);
- Disclosure Reports/Statements as required by **CPR 31.5.3**;
- Any case summaries (see **sections 5.3.3 and 5.3.4** above).

5.10.2 The permanent case management bundle can then be supplemented by the specific documents relevant to any particular application that may be made. Whether these supplementary documents should (a) become a permanent addition to the case management bundle or (b) be set on one side, will depend upon their nature. The permanent case management bundle may remain at court and be marked up by the judge; alternatively, the judge may direct that the permanent case management bundle be maintained at the offices of the claimant's solicitors and provided to the court when required.

Section 6. Applications after the first CMC

6.1 Relevant parts of the CPR

6.1.1 The basic rules relating to all applications that any party may wish to make are set out in **CPR Part 23** and its accompanying Practice Directions.

6.1.2 **Part 7** of the **Practice Direction** accompanying **CPR Part 60** is also of particular relevance.

6.2 Application Notice

6.2.1 As a general rule, any party to proceedings in the TCC wishing to make an application of any sort must file an application notice (**CPR 23.3**) and serve that application notice on all relevant parties as soon as practicable after it has been filed (**CPR 23.4**). Application notices should be served by the parties, unless (as happens in some court centres outside London) service is undertaken by the court. Where the circumstances may justify an application being made without notice, see **section 6.10** below.

6.2.2 The application notice must set out in clear terms what order is sought and, more briefly, the reasons for seeking that order: see **CPR 23.6.**

6.2.3 The application notice must be served at least **3 days** before the hearing at which the Court deals with the application: **CPR 23.7 (1).** Such a short notice period is only appropriate for the most straight-forward type of application.

6.2.4 Most applications, in particular applications for summary judgment under **CPR Part 24** or to strike out a statement of case under **CPR 3.4,** will necessitate a much longer notice period than **3 days**. In such cases, it is imperative that the applicant obtain a suitable date and time for the hearing of the application from the assigned judge's clerk before the application notice is issued. The applicant must then serve his application notice and evidence in support sufficiently far ahead of the date fixed for the hearing of the application for there to be time to enable the respondent to serve evidence in response. Save in exceptional circumstances, there should be a minimum period of **10 working days** between the service of the notice (and supporting evidence) and the hearing date. If any party considers that there is insufficient time before the hearing of the application or if the time estimate for the application itself is too short, that party must notify the Judge's clerk and the hearing may then be refixed by agreement.

6.2.5 When considering the application notice, the judge may give directions in writing as to the dates for the provision or exchange of evidence and any written submissions or skeleton arguments for the hearing.

6.2.6 In cases of great urgency applications may be made without formal notice to the other party, but that party should (save in exceptional cases) be informed of the hearing sufficiently in advance to enable him to instruct a representative to attend.

6.3 Evidence in Support

6.3.1 The application notice when it is served must be accompanied by all evidence in support: **CPR 23.7 (2)**.

6.3.2 Unless the CPR expressly requires otherwise, evidence will be given by way of witness statements. Such statements must be verified by a statement of truth signed by the maker of the statement: **CPR 22.1.**

6.4 Evidence in opposition and Evidence in reply

6.4.1 Likewise, any evidence in opposition to the application should, unless the rules expressly provide otherwise, be given by way of witness statement verified by a statement of truth.

6.4.2 It is important to ensure that the evidence in opposition to the application is served in good time before the hearing so as to enable:

- the court to read and note up the evidence;
- the applicant to put in any further evidence in reply that may be considered necessary.

Such evidence should be served at least **5 working days** before the hearing.

6.4.3 Any evidence in reply should be served not less than **3 working days** before the hearing. Again, if there are disputes as to the time taken or to be taken for the preparation of evidence prior to a hearing, or any other matters in respect of a suitable timetable for that hearing, the court will consider the written positions of both parties and decide such disputes on paper. It will not normally be necessary for either a separate application to be issued or a hearing to be held for such a purpose.

6.4.4 If the hearing of an application has to be adjourned because of delays by one or other of the parties in serving evidence, the court is likely to order that party to pay the costs straight away, and to make a summary assessment of those costs.

6.5 Application Bundle

6.5.1 The bundle for the hearing of anything other than the most simple and straightforward application should consist of:

- the permanent case management bundle (see **Section 5.8** above);
- the witness statements provided in support of the application, together with any exhibits;
- the witness statements provided in opposition to the application together with exhibits;
- any witness statements in reply, together with exhibits.

6.5.2 The permanent case management bundle will either be with the court or with the claimant's solicitors, depending on the order made at the first CMC: see **paragraph 5.9** above. If it is with the claimant's solicitors, it should be provided to the court not less than **2 working days** before the hearing. In any event, a paginated bundle (see **paragraph 6.5.4** below) containing any material specific to the application should also be provided to the court not less than **2 working days** before the hearing, unless otherwise directed by

the judge. A failure to comply with this deadline may result in the adjournment of the hearing, and the costs thrown away being paid by the defaulting party.

6.5.3 In all but the simplest applications, the court will expect the parties to provide skeleton arguments and copies of any authorities to be relied on. The form and content of the skeleton argument is principally a matter for the author, although the judge will expect it to identify the issues that arise on the application, the important parts of the evidence relied on, and the applicable legal principles. For detailed guidance as to the form, content and length of skeleton arguments, please see paragraph 7.11.12 of the Queen's Bench Guide; Appendix 3 of the Chancery Guide; and Appendix 9 of the Commercial Court Guide.

6.5.4 For an application that is estimated to last ½ day or less, the skeleton should be provided no later than **1 pm on the last working day before the hearing**. It should be accompanied by photocopies of the authorities relied on (preferably in the form of a common agreed bundle). An electronic copy of each skeleton argument (in Microsoft Word compatible format) should be sent to the clerk of the judge hearing the application: if a party is reluctant for other parties to be provided with its skeleton argument in Word, it may serve it in pdf (or other readable) form provided that it certifies that the version sent to the judge is identical in content to that served on the other party(ies).

6.5.5 For an application that is estimated to last more than ½ day, the skeleton should be provided no later than **4 pm one clear working day before the hearing**. It should be accompanied by photocopies of the authorities relied on (again, preferably in the form of a common agreed bundle).

6.5.6 The time limits at **paragraphs 6.5.4** and **6.5.5** above will be regarded as the latest times by which such skeletons should be provided to the court. Save in exceptional circumstances, no extension to these periods will be permitted.

6.5.7 Pagination. It is generally necessary for there to be a paginated bundle for the hearing. Where the parties have produced skeleton arguments, these should be cross-referred to the bundle page numbers. Where possible bundles should be paginated right through, but this may be dispensed with where a document within a discrete section of the bundle has its own internal pagination.

6.6 Hearings

6.6.1 Arbitration applications may be heard in private: see **CPR 62.10**. All other applications will be heard in public in accordance with **CPR 39.2**, save where otherwise ordered.

6.6.2 Provided that the application bundle and the skeletons have been lodged in accordance with the time limits set out above, the parties can assume that the court will have a good understanding of the points in issue. However, the court will expect to be taken to particular documents relied on by the parties and will also expect to be addressed on any important legal principles that arise.

6.6.3 It is important that the parties ensure that every application is dealt with in the estimated time period. Since many applications are dealt with on Fridays, it causes major disruption if application hearings are not disposed of within the estimated period. If the parties take too long in making their submissions, the application may be adjourned, part heard, and the Court may impose appropriate costs sanctions.

6.6.4 At the conclusion of the hearing, unless the court itself draws up the order, it will direct the applicant to do so within a specified period.

6.7 Paper Applications

6.7.1 As noted in **Section 4** above some applications may be suitable for determination on paper under the procedure set out in **paragraph 4.4** above.

6.7.2 In addition, certain simple applications (particularly in lower value cases) arising out of the management of the proceedings may be capable of being dealt with by correspondence without the need for any formal application or order of the court. This is particularly true of applications to vary procedural orders, which variations are wholly or largely agreed, or proposals to vary the estimated length of the trial. In such cases, the applicant should write to the other parties indicating the nature of its application and to seek their agreement to it. If, however, it emerges that there is an issue to be resolved by the court, then a formal application must be issued and dealt with as a paper application or, possibly, at an oral hearing.

6.7.3 It is essential that any communication by a party to the judge or the court is copied to all other parties, subject to **section 6.10** below (applications without notice).

6.8 Consent Orders

6.8.1 Consent Orders may be submitted to the Court in draft for approval without the need for attendance.

6.8.2 Two copies of the draft order should be lodged, at least one of which should be signed. The copies should be undated as the Court will set out the date the order is made: see **paragraph 5.8.1** above.

6.8.3 As noted elsewhere, whilst the parties can agree between themselves the orders to be made either at the Case Management Conference or the Pre-Trial Review, it is normally necessary for the Court to consider the case with the parties (either at an oral hearing or by way of a telephone conference) on those occasions in any event.

6.8.4 Generally, when giving directions, the court will endeavour to identify the date by which the relevant step must be taken, and will not simply provide a period during which that task should be performed. The parties should therefore ensure that any proposed consent order also identifies particular dates, rather than periods, by which the relevant steps must be taken.

6.9 Costs

6.9.1 Costs are dealt with generally at **Section 16** below.

6.9.2 The costs of any application which took a day or less to be heard and disposed of will be dealt with summarily, unless there is a good reason for the court not to exercise its powers as to the summary assessment of costs.

6.9.3 Accordingly, it is necessary for parties to provide to the court and to one another their draft statements of costs no later than **24 hours** before the start of the application hearing. Any costs which are incurred after these draft statements have been prepared, but which have not been allowed for (e.g. because the hearing has exceeded its anticipated length), can be mentioned at the hearing.

6.10 Applications without notice

6.10.1 All applications should be made on notice, even if that notice has to be short, unless:

- any rule or Practice Direction provides that the application may be made without notice; or
- there are good reasons for making the application without notice, for example, because notice would might defeat the object of the application.

6.10.2 Where an application without notice does not involve giving undertakings to the court, it will normally be made and dealt with on paper, as, for example, applications for permission to serve the claim form out of the jurisdiction, and applications for an extension of time in which to serve a claim form.

6.10.3 Any application for an interim injunction or similar remedy will require an oral hearing.

6.10.4 A party wishing to make an application without notice which requires an oral hearing before a judge should contact the TCC Registry at the earliest opportunity.

6.10.5 If a party wishes to make an application without notice at a time when no TCC judge is available, he should apply to the Queen's Bench Judge Chambers.

6.10.6 On all applications without notice it is the duty of the applicant and those representing him:

- to make full and frank disclosure of all matters relevant to the application;
- to ensure that a note of the hearing of the without notice application, the evidence and skeleton argument in support and any order made all be served with the order or as soon as possible thereafter.

6.10.7 The papers lodged the application should include two copies of a draft of the order sought. Save in exceptional circumstances where time is not met, all the evidence relied upon in support of the application and any other relevant documents must be lodged in advance with the TCC Registry. If the application is urgent, the Registry should be informed of the fact and of the reasons for the urgency. Counsel's estimate of reading time likely to be required by the court should also be provided.

Section 7. ADR

7.1 General

7.1.1 The court will provide encouragement to the parties to use alternative dispute resolution ("ADR") and will, whenever appropriate, facilitate the use of such a procedure. In this Guide, ADR is taken to mean any process through which the parties attempt to resolve their dispute, which is voluntary. In most cases, ADR takes the form of inter-party negotiations or a mediation conducted by a neutral mediator. Alternative forms of ADR include early neutral evaluation either by a judge or some other neutral person who receives a concise presentation from each party and then provides his or her own evaluation of the case. The parties are advised to refer to the ADR Handbook.

7.1.2 Although the TCC is an appropriate forum for the resolution of all IT and construction/engineering disputes, the use of ADR can lead to a significant saving of costs and may result in a settlement which is satisfactory to all parties.

7.1.3 Legal representatives in all TCC cases should ensure that their clients are fully aware of the benefits of ADR and that the use of ADR has been carefully considered prior to the first CMC.

7.2 Timing

7.2.1 ADR may be appropriate before the proceedings have begun or at any subsequent stage. However the later ADR takes place, the more the costs which will have been incurred, often unnecessarily. The timing of ADR needs careful consideration.

7.2.2 The TCC Pre-Action Protocol (**Section 2** above) itself provides for a type of ADR, because it requires there to be at least one face-to-face meeting between the parties before the commencement of proceedings. At this meeting, there should be sufficient time to discuss and resolve the dispute. As a result of this procedure having taken place, the court will not necessarily grant a stay of proceedings upon demand and it will always need to be satisfied that an adjournment is actually necessary to enable ADR to take place.

7.2.3 However, at the first CMC, the court will want to be addressed on the parties' views as to the likely efficacy of ADR, the appropriate timing of ADR, and the advantages and disadvantages of a short stay of proceedings to allow ADR to take place. Having considered the representations of the parties, the court may order a short stay to facilitate ADR at that stage. Alternatively, the court may simply encourage the parties to seek ADR and allow for it to occur within the timetable for the resolution of the proceedings set down by the court.

7.2.4 At any stage after the first CMC and prior to the commencement of the trial, the court, will, either on its own initiative or if requested to do so by one or both of the parties, consider afresh the likely efficacy of ADR and whether or not a short stay of the proceedings should be granted, in order to facilitate ADR.

7.3 Procedure

7.3.1 In an appropriate case, the court may indicate the type of ADR that it considers suitable, but the decision in this regard must be made by the parties. In most cases, the appropriate ADR procedure will be mediation.

7.3.2 If at any stage in the proceedings the court considers it appropriate, an ADR order in the terms of **Appendix E** may be made. If such an order is made at the first CMC, the court may go on to give directions for the conduct of the action up to trial (in the event that the ADR fails). Such directions may include provision for a review CMC.

7.3.3 The court will not ordinarily recommend any individual or body to act as mediator or to perform any other ADR procedure. In the event that the parties fail to agree the identity of a mediator or other neutral person pursuant to an order in the terms of **Appendix E**, the court may select such a person from the lists provided by the parties. To facilitate this process, the court would also need to be furnished with the CVs of each of the individuals on the lists.

7.3.4 Information as to the types of ADR procedures available and the individuals able to undertake such procedures is available from TeCSA, TECBAR, the Civil Mediation Council, and from some TCC court centres outside London.

7.4 Non-Cooperation

7.4.1 Generally. At the end of the trial, there may be costs arguments on the basis that one or more parties unreasonably refused to take part in ADR. The court will determine such issues having regard to all the circumstances of the particular case. In *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576; [2004] 1 WLR 3002, the Court of Appeal identified six factors that may be relevant to any such consideration:

(a) the nature of the dispute;

(b) the merits of the case;

(c) the extent to which other settlement methods have been attempted;

(d) whether the costs of the ADR would be disproportionately high;

(e) whether any delay in setting up and attending the ADR would have been prejudicial;

(f) whether the ADR had a reasonable prospect of success.

This case is the subject of extensive discussion in Civil Procedure, Volume 2, at Section 14. See also *PGF II SA v OMFS Company 1 Ltd* [2013] EWCA Civ 1288, [2014] BLR 1, particularly in relation to silence in the face of a request to mediate.

7.4.2 If an ADR Order Has Been Made. The court will expect each party to co-operate fully with any ADR procedure which takes place following an order of the court. If any other party considers that there has not been proper co-operation in relation to arrangements for mediation or any other ADR Procedure, the complaint will be considered by the court and cost orders and/or other sanctions may be ordered against the defaulting party in consequence. However, nothing in this paragraph should be understood as modifying the rights of all parties to a mediation or any other ADR Procedure to keep confidential all that is said or done in the course of that ADR Procedure.

7.5 Early Neutral Evaluation

7.5.1 An early neutral evaluation ("ENE") may be carried out by any appropriately qualified person, whose opinion is likely to be respected by the parties. In an appropriate case, and with the consent of all parties, a TCC judge may provide an early neutral evaluation either in respect of the full case or of particular issues arising within it. Unless the parties otherwise agree the ENE will be produced in writing and will set out conclusions and brief reasons. Such an ENE will not, save with the agreement of the parties, be binding on the parties.

7.5.2 If the parties would like an ENE to be carried out by the court, then they can seek an appropriate order from the assigned judge either at the first CMC or at any time prior to the commencement of the trial.

7.5.3 The assigned judge may choose to do the ENE himself. In such instance, the judge will take no further part in the proceedings once he has produced the ENE, unless the parties expressly agree otherwise. Alternatively, the assigned judge will select another available TCC judge to undertake the ENE.

7.5.4 The judge undertaking the ENE will give appropriate directions for the preparation and conduct of the ENE. These directions will generally be agreed by the parties and may include:

- a stay of the substantive proceedings whilst the ENE is carried out.
- a direction that the ENE is to be carried out entirely on paper with dates for the exchange of submissions.
- a direction that particular documents or information should be provided by a party.
- a direction that there will be an oral hearing (either with or without evidence), with dates for all the necessary steps for submissions, witness statements and expert evidence leading to that hearing. If there is an oral hearing the ENE will generally not last more than one day.
- a statement that the parties agree or do not agree that the ENE procedure and the documents, submissions or evidence produced in relation to the ENE are to be without prejudice, or, alternatively, that the whole or part of those items are not without prejudice and can be referred to at any subsequent trial or hearing.
- a statement whether the parties agree that the judge's evaluation after the ENE process will be binding on the parties or binding in certain circumstances (e.g. if not disputed within a period) or temporarily binding subject to a final decision in arbitration, litigation or final agreement.

7.6 Court Settlement Process

7.6.1 The Court Settlement Process is a form of mediation carried out by TCC judges. Whilst mediation may be carried out by any appropriately qualified person, in an appropriate case, and with the consent of all parties, a TCC judge may act as a Settlement Judge pursuant to a Court Settlement Order in the terms set out in **Appendix G**. This has proved to be successful in many cases.

7.6.2 If the parties would like to consider the use of the Court Settlement Process or would like further information, they should contact the TCC Registry in London or the TCC Liaison District Judges in the court centres outside London.

7.6.3 Where, following a request from the parties, the assigned TCC judge considers that the parties might be able to achieve an amicable settlement and that a TCC judge is particularly able to assist in achieving that settlement, that judge or another TCC judge, with the agreement of the parties, will make a Court Settlement Order (**Appendix G**) embodying the parties' agreement and fixing a date for the Court Settlement Conference to take place with an estimated duration proportionate to the issues in the case.

7.6.4 The TCC judge appointed as the Settlement Judge will then conduct the Court Settlement Process in accordance with that Court Settlement Order in a similar manner to that of a mediator. If no settlement is achieved then the case would proceed but, if the assigned judge carried out the Court Settlement Process, then the case would be assigned to another TCC judge. In any event, the Settlement Judge would take no further part in the court proceedings.

Section 8. Preliminary issues

8.1 General

8.1.1 The hearing of Preliminary Issues ("PI"), at which the court considers and delivers a binding judgment on particular issues in advance of the main trial, can be an extremely cost-effective and efficient way of narrowing the issues between the parties and, in certain cases, of resolving disputes altogether.

8.1.2 Some cases listed in the TCC lend themselves particularly well to this procedure. A PI hearing can address particular points which may be decisive of the whole proceedings; even if that is not the position, it is often possible for a PI hearing to cut down significantly on the scope (and therefore the costs) of the main trial.

8.1.3 At the first CMC the court will expect to be addressed on whether or not there are matters which should be taken by way of Preliminary Issues in advance of the main trial. Subject to **paragraph 8.5** below, it is not generally appropriate for the court to make an order for the trial of preliminary issues until after the defence has been served. After the first CMC, and at any time during the litigation, any party is at liberty to raise with any other party the possibility of a PI hearing and the court will consider any application for the hearing of such Preliminary Issues. In many cases, although not invariably, a PI order will be made with the support of all parties.

8.1.4 Whilst, for obvious reasons, it is not possible to set out hard and fast rules for what is and what is not suitable for a PI hearing, the criteria set out in **Section 8.2** below should assist the parties in deciding whether or not some or all of the disputes between them will be suitable for a PI hearing.

8.1.5 Drawbacks of preliminary issues in inappropriate cases. If preliminary issues are ordered inappropriately, they can have adverse effect. Evidence may be duplicated. The same witnesses may give evidence before different judges, in the event that there is a switch of assigned judge. Findings may be made at the PI hearing, which are affected by evidence called at the main hearing. The prospect of a PI hearing may delay the commencement of ADR or settlement negotiations. Also two trials are more expensive than one. For all these reasons, any proposal for preliminary issues needs to be examined carefully, so that the benefits and drawbacks can be evaluated. Also the court should give due weight to the views of the parties when deciding whether a PI hearing would be beneficial.

8.1.6 Staged trials. The breaking down of a long trial into stages should be differentiated from the trial of preliminary issues. Sometimes it is sensible for liability (including causation) to be tried before quantum of damages. Occasionally the subject matter of the litigation is so extensive that for reasons of case management the trial needs to be broken down into separate stages.

8.2 Guidelines

8.2.1 The Significance of the Preliminary Issues. The court would expect that any issue proposed as a suitable PI would, if decided in a particular way, be capable of:

- resolving the whole proceedings or a significant element of the proceedings; or
- significantly reducing the scope, and therefore the costs, of the main trial; or
- significantly improving the possibility of a settlement of the whole proceedings.

8.2.2 Oral Evidence. The court would ordinarily expect that, if issues are to be dealt with by way of a PI hearing, there would be either no or relatively limited oral evidence. If extensive oral evidence was required on any proposed PI, then it may not be suitable for a PI hearing. Although it is difficult to give specific guidance on this point, it is generally considered that a PI hearing in a smaller case should not take more than about 2 days, and in a larger and more complex case, should not take more than about 4 days.

8.3 Common Types of Preliminary Issue

The following are commonly resolved by way of a PI hearing:

(a) Disputes as to whether or not there was a binding contract between the parties.

(b) Disputes as to what documents make up or are incorporated within the contract between the parties and disputes as to the contents or relevance of any conversations relied on as having contractual status or effect.

(c) Disputes as to the proper construction of the contract documents or the effect of an exclusion or similar clause.

(d) Disputes as to the correct application of a statute or binding authority to a situation where there is little or no factual dispute.

(e) Disputes as to the existence and/or scope of a statutory duty.

(f) Disputes as to the existence and/or scope of a duty of care at common law in circumstances where there is no or little dispute about the relevant facts.

8.4 Other Possible Preliminary Issues

The following can sometimes be resolved by way of a preliminary issue hearing, although a decision as to whether or not to have such a hearing will always depend on the facts of the individual case:

8.4.1 A Limitation Defence. It is often tempting to have limitation issues resolved in advance of the main trial. This can be a good idea because, if a complex claim is statute-barred, a decision to that effect will lead to a significant saving of costs. However, there is also a risk that extensive evidence relevant to the limitation defence (relating to matters such as when the damage occurred or whether or not there has been deliberate concealment) may also be relevant to the liability issues within the main trial. In such a case, a preliminary issue hearing may lead to a) extensive duplication of evidence and therefore costs and b) give rise to difficulty if the main trial is heard by a different judge.

8.4.2 Causation and ‘No Loss’ Points. Causation and ‘No Loss’ points may be suitable for a PI hearing, but again their suitability will diminish if it is necessary for the court to resolve numerous factual disputes as part of the proposed PI hearing. The most appropriate disputes of this type for a PI hearing are those where the defendant contends that, even accepting all the facts alleged by the claimant, the claim must fail by reason of causation or the absence of recoverable loss.

8.4.3 ‘One-Off’ Issues. Issues which do not fall into any obvious category, like economic duress, or misrepresentation, may be suitable for resolution by way of a PI hearing, particularly if the whole case can be shown to turn on them.

8.5 Use of PI as an adjunct to ADR

8.5.1 Sometimes parties wish to resolve their dispute by ADR, but there is one major issue which is a sticking point in any negotiation or mediation. The parties may wish to obtain the court's final decision on that single issue, in the expectation that after that they can resolve their differences without further litigation.

8.5.2 In such a situation the parties may wish to bring proceedings under **CPR Part 8**, in order to obtain the court's decision on that issue. Such proceedings can be rapidly progressed. Alternatively, if the issue is not suitable for **Part 8** proceedings, the parties may bring proceedings under **Part 7** and then seek determination of the critical question as a preliminary issue. At the first CMC the position can be explained and the judge can be asked to order early trial of the proposed preliminary issue, possibly without the need for a defence or any further pleadings.

8.6 Precise Wording of PI

8.6.1 If a party wishes to seek a PI hearing, either at the first CMC or thereafter, that party must circulate a precise draft of the proposed preliminary issues to the other parties and to the court well in advance of the relevant hearing.

8.6.2 If the court orders a PI hearing, it is likely to make such an order only by reference to specific and formulated issues, in order to avoid later debate as to the precise scope of the issues that have been ordered. Of course, the parties are at liberty to propose amendments to the issues before the PI hearing itself, but if such later amendments are not agreed by all parties, they are unlikely to be ordered.

8.7 Appeals

8.7.1 When considering whether or not to order a PI hearing, the court will take into account the effect of any possible appeal against the PI judgment, and the concomitant delay caused.

8.7.2 At the time of ordering preliminary issues, both the parties and the court should specifically consider whether, in the event of an appeal against the PI judgment, it is desirable that the trial of the main action should (a) precede or (b) follow such appeal. It should be noted, however, that the first instance court has no power to control the timetable for an appeal. The question whether an appeal should be (a) expedited or (b) stayed is entirely a matter for the Court of Appeal. Nevertheless, the Court of Appeal will take notice of any "indication" given by the lower court in this regard.

Section 9. Adjudication business

9.1 Introduction

9.1.1 The TCC is ordinarily the court in which the enforcement of an adjudicator's decision and any other business connected with adjudication is undertaken. Adjudicators' decisions predominantly arise out of adjudications which are governed by the mandatory provisions of the Housing Grants, Construction and Regeneration Act 1996 (as amended by the Local Democracy, Economic Development and Construction Act 2009 for contracts entered into on or after 1 October 2011) relating to the carrying out of construction operations in England and Wales ("HGCRA"). These provisions apply automatically to any construction contract as defined in the legislation. Some Adjudicators' decisions arise out of standard form contracts which contain adjudication provisions, and others arise from *ad hoc* agreements to adjudicate. The TCC enforcement procedure is the same for all kinds of adjudication.

9.1.2 In addition to enforcement applications, declaratory relief is sometimes sought in the TCC at the outset of or during an adjudication in respect of matters such as the jurisdiction of the adjudicator or the validity of the adjudication. This kind of application is dealt with in **Paragraph 9.4** below.

9.1.3 The HGCRA provides for a mandatory 28-day period within which the entire adjudication process must be completed, unless a) the referring party agrees to an additional 14 days, or b) both parties agree to a longer period. In consequence, the TCC has moulded a rapid procedure for enforcing an adjudication decision that has not been honoured. Other adjudication proceedings are ordinarily subject to similar rapidity.

9.2 Procedure in Enforcement Proceedings

9.2.1 Unlike arbitration business, there is neither a practice direction nor a claim form concerned with adjudication business. The enforcement proceedings normally seek a monetary judgment so that **CPR Part 7** proceedings are usually appropriate. However, if the enforcement proceedings are known to raise a question which is unlikely to involve a substantial dispute of fact and no monetary judgment is sought, **CPR Part 8** proceedings may be used instead.

9.2.2 The TCC has fashioned a procedure whereby enforcement applications are dealt with promptly. The details of this procedure are set out below.

9.2.3 The claim form should identify the construction contract, the jurisdiction of the adjudicator, the procedural rules under which the adjudication was conducted, the adjudicator's decision, the relief sought and the grounds for seeking that relief.

9.2.4 The claim form should be accompanied by an application notice that sets out the procedural directions that are sought. Commonly, the claimant's application will seek an abridgement of time for the various procedural steps, and summary judgment under **CPR Part 24**. The claim form and the application should be accompanied by a witness statement or statements setting out the evidence relied on in support of both the adjudication enforcement claim and the associated procedural application. This evidence should ordinarily include a copy of the Notice of Intention to Refer and the adjudicator's decision. Further pleadings in the adjudication may be required where questions of the adjudicator's jurisdiction are being raised.

9.2.5 The claim form, application notice and accompanying documents should be lodged in the appropriate registry or court centre clearly marked as being a "paper without notice adjudication enforcement claim and application for the urgent attention of a TCC judge". A TCC judge will ordinarily provide directions in connection with the procedural application within **3 working days** of the receipt of the application notice at the courts.

9.2.6 The procedural application is dealt with by a TCC judge on paper, without notice. The paper application and the consequent directions should deal with:

(a) the abridged period of time in which the defendant is to file an acknowledgement of service;

(b) the time for service by the defendant of any witness statement in opposition to the relief being sought;

(c) an early return date for the hearing of the summary judgment application and a note of the time required or allowed for that hearing; and

(d) identification of the judgment, order or other relief being sought at the hearing of the adjudication claim.

The order made at this stage will always give the defendant liberty to apply.

9.2.7 A direction providing that the claim form, supporting evidence and court order providing for the hearing are to be served on the defendant as soon as practicable, or sometimes by a particular date, will ordinarily also be given when the judge deals with the paper procedural application.

9.2.8 The directions will ordinarily provide for an enforcement hearing within about **28 days** of the directions being made and for the defendant to be given at least **14 days** from the date of service for the serving of any evidence in opposition to the adjudication application. In more straightforward cases, the abridged periods may be less.

9.2.9 Draft standard directions of the kind commonly made by the court on a procedural application by the claimant in an action to enforce the decision of an adjudicator are attached as **Appendix F**.

9.2.10 The claimant should, with the application, provide an estimate of the time needed for the hearing of the application. This estimate will be taken into account by the judge when fixing the date and length of the hearing. The parties should, if possible jointly, communicate any revised time estimate to the court promptly and the judge to whom the case has been allocated will consider whether to refix the hearing date or alter the time period that has been allocated for the hearing.

9.2.11 If the parties cannot agree on the date or time fixed for the hearing, a paper application must be made to the judge to whom the hearing has been allocated for directions.

9.2.12 Parties seeking to enforce adjudication decisions are reminded that they might be able to obtain judgment in default of service of an acknowledgment of service or, if the other party does not file any evidence in response, they might be able to obtain an expedited hearing of the Part 24 application. Generally, it is preferable for a party to enter default judgment rather than seek an expedited hearing, because that reduces the costs involved (the terms of the order usually mention this explicitly).

9.3 The Enforcement Hearing

9.3.1 Where there is any dispute to be resolved at the hearing, the judge should be provided with copies of the relevant sections of the HGCRA, the adjudication procedural rules under which the adjudication was conducted, the adjudicator's decision and copies of any adjudication provisions in the contract underlying the adjudication.

9.3.2 Subject to any more specific directions given by the court, the parties should lodge, **by 4.00 pm one clear working day before the hearing**, a bundle containing the documents that will be required at the hearing. The parties should also file and serve short skeleton arguments and copies of any authorities which are to be relied on (preferably as an agreed joint bundle), summarising their respective contentions as to why the adjudicator's decision is or is not enforceable or as to any other relief being sought. For a hearing that is expected to last half a day or less, the skeletons should be provided **no later than 1 pm on the last working day before the hearing.** For a hearing that is estimated to last more than half a day, the skeletons should be provided **no later than 4 pm one clear working day before the hearing**.

9.3.3 The parties should be ready to address the court on the limited grounds on which a defendant may resist an application seeking to enforce an adjudicator's decision or on which a court may provide any other relief to any party in relation to an adjudication or an adjudicator's decision.

9.4 Other Proceedings Arising Out Of Adjudication

9.4.1 As noted above, the TCC will also hear any applications for declaratory relief arising out of the commencement of a disputed adjudication. Commonly, these will concern:

- Disputes over the jurisdiction of an adjudicator. It can sometimes be appropriate to seek a declaration as to jurisdiction at the outset of an adjudication, rather than both parties incurring considerable costs in the adjudication itself, only for the jurisdiction point to emerge again at the enforcement hearing.

- Disputes over whether there is a construction contract within the meaning of the Act (and, in older contracts, whether there was a written contract between the parties).

- Disputes over the permissible scope of the adjudication, and, in particular, whether the matters which the claimant seeks to raise in the adjudication are the subject of a pre-existing dispute between the parties.

9.4.2 Any such application will be immediately assigned to a named judge. In such circumstances, given the probable urgency of the application, the judge will usually require the parties to attend a CMC **within 2 working days** of the assignment of the case to him, and he will then give the necessary directions to ensure the speedy resolution of the dispute.

9.4.3 It sometimes happens that one party to an adjudication commences enforcement proceedings, whilst the other commences proceedings under Part 8, in order to challenge the validity of the adjudicator's award. This duplication of effort is unnecessary and it involves the parties in extra costs, especially if the two actions are commenced at different court centres. Accordingly there should be sensible discussions between the parties or their lawyers, in order to agree the appropriate venue and also to agree who shall be claimant and who defendant. All the issues raised by each party can and should be raised in a single action. However, in cases where an adjudicator has made a clear error (but has acted within his jurisdiction), it may on occasions be appropriate to bring proceedings under Part 8 for a declaration as a pre-emptive response to an anticipated application to enforce the decision.

Section 10. Arbitration

10.1 Arbitration Claims in the TCC

10.1.1 "Arbitration claims" are any application to the court under the Arbitration Act 1996 and any other claim concerned with an arbitration that is referred to in **CPR 62.2(1**). Common examples of arbitration claims are challenges to an award on grounds of jurisdiction under section 67, challenges to an award for serious irregularity under section 68 or appeals on points of law under section 69 of the Arbitration Act 1996. Arbitration claims may be started in the TCC, as is provided for in **paragraph 2.3 of the Practice Direction – Arbitration** which supplements **CPR Part 62**.

10.1.2 In practice, arbitration claims arising out of or connected with a construction or engineering arbitration (or any other arbitration where the subject matter involved one or more of the categories of work set out in **paragraph 1.3.1 above**) should be started in the TCC. The only arbitration claims that must be started in the Commercial Court are those (increasingly rare) claims to which the old law (i.e. the pre-1996 Act provisions) apply: see **CPR 62.12**.

10.1.3 The TCC follows the practice and procedure for arbitration claims established by **CPR Part 62** and (broadly) the practice of the Commercial Court as summarised by **Section O of the Admiralty and Commercial Court Guide.** In the absence of any specific directions given by the court, the automatic directions set out in **section 6 of the Practice Direction supplementing CPR Part 62** govern the procedures to be followed in any arbitration claim from the date of service up to the substantive hearing.

10.2 Leave to appeal

10.2.1 Where a party is seeking to appeal a question of law arising out of an award pursuant to section 69 of the Arbitration Act 1996 and the parties have not in their underlying contract agreed that such an appeal may be brought, the party seeking to appeal must apply for leave to appeal pursuant to sections 69(2), 69(3) and 69(4) of that Act. That application must be included in the arbitration claim form as explained in **paragraph 12 of the Practice Direction**.

10.2.2 In conformity with the practice of the Commercial Court, the TCC will normally consider any application for permission to appeal on paper after the defendant has had an appropriate opportunity to answer in writing the application being raised.

10.2.3 The claimant must include within the claim form an application for permission to appeal. No separate application notice is required.

10.2.4 The claim form and supporting documents must be served on the defendant. The judge will not consider the merits of the application for permission to appeal until (a) a certificate of service has been filed at the appropriate TCC registry or court centre and (b), subject to any order for specific directions, a further **28 days** have elapsed, so as to enable the defendant to file written evidence in opposition. Save in exceptional circumstances, the only material admissible on an application for permission to appeal is (a) the award itself and any documents annexed to or necessary to understand the award and (b) evidence relevant to the issue whether any identified question of law is of general public importance: see the requirements of **paragraph 12 of the Practice Direction**.

10.2.5 If necessary, the judge dealing with the application will direct an oral hearing with a date for the hearing. That hearing will, ordinarily, consist of brief submissions by each party. The judge dealing with the application will announce his decision in writing or, if a hearing has been directed, at the conclusion of the hearing with brief reasons if the application is refused.

10.2.6 Where the permission has been allowed in part and refused in part:

(a) Only those questions for which permission has been granted may be raised at the hearing of the appeal.

(b) Brief reasons will be given for refusing permission in respect of the other questions.

10.2.7 If the application is granted, the judge will fix the date for the appeal, and direct whether the same judge or a different judge shall hear the appeal.

10.3 Appeals where leave to appeal is not required

10.3.1 Parties to a construction contract should check whether they have agreed in the underlying contract that an appeal may be brought without leave, since some construction and engineering standard forms of contract so provide. If that is the case, the appeal may be set down for a substantive hearing without leave being sought. The arbitration claim form should set out the clause or provision which it is contended provides for such agreement and the claim form should be marked “Arbitration Appeal – Leave not required”.

10.3.2 Where leave is not required, the claimant should identify each question of law that it is contended arises out of the award and which it seeks to raise in an appeal under section 69. If the defendant does not accept that the questions thus identified are questions of law or maintains that they do not arise out of the award or that the appeal on those questions may not be brought for any other reason, then the defendant should notify the claimant and the court of its contentions and apply for a directions hearing before the judge nominated to hear the appeal on a date prior to the date fixed for the hearing of the appeal. Unless the judge hearing the appeal otherwise directs, the appeal will be confined to the questions of law identified in the arbitration claim form.

10.3.3 In an appropriate case, the judge may direct that the question of law to be raised and decided on the appeal should be reworded, so as to identify more accurately the real legal issue between the parties.

10.4 The hearing of the appeal

10.4.1 Parties should ensure that the court is provided only with material that is relevant and admissible to the point of law. This will usually be limited to the award and any documents annexed to the award: see *Hok Sport Ltd v Aintree Racecourse Ltd* [2003] BLR 155 at 160. However, the court should also receive any document referred to in the award, which the court needs to read in order to determine a question of law arising out of the award: see *Kershaw Mechanical Services Ltd v Kendrick Construction Ltd* [2006] EWHC (TCC).

10.4.2 On receiving notice of permission being granted, or on issuing an arbitration claim form in a case where leave to appeal is not required, the parties should notify the court of their joint estimate or differing estimates of the time needed for the hearing of the appeal.

10.4.3 The hearing of the appeal is to be in open court unless an application (with notice) has previously been made that the hearing should be wholly or in part held in private and the court has directed that this course should be followed.

10.5 Section 68 applications – Serious Irregularity

10.5.1 In some arbitration claims arising out of construction and engineering arbitrations, a party will seek to appeal a question of law and, at the same time, seek to challenge the award under section 68 of the Arbitration Act 1996 on the grounds of serious irregularity. This raises questions of procedure, since material may be admissible in a section 68 application which is inadmissible on an application or appeal under section 69. Similarly, it may not be appropriate for all applications to be heard together. A decision is needed as to the order in which the applications should be heard, whether there should be one or more separate hearings to deal with them and whether or not the same judge should deal with all applications. Where a party intends to raise applications under both sections of the Arbitration Act 1996, they should be issued in the same arbitration claim form or in separate claim forms issued together. The court should be informed that separate applications are intended and asked for directions as to how to proceed.

10.5.2 The court will give directions as to how the section 68 and section 69 applications will be dealt with before hearing or determining any application. These directions will normally be given in writing but, where necessary or if such is applied for by a party, the court will hold a directions hearing at which directions will be given. The directions will be given following the service of any documentation by the defendant in answer to all applications raised by the claimant.

10.6 Successive awards and successive applications

10.6.1 Some construction and engineering arbitrations give rise to two or more separate awards issued at different times. Where arbitration applications arise under more than one of these awards, any second or subsequent application, whether arising from the same or a different award, should be referred to the same judge who has heard previous applications. Where more than one judge has heard previous applications, the court should be asked to direct to which judge any subsequent application is to be referred.

10.7 Other applications and Enforcement

10.7.1 All other arbitration claims, and any other matter arising in an appeal or an application concerning alleged serious irregularity, will be dealt with by the TCC in the same manner as is provided for in **CPR Part 62, Practice Direction** – **Arbitration** and **Section O of The Admiralty and Commercial Courts Guide**.

10.7.2 All applications for permission to enforce arbitration awards are governed by **Section III of Part 62 (rules 62.17- 62.19).**

10.7.3 An application for permission to enforce an award in the same manner as a judgment or order of the court may be made in an arbitration claim form without notice and must be supported by written evidence in accordance with **CPR 62.18(6)**. Two copies of the draft order must accompany the application, and the form of the order sought must correspond to the terms of the award.

10.7.4 An order made without notice giving permission to enforce the award:

- must give the defendant 14 days after service of the order (or longer, if the order is to be served outside the jurisdiction) to apply to set it aside;

- must state that it may not be enforced until after the expiry of the 14 days (or any longer period specified) or until any application to set aside the order has been finally disposed of: **CPR 62.18(9) and (10)**.

10.7.5 On considering an application to enforce without notice, the judge may direct that, instead, the arbitration claim form must be served on specified parties, with the result that the application will then continue as an arbitration claim in accordance with the procedure set out in **Section I of Part 62:** see **CPR 62.18(1)-(3)**.

Section 11. Disclosure

11.1 General

11.1.1 **CPR 31.5** now provides a menu of different disclosure options, of which standard disclosure is but one.

11.1.2 What order is for disclosure is appropriate will normally be considered and made at the first case management conference. This is governed by **CPR Part 31** and the Practice Direction supplementing it. This provides for various alternatives: (a) no disclosure (b) an order that a party discloses the documents on which it relies and at the same time requests any specific disclosure that it requires from the other parties (c) disclosure on an issue by issue basis (d) an order that each party discloses documents that it is reasonable to suppose will support its own case or damage that of another party (e) standard disclosure or any other form of disclosure..

In relation to electronic disclosure, see the provisions requiring the exchange of Electronic Documents Questionnaires (**CPR 31.22** and **PD13B**).

11.2 Limiting disclosure and the cost of disclosure

11.2.1 In many cases being conducted in the TCC, standard disclosure will not be appropriate. This may for any one or more of the following reasons:

- The amount of documentation may be considerable, given the complexity of the dispute and the underlying contract or contracts, and the process of giving standard disclosure may consequently be disproportionate to the issues and sums in dispute.
- The parties may have many of the documents in common from their previous dealings so that disclosure is not necessary or desirable.
- The parties may have provided informal disclosure and inspection of the majority of these documents, for example when complying with the pre-action Protocol.
- The cost of providing standard disclosure may be disproportionate.
- In such cases, the parties should seek to agree upon a more limited form of disclosure, whether in one of the forms set out in CPR 31.5 or otherwise, or to dispense with formal disclosure altogether.

11.2.2 Where disclosure is to be provided, the parties should consider whether it is necessary for lists of documents to be prepared or whether special arrangements should be agreed as to the form of listing and identifying disclosable documents, the method, timing and location of inspection and the manner of copying or providing copies of documents. Where documents are scattered over several locations, or are located overseas or are in a foreign language, special arrangements will also need to be considered. Thought should also be given to providing disclosure in stages or to reducing the scope of disclosure by providing the relevant material in other forms.

11.2.3 Electronic data and documents give rise to particular problems as to searching, preserving, listing, inspecting and other aspects of discovery and inspection. These problems should be considered and, if necessary made the subject of special directions. Furthermore, in many cases disclosure, inspection and the provision of documents in electronic form or electronic copies of hard copies may be undertaken using information

technology. Attention is drawn to the relevant provisions in **CPR Part 31** and **Practice Direction 31B: Disclosure of Electronic Documents** A protocol for e-disclosure prepared by TeCSA, TECBAR and the Society for Computers and Law was launched on 1 November 2013 which provides a procedure and guidance in relation to these matters. The protocol was developed in consultation with the judges of the TCC, and is likely to be ordered by the court if the parties have not agreed on any alternative by the time of the first CMC. It is available on the TeCSA website.

11.2.4 All these matters should be agreed between the parties. If it is necessary to raise any of these matters with the court they should be raised, if possible, at the first CMC. If points arise on disclosure after the first CMC, they may well be capable of being dealt with by the court on paper.

Section 12. Witness statements and factual evidence for use at trial

12.1 Witness statements

12.1.1 Witness statements should be prepared generally in accordance with **CPR Part 22.1** (documents verified by a statement of truth) and **CPR Part 32** (provisions governing the evidence of witnesses) and their practice directions, particularly **paragraphs 17 to 22 of the Practice Direction supplementing CPR Part 32**.

12.1.2 Unless otherwise directed by the court, witness statements should not have annexed to them copies of other documents and should not reproduce or paraphrase at length passages from other documents. The only exception arises where a specific document needs to be annexed to the statement in order to make that statement reasonably intelligible.

12.1.3 When preparing witness statements, attention should be paid to the following matters:

- Even when prepared by a legal representative or other professional, the witness statement should be, so far as practicable, in the witness's own words.
- The witness statement should indicate which matters are within the witness's own knowledge and which are matters of information and belief. Where the witness is stating matters of hearsay or of either information or belief, the source of that evidence should also be stated.
- A witness statement should be no longer than necessary and should not be argumentative.
- A witness statement should not contain extensive reference to contemporaneous documents by way of narrative.
- The witness statement must include a statement by the witness that he believes the facts stated to be true.

12.1.4 Costs. If at any stage the judge considers that the way in which witness statements have been prepared, particularly by the inclusion of extensive irrelevant or peripheral material, is likely to lead or has led to inefficiency in the conduct of the proceedings or to unnecessary time or costs being spent, the judge may order that the witness should re-submit the witness statement in whole or part and may make a costs order disallowing costs or ordering costs to be paid, either on the basis of a summary assessment or by giving a direction to the costs judge as to what costs should be disallowed or paid on a detailed assessment: see **paragraph 5.5.5** above.

12.2 Other matters concerned with witness statements

12.2.1 Foreign language. If a witness is not sufficiently fluent in English to give his evidence in English, the witness statement should be in his or her own language and an authenticated translation provided. Where the witness has a broken command of English, the statement may be drafted by others so as to express the witness's evidence as accurately as possible. In that situation, however, the witness statement should indicate that this process of interpolation has occurred and also should explain the extent of the witness's

command of English and how and to what parts of the witness statement the process of interpolation has occurred.

12.2.2 Reluctant witness. Sometimes a witness is unwilling or not permitted or is unavailable to provide a witness statement before the trial. The party seeking to adduce this evidence should comply with the provisions of **CPR 32.9** concerned with the provision of witness summaries.

12.2.3 Hearsay. Parties should keep in mind the need to give appropriate notice of their intention to rely on hearsay evidence or the contents of documents without serving a witness statement from their maker or from the originator of the evidence contained in those documents. The appropriate procedure is contained in **CPR 33.1 – 33.5**.

12.2.4 Supplementary Witness Statements. The general principle is that a witness should set out in their witness statement their complete evidence relevant to the issues in the case. The witness statement should not include evidence on the basis that it might be needed depending on what the other party's witnesses might say. The correct procedure in such cases is for the witness to provide a supplementary witness statement or, as necessary, for a new witness to provide a witness statement limited to responding to particular matters contained in the other party's witness statement and to seek permission accordingly. In some cases it might be appropriate for the court to provide for the service of supplementary witness statements as part of the order at the first case management conference.

12.2.5 Supplementary Evidence in Chief. The relevant witness evidence should be contained in the witness statements, or if appropriate witness summaries, served in advance of the hearing. Where, for whatever reason, this has not happened and the witness has relevant important evidence to give, particularly where the need for such evidence has only become apparent during the trial, the judge has a discretion to permit supplementary evidence in chief.

12.3 Cross-referencing

12.3.1 Where a substantial number of documents will be adduced in evidence or contained in the trial bundles, it is of considerable assistance to the court and to all concerned if the relevant page references are annotated in the margins of the copy witness statements. It is accepted that this is a time-consuming exercise, the need for which will be considered at the PTR, and it will only be ordered where it is both appropriate and proportionate to do so. See further **paragraphs 14.5.1** and **15.2.3** below.

12.4 Video link

12.4.1 If any witness (whose witness statement has been served and who is required to give oral evidence) is located outside England and Wales or would find a journey to court inconvenient or impracticable, his evidence might be given via a video link. Thought should be given before the PTR to the question whether this course would be appropriate and proportionate. Such evidence is regularly received by the TCC and facilities for its reception, whether in appropriate court premises or at a convenient venue outside the court building, are now readily available.

12.4.2 Any application for a video link direction and any question relating to the manner in which such evidence is to be given should be dealt with at the PTR. Attention is drawn to the Video-conferencing Protocol set out at Annex 3 to the **Practice Direction supplementing CPR Part 32 - Evidence**. The procedure described in Annex 3 is followed by the TCC.

Section 13. Expert evidence

13.1 Nature of expert evidence

13.1.1 Expert evidence is evidence as to matters of a technical or scientific nature and will generally include the opinions of the expert. The quality and reliability of expert evidence will depend upon (a) the experience and the technical or scientific qualifications of the expert and (b) the accuracy of the factual material that is used by the expert for his assessment. Expert evidence is dealt with in detail in **CPR Part 35 ("**Experts and Assessors") and in the **Practice Direction supplementing Part 35**. Particular attention should be paid to all these provisions, given the detailed reliance on expert evidence in most TCC actions. Particular attention should also be paid to the "Protocol for the instruction of experts to give evidence in civil claims" annexed to **Practice Direction 35 – Experts and Assessors** (it should be noted that this Protocol is expected to be replaced at some point with the "Guidance for the instruction of experts to give evidence in Civil claims").

13.1.2 The attention of the parties is drawn to the specific requirements in relation to the terms of the expert's declaration at the conclusion of the report.

13.1.3 The provisions in **CPR Part 35** are concerned with the terms upon which the court may receive expert evidence. These provisions are principally applicable to independently instructed expert witnesses. In cases where a party is a professional or a professional has played a significant part in the subject matter of the action, opinion evidence will almost inevitably be included in the witness statements. Any points arising from such evidence (if they cannot be resolved by agreement) can be dealt with by the judge on an application or at the PTR.

13.2 Control of expert evidence

13.2.1 Expert evidence is frequently needed and used in TCC cases. Experts are often appointed at an early stage. Most types of case heard in the TCC involve more than one expertise and some, even when the dispute is concerned with relatively small sums, involve several different experts. Such disputes include those concerned with building failures and defects, delay and disruption, dilapidations, subsidence caused by tree roots and the supply of software systems. However, given the cost of preparing such evidence, the parties and the court must, from the earliest pre-action phase of a dispute until the conclusion of the trial, seek to make effective and proportionate use of experts. The scope of any expert evidence must be limited to what is necessary for the requirements of the particular case.

13.2.2 At the first CMC, or thereafter, the court may be asked to determine whether the cost of instructing experts is proportionate to the amount at issue in the proceedings, and the importance of the case to the parties. When considering an application for permission to call an expert, the court is to be provided with estimates of the experts' costs: see **CPR 35.4(2)**. The permission may limit the issues to be considered by the experts: see **CPR 35.4(3)**. This should ordinarily be linked to the party's costs budget.

13.2.3 The parties should also be aware that the court has the power to limit the amount of the expert's fees that a party may recover pursuant to **CPR 35.4 (4)**.

13.3 Prior to and at the first CMC

13.3.1 There is an unresolved tension arising from the need for parties to instruct and rely on expert opinions from an early pre-action stage and the need for the court to seek, wherever possible, to reduce the cost of expert evidence by dispensing with it altogether or by encouraging the appointment of jointly instructed experts. This tension arises because the court can only consider directing joint appointments or limiting expert evidence long after a party may have incurred the cost of obtaining expert evidence and have already relied on it. Parties should be aware of this tension. So far as possible, the parties should avoid incurring the costs of expert evidence on uncontroversial matters or matters of the kind referred to in paragraph 13.4.3 below, before the first CMC has been held.

13.3.2 In cases where it is not appropriate for the court to order a single joint expert, it is imperative that, wherever possible, the parties' experts co-operate fully with one another. This is particularly important where tests, surveys, investigations, sample gathering or other technical methods of obtaining primary factual evidence are needed. It is often critical to ensure that any laboratory testing or experiments are carried out by the experts together, pursuant to an agreed procedure. Alternatively, the respective experts may agree that a particular firm or laboratory shall carry out specified tests or analyses on behalf of all parties.

13.3.3 Parties should, where possible, disclose initial or preliminary reports to opposing parties prior to any pre-action protocol meeting, if only on a without prejudice basis. Such early disclosure will assist in early settlement or mediation discussions and in helping the parties to define and confine the issues in dispute with a corresponding saving in costs.

13.3.4 Before and at the first CMC and at each subsequent pre-trial stage of the action, the parties should give careful thought to the following matters:

- The number, disciplines and identity of the expert witnesses they are considering instructing as their own experts or as single joint experts.
- The precise issues which each expert is to address in his/her reports, to discuss without prejudice with opposing parties' experts and give evidence about at the trial.
- The timing of any meeting, agreed statement or report.
- Any appropriate or necessary tests, inspections, sampling or investigations that could be undertaken jointly or in collaboration with other experts. Any such measures should be preceded by a meeting of relevant experts at which an appropriate testing or other protocol is devised. This would cover (i) all matters connected with the process in question and its recording and (ii) the sharing and agreement of any resulting data or evidence.
- Any common method of analysis, investigation or reporting where it is appropriate or proportionate that such should be adopted by all relevant experts. An example of this would be an agreement as to the method to be used to analyse the cause and extent of any relevant period of delay in a construction project, where such is in issue in the case.
- The availability and length of time that experts will realistically require to complete the tasks assigned to them.

(Note that the amendment to **CPR 35.4(3)** permits the order granting permission to specify the issues which the expert evidence should address.)

13.3.5 In so far as the matters set out in the previous paragraph cannot be agreed, the court will give appropriate directions. In giving permission for the reception of any expert evidence, the court will ordinarily order the exchange of such evidence, with a definition of the expert's area of expertise and a clear description of the issues about which that expert is permitted to give evidence. It is preferable that, at the first CMC or as soon as possible thereafter, the parties should provide the court with the name(s) of their expert(s).

13.4 Single joint experts

13.4.1 An order may be made, at the first CMC or thereafter, that a single joint expert should address particular issues between the parties. Such an order would be made pursuant to **CPR Parts 35.7 and 35.8**.

13.4.2 Single joint experts are not usually appropriate for the principal liability disputes in a large case, or in a case where considerable sums have been spent on an expert in the pre-action stage. They are generally inappropriate where the issue involves questions of risk assessment or professional competence.

13.4.3 On the other hand, single joint experts can often be appropriate:

- in low value cases, where technical evidence is required but the cost of adversarial expert evidence may be prohibitive;
- where the topic with which the single joint expert's report deals is a separate and self-contained part of the case, such as the valuation of particular heads of claim;
- where there is a subsidiary issue, which requires particular expertise of a relatively uncontroversial nature to resolve;
- where testing or analysis is required, and this can conveniently be done by one laboratory or firm on behalf of all parties.

13.4.4 Where a single joint expert is to be appointed or is to be directed by the court, the parties should attempt to devise a protocol covering all relevant aspects of the appointment (save for those matters specifically provided for by **CPR 35.6, 35.7 and 35.8)**.

13.4.5 The matters to be considered should include: any ceiling on fees and disbursements that are to be charged and payable by the parties; how, when and by whom fees will be paid to the expert on an interim basis pending any costs order in the proceedings; how the expert's fees will be secured; how the terms of reference are to be agreed; what is to happen if terms of reference cannot be agreed; how and to whom the jointly appointed expert may address further enquiries and from whom he should seek further information and documents; the timetable for preparing any report or for undertaking any other preparatory step; the possible effect on such timetable of any supplementary or further instructions. Where these matters cannot be agreed, an application to the court, which may often be capable of being dealt with as a paper application, will be necessary.

13.4.6 The usual procedure for a single joint expert will involve:

- The preparation of the expert's instructions. These instructions should clearly identify those issues or matters where the parties are in conflict, whether on the facts or on matters of opinion. If the parties can agree joint instructions, then a single set of

instructions should be delivered to the expert. However, rule 35.8 expressly permits separate instructions and these are necessary where joint instructions cannot be agreed

- The preparation of the agreed bundle, which is to be provided to the expert. This bundle must include CPR Part 35, the Practice Direction supplementing Part 35 and the section 13 of the TCC Guide.

- The preparation and production of the expert's report.

- The provision to the expert of any written questions from the parties, which the expert must answer in writing.

13.4.7 In most cases the single joint expert's report, supplemented by any written answers to questions from the parties, will be sufficient for the purposes of the trial. Sometimes, however, it is necessary for a single joint expert to be called to give oral evidence. In those circumstances, the usual practice is for the judge to call the expert and then allow each party the opportunity to cross-examine. Such cross-examination should be conducted with appropriate restraint, since the witness has been instructed by the parties. Where the expert's report is strongly in favour of one party's position, it may be appropriate to allow only the other party to cross-examine.

13.5 Meetings of experts

13.5.1 The desirability of holding without prejudice meetings between experts at all stages of the pre-trial preparation should be kept in mind. The desired outcome of such meetings is to produce a document whose contents are agreed and which defines common positions or each expert's differing position. The purpose of such meetings includes the following:

- The provision to the expert of any written questions from the parties, which the expert must answer in writing.

- to define a party's technical case and to inform opposing parties of the details of that case;

- to clear up confusion and to remedy any lack of information or understanding of a party's technical case in the minds of opposing experts;

- to identify the issues about which any expert is to give evidence;

- to narrow differences and to reach agreement on as many "expert" issues as possible; and

- to assist in providing an agenda for the trial and for cross examination of expert witnesses, and to limit the scope and length of the trial as much as possible.

13.5.2 In many cases it will be helpful for the parties' respective legal advisors to provide assistance as to the agenda and topics to be discussed at an experts' meeting. However, (save in exceptional circumstances and with the permission of the judge) the legal advisors must not attend the meeting. They must not attempt to dictate what the experts say at the meeting.

13.5.3 Experts' meetings can sometimes usefully take place at the site of the dispute. Thought is needed as to who is to make the necessary arrangements for access, particularly where the site is occupied or in the control of a non-party. Expert meetings are often more

productive, if (a) the expert of one party (usually the claimant) is appointed as chairman and (b) the experts exchange in advance agendas listing the topics each wishes to raise and identifying any relevant material which they intend to introduce or rely on during the meeting.

13.5.4 It is generally sensible for the experts to meet at least once before they exchange their reports.

13.6 Experts' Joint Statements

13.6.1 Following the experts' meetings, and pursuant to **CPR 35.12 (3)**, the judge will almost always require the experts to produce a signed statement setting out the issues which have been agreed, and those issues which have not been agreed, together with a short summary of the reasons for their disagreement. In any TCC case in which expert evidence has an important role to play, this statement is a critical document and it must be as clear as possible.

13.6.2 It should be noted that, even where experts have been unable to agree very much, it is of considerable importance that the statement sets out their disagreements and the reasons for them. Such disagreements as formulated in the joint statement are likely to form an important element of the agenda for the trial of the action.

13.6.3 Whilst the parties' legal advisors may assist in identifying issues which the statement should address, those legal advisors must not be involved in either negotiating or drafting the experts' joint statement. Legal advisors should only invite the experts to consider amending any draft joint statement in exceptional circumstances where there are serious concerns that the court may misunderstand or be misled by the terms of that joint statement. Any such concerns should be raised with all experts involved in the joint statement.

13.7 Experts' Reports

13.7.1 It is the duty of an expert to help the court on matters within his expertise. This duty overrides any duty to his client: **CPR 35.3**. Each expert's report must be independent and unbiased. **Paragraphs 3(vii), 3.3.1(vi) and 5.5(i) of the Pre-Action Protocol for Construction and Engineering Disputes** contain provisions as to experts in TCC cases and accordingly **Annex C to the Practice Direction – Pre-Action Conduct** does not apply: see **The Practice Direction – Pre-Action Conduct.**

13.7.2 The parties must identify the issues with which each expert should deal in his or her report. Thereafter, it is for the expert to draft and decide upon the detailed contents and format of the report, so as to conform to **the Practice Direction supplementing CPR Part 35** and **the Protocol for the Instruction of Experts to give Evidence in Civil Claims**. It is appropriate, however, for the party instructing an expert to indicate that the report (a) should be as short as is reasonably possible; (b) should not set out copious extracts from other documents; (c) should identify the source of any opinion or data relied upon; and (d) should not annex or exhibit more than is reasonably necessary to support the opinions expressed in the report. In addition, as set out in **paragraph 15.2 of the Protocol for the Instruction of Experts to give Evidence in Civil Claims**, legal advisors may also invite experts to consider amendments to their reports to ensure accuracy, internal consistency, completeness, relevance to the issues or clarity of reports.

13.8 Presentation of Expert Evidence

13.8.1 The purpose of expert evidence is to assist the court on matters of a technical or scientific nature. Particularly in large and complex cases where the evidence has developed through a number of experts' joint statements and reports, it is often helpful for the expert at the commencement of his or her evidence to provide the court with a summary of their views on the main issues. This can be done orally or by way of a PowerPoint or similar presentation. The purpose is not to introduce new evidence but to explain the existing evidence.

13.8.2 The way in which expert evidence is given is a matter to be considered at the PTR. However where there are a number of experts of different disciplines the court will consider the best way for the expert evidence to be given. It is now quite usual for all expert evidence to follow the completion of the witness evidence from all parties. At that stage there are a number of possible ways of presenting evidence including:

- For one party to call all its expert evidence, followed by each party calling all of its expert evidence.
- For one party to call its expert in a particular discipline, followed by the other parties calling their experts in that discipline. This process would then be repeated for the experts of all disciplines.
- For one party to call its expert or experts to deal with a particular issue, followed by the other parties calling their expert or experts to deal with that issues. This process would then be repeated for all the expert issues.
- For the experts for all parties to be called to give concurrent evidence, colloquially referred to as "hot-tubbing". When this method is adopted there is generally a need for experts to be cross-examined on general matters and key issues before they are invited to give evidence concurrently on particular issues. Procedures vary but, for instance, a party may ask its expert to explain his or her view on an issue, then ask the other party's expert for his or her view on that issue and then return to that party's expert for a comment on that view. Alternatively, or in addition, questions may be asked by the judge or the experts themselves may each ask the other questions. The process is often most useful where there are a large number of items to be dealt with and the procedure allows the court to have the evidence on each item dealt with on the same occasion rather than having the evidence divided with the inability to have each expert's views expressed clearly. Frequently, it allows the extent of agreement and reason for disagreement to be seen more clearly. The giving of concurrent evidence may be consented to by the parties and the judge will consider whether, in the absence of consent, any modification is required to the procedure for giving concurrent evidence set out in the CPR (at **PD35, paragraph 11)**.

Section 14. The Pre-Trial Review

14.1 Timing and Attendance

14.1.1 The Pre-Trial Review ("PTR") will usually be fixed for a date that is 4-6 weeks in advance of the commencement of the trial itself. It is vital that the advocates, who are going to conduct the trial, should attend the PTR and every effort should be made to achieve this. It is usually appropriate for the PTR to be conducted by way of an oral hearing or, at the very least, a telephone conference, so that the judge may raise matters of trial management even if the parties can agree beforehand any outstanding directions and the detailed requirements for the management of the trial. In appropriate cases, e.g. where the amount in issue is disproportionate to the costs of a full trial, the judge may wish to consider with the parties whether there are other ways in which the dispute might be resolved.

14.2 Documents

14.2.1 The parties must complete the PTR Questionnaire (a copy of which is at **Appendix C** attached) and return it in good time to the court. In addition, the judge may order the parties to provide other documents for the particular purposes of the PTR.

14.2.2 In an appropriate case, the advocates for each party should prepare a Note for the PTR, which addresses:

- any outstanding directions or interlocutory steps still to be taken;
- the issues for determination at the trial;
- the most efficient way in which those issues might be dealt with at the trial, including all questions of timetabling of witnesses.

These Notes should be provided to the court **by 4 pm one clear working day before the PTR**.

14.2.3 The parties should also ensure that, for the PTR, the court has an up-to-date permanent case management bundle, together with a bundle of the evidence (factual and expert) that has been exchanged. This Bundle should also be made available to the court **by 4 pm one clear day before the PTR**.

14.3 Outstanding Directions

14.3.1 It can sometimes be the case that there are still outstanding interlocutory steps to be taken at the time of the PTR. That will usually mean that one, or more, of the parties has not complied with an earlier direction of the court. In that event, the court is likely to require prompt compliance, and may make costs orders to reflect the delays.

14.3.2 Sometimes a party will wish to make an application to be heard at the same time as the PTR. Such a practice is unsatisfactory, because it uses up time allocated for the PTR, and it gives rise to potential uncertainty close to the trial date. It is always better for a party, if it possibly can, to make all necessary applications well in advance of the PTR. If that is not practicable, the court should be asked to allocate additional time for the PTR, in order to accommodate specific applications. If additional time is not available, such applications will not generally be entertained.

14.4 Issues

14.4.1 The parties should, if possible, provide the judge at the PTR with an agreed list of the main issues for the forthcoming trial (including, where appropriate, a separate list of technical issues to be covered by the experts). The list of issues should not be extensive and should focus on the key issues. It is provided as a working document to assist in the management of the trial and not as a substitute for the pleadings.

14.4.2 If the parties are unable to agree the precise formulation of the issues, they should provide to the court their respective formulations. Because the list of issues should focus on the key issues the opportunity for disagreement should be minimised. The judge will note the parties' formulations, but, because the issues are those which arise on the pleadings, is unlikely to give a ruling on this matter at the PTR unless the different formulations show that there is a dispute as to the pleaded case.

14.5 Timetabling and Trial Logistics

14.5.1 Much of the PTR will be devoted to a consideration of the appropriate timetable for the trial, and other logistical matters. These will commonly include:

- Directions in respect of oral and written openings and any necessary reading time for the judge.
- Sequence of oral evidence; for example, whether all the factual evidence should be called before the expert evidence.
- Timetabling of oral evidence. To facilitate this exercise, the advocates should, after discussing the matter and whether some evidence can be agreed, provide a draft timetable indicating which witnesses need to be cross-examined and the periods during it is proposed that they should attend. Such timetables are working documents.
- The manner in which expert evidence is to be presented: see **paragraph 13.8** above.
- Whether any form of time limits should be imposed. (Since the purpose of time limits is to ensure that that the costs incurred and the resources devoted to the trial are proportionate, this is for the benefit of the parties. The judge will endeavour to secure agreement to any time limits imposed.)
- Directions in respect of the trial bundle: when it should be agreed and lodged; the contents and structure of the bundle; avoidance of duplication; whether witness statements and/or expert reports should be annotated with cross references to page numbers in the main bundle (see **paragraph 12.3** above); and similar matters.
- Whether there should be a core bundle; if so how it should be prepared and what it should contain. (The court will order a core bundle in any case where (a) there is substantial documentation and (b) having regard to the issues it is appropriate and proportionate to put the parties to cost of preparing a core bundle).
- Rules governing any email communication during trial between the parties and the court.
- Any directions relating to the use of electronic document management systems at trial (this subject to agreement between the parties).

- Any directions relating to the use of simultaneous transcription at trial (this subject to agreement between the parties).
- Whether there should be a view by the judge.
- The form and timing of closing submissions.
- Whether there is a need for a special court (because of the number of parties or any particular facilities required).
- Whether there is need for evidence by video link.
- Any applications for review or variation of costs budgets.

14.5.2 The topics identified in paragraph 14.5.1 are discussed in greater detail in section 15 below.

Section 15. The trial

15.1 Arrangements prior to the trial – witnesses

15.1.1 Prior to the trial the parties' legal representatives should seek to agree on the following matters, in so far as they have not been resolved at the PTR: the order in which witnesses are to be called to give evidence; which witnesses are not required for cross examination and whose evidence in consequence may be adduced entirely from their witness statements; the timetable for the trial and the length of time each advocate is to be allowed for a brief opening speech. When planning the timetable, it should be noted that trials normally take place on Mondays to Thursdays, since Fridays are reserved for applications.

15.1.2 The witnesses should be notified in advance of the trial as to: (a) when each is required to attend court and (b) the approximate period of time for which he or she will be required to attend.

15.1.3 It is the parties' responsibility to ensure that their respective witnesses are ready to attend court at the appropriate time. It is never satisfactory for witnesses to be interposed, out of their proper place. It would require exceptional circumstances for the trial to be adjourned for any period of time because of the unavailability of a witness.

15.2 Opening notes, trial bundle and oral openings

15.2.1 Opening notes. Unless the court has ordered otherwise, each party's advocate should provide an opening note, which outlines that party's case in relation to each of the issues identified at the PTR. Each opening note should indicate which documents (giving their page numbers in the trial bundle) that party considers that the judge should pre-read. The claimant's opening note should include a neutral summary of the background facts, as well as a chronology and cast list. The other parties' opening notes should be shorter and should assume familiarity with the factual background. In general terms, all opening notes should be of modest length and proportionate to the size and complexity of the case. Subject to any specific directions at the PTR, the claimant's opening note should be served two clear working days before the start of the trial; the other parties opening notes should be served by 1 pm on the last working day before the trial.

15.2.2 Trial bundles. Subject to any specific directions at the PTR, the trial bundles should be delivered to court at least three working days before the hearing. It is helpful for the party delivering the trial bundles to liaise in advance with the judge's clerk, in order to discuss practical arrangements, particularly when a large number of bundles are to be delivered. The parties should provide for the court an agreed index of all trial bundles. There should also be an index at the front of each bundle. This should be a helpful guide to the contents of that bundle. (An interminable list, itemising every letter or sheet of paper is not a helpful guide. Nor are bland descriptions, such as "exhibit "JT3", of much help to the bundle user.) The spines and inside covers of bundles should be clearly labelled with the bundle number and brief description.

15.2.3 As a general rule the trial bundles should be clearly divided between statements of case, orders, contracts, witness statements, expert reports and correspondence/minutes of meetings. The correspondence/minutes of meetings should be in a separate bundle or bundles and in chronological order. Documents should only be included if they are relevant to the issues in the case or helpful as background material. Documents should not be duplicated, and unnecessary duplication of e-mail threads should be avoided where possible. Exhibits to witness statements should generally be omitted, since the

documents to which the witnesses are referring will be found elsewhere in the bundles. The bundles of contract documents and correspondence/minutes of meetings should be paginated, so that every page has a discrete number. The other bundles could be dealt with in one of two ways:

- The statements of case, witness statements and expert reports could be placed in bundles and continuously paginated.

- Alternatively, the statements of case, witness statements and expert reports could be placed behind tabbed divider cards, and then the internal numbering of each such document can be used at trial. If the latter course is adopted, it is vital that the internal page numbering of each expert report continues sequentially through the appendices to that report.

The court encourages the parties to provide original copies of expert reports in this way so that any photographs, plans or charts are legible in their original size and, where appropriate, in colour. In such cases sequential numbering of every page including appendices is essential.

The ultimate objective is to create trial bundles, which are user friendly and in which any page can be identified with clarity and brevity (e.g. “bundle G page 273” or “defence page 3” or “Dr Smith page 12”). The core bundle, if there is one (as to which see **paragraph 14.5.1** above), will be a separate bundle with its own pagination or contain documents from other bundles retaining the original bundle number behind a divider marked with the bundle number.

15.2.4 In document heavy cases the parties should consider the use of an electronic document management system that can be used at the trial. In order for the most effective use to be made of such a system, it is a matter that may require consideration at an early stage in the litigation.

15.2.5 Opening speeches. Subject to any directions made at the PTR, each party will be permitted to make an opening speech. These speeches should be prepared and presented on the basis that the judge will have pre-read the opening notes and the documents identified by the parties for pre-reading. The claimant’s advocate may wish to highlight the main features of the claimant’s case and/or to deal with matters raised in the other parties’ opening notes. The other parties’ advocates will then make shorter opening speeches, emphasising the main features of their own cases and/or responding to matters raised in the claimant’s opening speech.

15.2.6 It is not usually necessary or desirable to embark upon legal argument during opening speeches. It is, however, helpful to foreshadow those legal arguments which (a) explain the relevance of particular parts of the evidence or (b) will assist the judge in following a party’s case that is to be presented during the trial.

15.2.7 Narrowing of issues. Experience shows that often the issues between the parties progressively narrow as the trial advances. Sometimes this process begins during the course of opening speeches. Weaker contentions may be abandoned and responses to those contentions may become irrelevant. The advocates will co-operate in focussing their submissions and the evidence on the true issues between the parties, as those issues are thrown into sharper relief by the adversarial process.

15.3 Simultaneous transcription

15.3.1 Many trials in the TCC, including the great majority of the longer trials, are conducted with simultaneous transcripts of the evidence being provided. There are a number of transcribing systems available. It is now common for a system to be used involving simultaneous transcription onto screens situated in court. However, systems involving the production of the transcript in hard or electronic form at the end of the day or even after a longer period of time are also used. The parties must make the necessary arrangements with one of the companies who provide this service. The court can provide a list, on request, of all companies who offer such a service.

15.3.2 In long trials or those which involve any significant amount of detailed or technical evidence, simultaneous transcripts are helpful. Furthermore, they enable all but the shortest trials to be conducted so as to reduce the overall length of the trial appreciably, since the judge does not have to note the evidence or submissions in longhand as the trial proceeds. Finally, a simultaneous transcript makes the task of summarising a case in closing submissions and preparing the judgment somewhat easier. It reduces both the risk of error or omission and the amount of time needed to prepare a reserved judgment.

15.3.3 If possible, the parties should have agreed at or before the PTR whether a simultaneous transcript is to be employed. It is usual for parties to agree to share the cost of a simultaneous transcript as an interim measure pending the assessment or agreement of costs, when this cost is assessable and payable as part of the costs in the case. Sometimes, a party cannot or will not agree to an interim cost sharing arrangement. If so, it is permissible for one party to bear the cost, but the court cannot be provided with a transcript unless all parties have equal access to the transcript. Unlike transcripts for use during an appeal, there is no available means of obtaining from public funds the cost of a transcript for use at the trial.

15.4 Time limits

15.4.1 Generally trials in the TCC are conducted under some form of time limit arrangement. Several variants of time limit arrangements are available, but the TCC has developed the practice of imposing flexible guidelines in the form of directions as to the sharing of the time allotted for the trial. These are not mandatory but an advocate should ordinarily be expected to comply with them.

15.4.2 The practice is, in the usual case, for the court to fix, or for the parties to agree, at the PTR or before trial an overall length of time for the trial and overall lengths of time within that period for the evidence and submissions. The part of those overall lengths of time that will be allocated to each party must then be agreed or directed.

15.4.3 The amount of time to be allotted to each party will not usually be the same. The guide is that each party should have as much time as is reasonably needed for it to present its case and to test and cross examine any opposing case, but no longer.

15.4.4 Before the trial, the parties should agree a running order of the witnesses and the approximate length of time required for each witness. A trial timetable should be provided to the court when the trial starts and, in long trials, regularly updated.

15.4.5 The practice of imposing a strict guillotine on the examination or cross examination of witnesses, is not normally appropriate. Flexibility is encouraged, but the agreed or directed time limits should not ordinarily be exceeded without good reason. It is unfair on a party, if that party's advocate has confined cross-examination to the agreed time limits,

but an opposing party then greatly exceeds the corresponding time limits that it has been allocated.

15.4.6 An alternative form of time limit, which is sometimes agreed between the parties and approved by the court, is the "chess clock arrangement". The available time is divided equally between the parties, to be used by the parties as they see fit. Thus each side has X hours. One representative on each side operates the chess clock. The judge has discretion "to stop the clock" in exceptional circumstances. A chess clock arrangement is only practicable in a two-party case.

15.5 Oral evidence

15.5.1 Evidence in chief is ordinarily adduced by the witness confirming on oath the truth and accuracy of the previously served witness statement or statements. A limited number of supplementary oral questions will usually be allowed (a) to give the witness an opportunity to become familiar with the procedure and (b) to cover points omitted by mistake from the witness statement or which have arisen subsequent to its preparation.

15.5.2 In some cases, particularly those involving allegations of dishonest, disreputable or culpable conduct or where significant disputes of fact are not documented or evidenced in writing, it is desirable that the core elements of a witness's evidence-in-chief are given orally. The giving of such evidence orally will often assist the court in assessing the credibility or reliability of a witness.

15.5.3 If any party wishes such evidence to be given orally, a direction should be sought either at the PTR or during the openings to that effect. Where evidence in chief is given orally, the rules relating to the use of witness statements in cross-examination and to the adducing of the statement in evidence at any subsequent stage of the trial remain in force and may be relied on by any party.

15.5.4 It is usual for all evidence of fact from all parties to be adduced before expert evidence and for the experts to give evidence in groups with all experts in a particular discipline giving their evidence in sequence: see **paragraph 13.8.2** above for ways for expert evidence to be given. Usually, but not invariably, the order of witnesses will be such that the claimant's witnesses give their evidence first, followed by all the witnesses for each of the other parties in turn. If a party wishes a different order of witnesses to that normally followed, the agreement of the parties or a direction from the judge must be obtained in advance.

15.5.5 In a multi-party case, attention should be given (when the timetable is being discussed) to the order of cross-examination and to the extent to which particular topics will be covered by particular cross-examiners. Where these matters cannot be agreed, the order of cross-examination will (subject to any direction of the judge) follow the order in which the parties are set out in the pleadings. The judge will seek to limit cross examination on a topic which has been covered in detail by a preceding cross examination.

15.5.6 In preparing witness statements and in ascertaining what evidence a witness might give in an original or supplementary witness statement or as supplementary evidence-in-chief, lawyers may discuss the evidence to be given by a witness with that witness. The coaching of witnesses or the suggestion of answers that may be given, either in the preparation of witness statements or before a witness starts to give evidence, is not permitted. In relation to the process of giving evidence, witness familiarisation is permissible, but witness coaching is not. The boundary between witness familiarisation and witness coaching is discussed in the context of criminal proceedings by the Court of Appeal in *R v Momodou* [2005] EWCA Crim 177 at [61] – [62]. Once a witness has started

giving evidence, that witness cannot discuss the case or their evidence either with the lawyers or with anyone else until they have finally left the witness box. Occasionally a dispensation is needed (for example, an expert may need to participate in an experts' meeting about some new development). In those circumstances the necessary dispensation will either be agreed between the advocates or ordered by the judge.

15.6 Submissions during the trial

15.6.1 Submissions and legal argument should be kept to a minimum during the course of the trial. Where these are necessary, (a) they should, where possible, take place when a witness is not giving evidence and (b) the judge should be given forewarning of the need for submissions or legal argument. Where possible, the judge will fix a time for these submissions outside the agreed timetable for the evidence.

15.7 Closing submissions

15.7.1 The appropriate form of closing submissions can be determined during the course of the trial. Those submissions may take the form of (a) oral closing speeches or (b) written submission alone or (c) written submissions supplemented by oral closing speeches. In shorter or lower value cases, oral closing speeches immediately after the evidence may be the most cost effective way to proceed. Alternatively, if the evidence finishes in the late afternoon, a direction for written closing submissions to be delivered by specified (early) dates may avoid the cost of a further day's court hearing. In longer and heavier cases the judge may (in consultation with the advocates) set a timetable for the delivery of sequential written submissions (alternatively, an exchange of written submissions) followed by an oral hearing. In giving directions for oral and/or written closing submissions, the judge will have regard to the circumstances of the case and the overriding objective.

15.7.2 It is helpful if, in advance of preparing closing submissions, the parties can agree on the principal topics or issues that are to be covered. It is also helpful for the written and oral submissions of each party to be structured so as to cover those topics in the same order.

15.7.3 It is both customary and helpful for the judge to be provided with a photocopy of each authority and statutory provision that is to be cited in closing submissions.

15.8 Views

15.8.1 It is sometimes necessary or desirable for the judge to be taken to view the subject-matter of the case. In normal circumstances, such a view is best arranged to take place immediately after the openings and before the evidence is called. However, if the subject matter of the case is going to be covered up or altered prior to the trial, the view must be arranged earlier. In that event, it becomes particularly important to avoid a change of judge. Accordingly, the court staff will note on the trial diary the fact that the assigned judge has attended a view. In all subsequent communications between the parties and court concerning trial date, the need to avoid a change of judge must be borne firmly in mind.

15.8.2 The matters viewed by the judge form part of the evidence that is received and may be relied on in deciding the case. However, nothing said during the view to (or in the earshot of) the judge, has any evidential status, unless there has been an agreement or order to that effect.

15.8.3 The parties should agree the arrangements for the view and then make those arrangements themselves. The judge will ordinarily travel to the view unaccompanied and, save in exceptional circumstances when the cost will be shared by all parties, will not require any travelling costs to be met by the parties.

15.9 Judgments

15.9.1 Depending on the length and complexity of the trial, the judge may (a) give judgment orally immediately after closing speeches; (b) give judgment orally on the following day or soon afterwards; or (c) deliver a reserved judgment in writing at a later date.

15.9.2 If a party wishes to obtain a transcript of an oral judgment, it should notify the judge's clerk so that any notes made by the judge can be retained in order to assist the judge when correcting the transcript.

15.9.3 Where judgment is reserved. The judge will normally indicate at the conclusion of the trial what arrangements will be followed in relation to (a) the making available of any draft reserved judgment and (b) the handing down of the reserved judgment in open court. If a judgment is reserved, it will be handed down as soon as possible. Save in exceptional circumstances, any reserved judgment will be handed down within 3 months of the conclusion of the trial. Any enquiries as to the progress of a reserved judgment should be addressed in the first instance to the judge's clerk, with notice of that enquiry being given to other parties. If concerns remain following the judge's response to the parties, further enquiries or communication should be addressed to the judge in charge of the TCC.

15.9.4 If the judge decides to release a draft judgment in advance of the formal hand down, this draft judgment will be confidential to the parties and their legal advisers. Solicitors and counsel on each side should send to the judge a note (if possible, agreed) of any clerical errors or slips which they note in the judgment. However, this is not to be taken as an opportunity to re-argue the issues in the case.

15.10 Disposal of judge's bundle after conclusion of the case

15.10.1 The judge will have made notes and annotations on the bundle during the course of the trial. Accordingly, the normal practice is that the entire contents of the judge's bundle are disposed of as confidential waste. The empty ring files can be recovered by arrangement with the judge's clerk.

15.10.2 If any party wishes to retrieve from the judge's bundle any particular items of value which it has supplied (e.g. plans or photographs), a request for these items should be made to the judge's clerk promptly at the conclusion of the case. If the judge has not made annotations on those particular items, they will be released to the requesting party.

Section 16. Costs and Costs Management

16.1 General

16.1.1 All disputes as to costs will be resolved in accordance with **CPR Part 44**, and in particular **CPR 44.2**.

16.1.2 The judge's usual approach will be to determine which party can be properly described as 'the successful party', and then to investigate whether there are any good reasons why that party should be deprived of some or all of their costs.

16.1.3 It should be noted that, in view of the complex nature of TCC cases, a consideration of the outcome on particular issues or areas of dispute can sometimes be an appropriate starting point for any decision on costs.

16.1.4 As set out in **paragraphs 5.1.6, 5.5.5 and 12.1.4** above, if the judge considers that any particular aspect is likely to or has led to unnecessarily increased costs, the judge may make a costs order disallowing costs or ordering costs to be paid, either on the basis of a summary assessment, or by giving a direction to the costs judge as to what costs should be disallowed or paid on a detailed assessment.

16.2 Summary Assessment of Costs

16.2.1 Interlocutory hearings that last one day or less will usually be the subject of a summary assessment of costs in accordance with **CPR 44.6** and **section 9 of PD44.** The parties must ensure that their statements of costs, on which the summary assessment will be based, are provided to each other party, and the Court, no later than **24 hours** before the hearing in question: see **paragraph 6.9.3** above.

16.2.2 The Senior Courts Costs Office Guide to the Summary Assessment of Costs sets out clear advice and guidance as to the principles to be followed in any summary assessment. Generally summary assessment proceeds on the standard basis. In making an assessment on the standard basis, the court will only allow a reasonable amount in respect of costs reasonably incurred and any doubts must be resolved in favour of the paying party.

16.2.3 In arguments about the hourly rates claimed, the judge will have regard to the principles set out by the Court of Appeal in *Wraith v Sheffield Forgemasters Ltd* [1998] 1 WLR 132: ie. the judge will consider whether the successful party acted reasonably in employing the solicitors who had been instructed and whether the costs they charged were reasonable compared with the broad average of charges made by similar firms practising in the same area.

16.2.4 When considering hourly rates, the judge in the TCC may have regard to any relevant guideline rates.

16.2.5 The court will also consider whether unnecessary work was done or an unnecessary amount of time was spent on the work.

16.2.6 It may be that, because of pressures of time, and/or the nature and extent of the disputes about the level of costs incurred, the court is unable to carry out a satisfactory summary assessment of the costs. In those circumstances, the court will direct that costs be assessed on the standard (or indemnity) basis and will order an amount to be paid on account of costs under **CPR 44.3 (8**).

16.3 Costs Management

16.3.1 Following a pilot scheme in the TCC and elsewhere, **Section II of CPR 3** introduces the new regime of Costs Management. This implements the recommendations of the Jackson Report.

16.3.2 The rules now require each party to file a costs budget in the prescribed form at the outset of the litigation (before the first CMC). Although not expressly stated in **Practice Direction 3E**, the budgets should be discussed between the parties prior to the budgets being filed with the court. The court will fix the first CMC sufficiently far ahead to enable this to be done.

16.3.3 At the first CMC the court will consider the costs budgets. If they are agreed, the court will make an order recording the extent to which the budgets have been agreed: see **CPR 3.15(2)(a)**. In such cases the parties' costs will be subject to detailed assessment as in the pre costs management regime. The penalty for failure to serve a budget is draconian: the party will be limited to recovering the court fees only (see CPR 3.14), as applied by the Court of Appeal in *Mitchell v News Group Newspapers* [2013] EWCA Civ 1537.

16.3.4 Where a budget or parts of a budget are not agreed, the court will consider the budget and make such revisions as it thinks fit. These will then be recorded in a Costs Management Order: see **CPR 3.15(2)(b)**.

16.3.5 Precedent H is the form for a costs budget. This divides the litigation into different phases, and the court will consider the amount of the fees and disbursements for each phase separately. Costs budgets are to be supported by a statement of truth (see **CPR 3EPD.1**).

16.3.6 Once approved, the costs shown in each phase of the costs budget will usually be recoverable on a detailed assessment if they have been incurred. Recovery will not usually be permitted where a party has overspent its budget for a particular phase, even though it may have underspent on another phase. The court will not depart from the approved figure in the budget unless satisfied that there is good reason to do so: see **CPR 3.18**.

16.3.7 Precedent H allows a party to provide an allowance for certain contingencies, but these must be set out in the budget and the reason for them given. It is open to a party to apply to the court to amend its costs budget if there is good reason to do so.

16.3.8 In cases where items in the costs budgets are in issue, it of great help to the court if counsel can prepare a brief summary of the differences (if necessary, there is available on the market an Excel programme that can do this).

16.3.9 The parties should note that a different regime applied to cases commenced before 1 April 2013: see **PD51G** (Costs Management in Mercantile Courts and Technology and Construction Courts – Pilot Scheme). For cases commenced on or after 1 April 2013: see **CPR 3.11-3.18** and **PD3E**, including the current £2 million cap (a revised Precedent H has been in force since 1 October 2013). For cases commencing after 22 April 2014 the costs management regime will apply where the value of the case is below £10 million: see **CPR 3.12** (as amended).

16.4 Costs Capping Orders

16.4.1 In exercising case management powers, the judge may make costs cap orders which, in normal circumstances, will be prospective only. New rules are set out in **CPR 3, Section III**. The judge should only do so, however, where:

- it is in the interests of justice to do so;
- there is a substantial risk that without such an order costs will be disproportionately incurred; and
- the court is not satisfied that the risk can be adequately controlled by case management and detailed assessment of costs after a trial.

See **CPR 3 Section III "Costs Capping"**.

16.4.2 The possibility of a costs cap order should be considered at the first CMC. The later such an order is sought, the more difficult it may be to impose an effective costs cap.

16.4.3 The procedure for making an application for a costs capping order are set out in **CPR 3.20** and **PD3F Costs Capping** (these include a new requirement that parties must file a costs budget rather than an estimate of costs with any application for a costs capping order).

16.5 Costs: Miscellaneous

16.5.1 Pursuant to **CPR 44.8** and **Section 10 PD44**, solicitors have a duty to tell their clients within 7 days if an order for costs was made against the clients and they were not present at the hearing, explaining how the order came to be made. They must also give the same information to anyone else who has instructed them to act on the case or who is liable to pay their fees.

Section 17. Enforcement

17.1 General

17.1.1 The TCC is concerned with the enforcement of judgments and orders given by the TCC and with the enforcement of adjudicators' decisions and arbitrators' awards. Adjudication and arbitration enforcement have been dealt with in, respectively, sections 9 and 10 above.

17.2 High Court

17.2.1 London. A party wishing to make use of any provision of the **CPR** concerned with the enforcement of judgments and orders made in the TCC in London can use the TCC Registry in London or any other convenient TCC District Registry listed in **Appendix A**.

17.2.2 Outside London. Where the judgment or order in respect of which enforcement is sought was made by a judge of the TCC out of London, the party seeking enforcement should use the Registry of the court in which the judgment or order was made.

17.2.3 Where orders are required or sought to support enforcement of a TCC judgment or order, a judge of the TCC is the appropriate judge for that purpose. If available, the judge who gave the relevant judgment or made the relevant order is the appropriate judge to whom all applications should be addressed.

17.3 County Court

17.3.1 A TCC County Court judgment (like any other County Court judgment):

- if for less than £600, must be enforced in the County Court;
- if for between £600 and £4999, can be enforced in either the County Court or the High Court, at the option of the judgment creditor;
- if for £5,000 or more, must be enforced in the High Court.

17.3.2 If a judgment creditor in a TCC County Court wishes to transfer any enforcement proceedings to any other County Court hearing centre (whether a TCC County Court or not), he must make a written request to do so pursuant to **section 2 of the Practice Direction supplementing Part 70**. Alternatively, at the end of the trial the successful party may make an oral application to the trial judge to transfer the proceedings to some other specified County Court or County Court hearing centre for the purposes of enforcement.

17.4 Enforcement on paper

17.4.1 Where the application or order is unopposed or does not involve any substantial dispute, the necessary order should be sought by way of a paper application.

17.5 Charging Orders and Orders For Sale

17.5.1 One of the most common methods of enforcement involves the making of a charging order over the judgment debtor's property. There are three stages in the process.

17.5.2 The judgment creditor can apply to the TCC for a charging order pursuant to CPR 73.3 and 73.4. The application is in Form N379 in which the judgment creditor must identify the relevant judgment and the property in question. The application is initially dealt with by the judge without a hearing, and he may make an interim charging order imposing a charge over the judgment debtor's interest in the property and fixing a hearing to consider whether or not to make the charging order final.

17.5.3 The interim charging order must be served in accordance with CPR 73.5. If the judgment debtor or any other person objects to the making of a final charging order, then he must set out his objection in accordance with CPR 73.8. There will then be a hearing at which the court will decide whether or not to make the charging order final.

17.5.4 Ultimately, if the judgment remains unsatisfied, the party who has obtained the final charging order may seek an order for the sale of the property in accordance with CPR 73.10. Although paragraph 4.2 of PD 73 might suggest that a claim for an order for sale to enforce a charging order must be started in the Chancery Division, there is no such restriction in the rule itself and practical difficulties have arisen for parties who have obtained a judgment, an interim charging order and a final charging order in the TCC and who do not want to have to transfer or commence fresh proceedings in another division in order to obtain an order for sale. The TCC will, in appropriate circumstances, in accordance with the overriding objective, make orders for sale in such circumstances, particularly if the parties are agreed that is the most convenient cost-effective course: see *Packman Lucas Limited v Mentmore Towers Ltd* [2010] EWHC 1037 (TCC).

17.5.5 In deciding whether or not to make an order for sale, the court will consider, amongst other things, the size of the debt, and the value of the property relative to that debt, the conduct of the parties and the absence of any other enforcement option on the part of the judgment creditor.

Section 18. The TCC judge as arbitrator

18.1 General

18.1.1 Section 93(1) of the Arbitration Act 1996 ("the 1996 Act") provides that a judge of the TCC (previously an Official Referee) may "if in all the circumstances he thinks fit, accept appointment as a sole arbitrator or as an umpire by or by virtue of an arbitration agreement." Judges of the TCC may accept appointments as sole arbitrators or umpires pursuant to these statutory provisions. The 1996 Act does not limit the appointments to arbitrations with the seat in England and Wales.

18.1.2 However, a TCC judge cannot accept such an appointment unless the Lord Chief Justice "has informed him that, having regard to the state of (TCC) business, he can be made available": see section 93(3) of the 1996 Act. In exceptional cases a judge of the TCC may also accept an appointment as a member of a three-member panel of arbitrators if the Lord Chief Justice consents but such arbitrations cannot be under section 93 of the 1996 Act because section 93(6) of the 1996 Act modifies the provisions of the 1996 Act where there is a judge-arbitrator and this could not apply to arbitral tribunals with three arbitrators, one of whom was a judge-arbitrator.

18.1.3 Application should be made in the first instance to the judge whose acceptance of the appointment is sought. If the judge is willing to accept the appointment, he will make application on behalf of the appointing party or parties, through the judge in charge of the TCC, to the Lord Chief Justice for his necessary approval. He will inform the party or parties applying for his appointment once the consent or refusal of consent has been obtained.

18.1.4 Subject to the workload of the court and the consent of the Lord Chief Justice, the TCC judges will generally be willing to accept such requests, particularly in short cases or where an important principle or point of law is concerned. Particular advantages have been noted by both TECBAR and TeCSA in the appointment of a TCC judge to act as arbitrator where the dispute centres on the proper interpretation of a clause or clauses within one of the standard forms of building and engineering contracts.

18.2 Arbitration Management and Fees

18.2.1 Following the appointment of the judge-arbitrator, the rules governing the arbitration will be decided upon, or directed, at the First Preliminary Meeting, when other appropriate directions will be given. The judge-arbitrator will manage the reference to arbitration in a similar way to a TCC case.

18.2.2 The judge sitting as an arbitrator will sit in a TCC court room (suitably rearranged) unless the parties and the judge-arbitrator agree to some other arrangement.

18.2.3 Fees are payable to the Court Service for the judge-arbitrator's services and for any accommodation provided. The appropriate fee for the judge-arbitrator, being a daily rate, is published in the Fees Order and should be paid through the TCC Registry.

18.3 Modifications to the Arbitration Act 1996 for judge-arbitrators

18.3.1 As section 93 envisages that appointments of judge-arbitrators will be in arbitrations where the seat of the arbitration is in England and Wales, Schedule 2 of the 1996 Act modifies the provisions of the Act which apply to arbitrations where the seat is in England and Wales.

18.3.2 In relation to arbitrations before judge-arbitrators, **paragraph 2 of Schedule 2 to the Arbitration Act 1996** provides that references in Part I of the 1996 Act to "the court" shall be construed in relation to a judge-arbitrator, or in relation to the appointment of a judge-arbitrator, as references to "the Court of Appeal". This means that, for instance, any appeal from a judge-arbitrator under section 69 of the 1996 Act is therefore heard, in the first instance, by the Court of Appeal.

Appendices

Appendix A – Case management information sheet

This Appendix is the same as Appendix A to the Part 60 Practice Direction.

Appendix B – Case management directions form

CASE MANAGEMENT DIRECTIONS FORM

Action no HT-……. [*Insert name of judge in title of order*]

[Delete or amend the following directions, as appropriate to the circumstances of the case]

1. Trial date …….. For the purposes of payment of the trial fee, but for no other purposes, this date is provisional. This date will cease to be provisional and the trial fee will become payable on … [*usually 2 months before the trial date*].

2. Estimated length of trial …….

3. Directions, if appropriate, (a) for the trial of any preliminary issues or (b) for the trial to be divided into stages …

4. This action is to be [consolidated] [managed and tried with] action no … The lead action shall be … All directions given in the lead action shall apply to both actions, unless otherwise stated.

5. Further statements of case shall be filed and served as follows:
   - Defence and any counterclaim by 4 pm on …
   - Reply (if any) and defence to counterclaim (if any) by 4 pm on …

6. Permission to make the following amendments …

7. Disclosure
   - By 5 pm on …
   - To be standard disclosure/on the basis set out in CPR 31(5)(7) …
   - On the basis set out in CPR 31(5)(7) …
   - Specific directions in respect of electronic disclosure … [where appropriate the TeCSA/TECBAR/SCL e-disclosure protocol is to be followed]

8. There shall be a Scott Schedule in respect of defects/ items of damage/ other …
   - The column headings shall be as follows …
   - Claimant/ defendant to serve Scott Schedule by 5 pm on …
   - Defendant/ claimant to respond to Scott Schedule by 5 pm on …

9. Signed statements of witnesses of fact to be served by 5 pm on …

   [Supplementary statements of witnesses of fact to be served by 5 pm on …]

10. The parties have permission to call the following expert witnesses in respect of the following issues:
    - …
    - …
    - …

11. In respect of any expert evidence permitted under paragraph 10:
    - Directions for carrying out inspections/ taking samples/ conducting experiments/ performance of calculations shall be …
    - Experts in like fields to hold discussions in accordance with rule 35.12 by …
    - Experts' statements rule 35.12 (3) to be prepared and filed by 5 pm on …
    - Experts' reports to be served by 5 pm on …

12. A single joint expert shall be appointed by the parties to report on the following issue(s) …. The following directions shall govern the appointment of the single joint expert:
    - ….
    - ….

13. The following documents shall be provided to the court electronically or in computer readable form, as well as in hard copy …

14. Costs Management
    - The costs budgets filed by the parties are approved.
    - The costs budget filed by the Claimant/Defendant is approved.
    - The following parties' costs budgets are approved subject to the following revisions:
        - …
        - …

15. A review case management conference shall be held on … at …am/pm. Time allowed …

16. The pre-trial review shall be held on … at ... am/pm. Time allowed …

17. The above dates and time limits may be extended by agreement between the parties. Nevertheless:
    - The dates and time limits specified in paragraphs … may not be extended by more than [14] days without the permission of the court.
    - The dates specified in paragraph 1 (trial) and paragraph 15 (pre-trial review) cannot be varied without the permission of the court.

18. Costs in the case.

DATED this day of 201

Appendix C – Pre-trial review questionnaire

This Appendix is the same as Appendix C to the Part 60 Practice Direction.

Appendix D – Contact details for Technology and Construction Court

The High Court of Justice, Queen's Bench Division, Technology and Construction Court

The Rolls Building
7 Rolls Buildings
Fetter Lane
London EC4A 1NL

Management
Court Manager: Mr Wilf Lusty (wilf.lusty@hmcts.gsi.gov.uk)
List Officer: Mr Steven Gibbon (steven.gibbon@hmcts.gsi.gov.uk)

Court Manager: Tel: 020 7947 7427
Listing: Tel: 020 7947 7156
Registry Tel: 020 7947 7591
Fax: 0870 761 7724 (Goldfax)

TCC Judges
Mr Justice Edwards-Stuart (Judge in Charge of the TCC from 1 September 2013)
Clerk: Philip Morris (philip.morris@hmcts.gsi.gov.uk)
Tel: 020 7947 7205
Fax: 0870 761 7694 (Goldfax)

Mr Justice Ramsey
Clerk: Mr David Hamilton (david.hamilton5@hmcts.gsi.gov.uk)
Tel: 020 7947 6331
Fax: 0870 761 7694 (Goldfax)

Mr Justice Akenhead
Clerk: Mr Sam Taylor (sam.taylor1@hmcts.gsi.gov.uk)
Tel: 020 7947 7445
Fax: 0870 761 7694 (Goldfax)

Mr Justice Coulson
Clerk: Mr Simon Smith (simon.smith@hmcts.gsi.gov.uk)
Tel: 020 7947 6547
Fax: 0870 761 7694 (Goldfax)

Mr Justice Stuart-Smith
Clerk: Maxine Barfoot (maxine.barfoot@hmcts.gsi.gov.uk)
Tel: 020 7073 4837

The following High Court Judges may be available, when necessary and by arrangement with the President of the Queen's Bench Division, to sit in the TCC:

Mr Justice Burton
Mrs Justice Carr
Mr Justice Field
Mr Justice Foskett
Mr Justice Ouseley
Mr Justice Simon
Mr Justice Teare

The following judges are also TCC judges who may be available when necessary and by arrangement with the President of the Queen's Bench Division, to sit in the TCC:

His Honour Judge Anthony Thornton QC
His Honour Judge David Mackie QC

Birmingham District Registry: Birmingham County Court

33 Bull Street
Birmingham
West Midlands B4 6DS

TCC listing and clerk to His Honour Judge David Grant: Peter Duke (Peter.Duke@hmcts.gsi.gov.uk)
birmingham.tcc@hmcts.gsi.gov.uk
Tel: 0121 681 4441
Fax: 0121 250 6437

TCC Judges
His Honour Judge David Grant (principal TCC Judge)
His Honour Judge Simon Brown QC (Mercantile Judge)
His Honour Judge Charles Purle QC (Chancery Judge)
His Honour Judge David Cooke
His Honour Martin McKenna
His Honour Judge Simon Barker QC

Bristol District Registry: Bristol County Court

TCC Listing Office
Bristol Civil Justice Centre
2 Redcliff Street
Bristol BS1 6GR

TCC Listing Officer: Victoria Haddock
Tel: 0117 366 4866
Email: bristoltcclisting@hmcts.gsi.gov.uk
Switchboard Tel: 0117 366 4800

TCC Judges
His Honour Judge Mark Havelock-Allan QC (principal TCC judge)

His Honour Judge Patrick McCahill QC
District Judge Brian Watson (TCC Liaison Judge)

Cardiff District Registry: Cardiff County Court

Cardiff Civil Justice Centre
2 Park Street
Cardiff CF10 1ET

Main switchboard: 029 2037 6400
Fax: 029 2037 6475
Listing office: 029 2037 6412

Circuit Judges Listing Manager: Tracey Davies
Tel: 029 2037 6483, tracey.davies2@hmcts.gsi.gov.uk

Specialist Listing Officer: Amanda Thomas
Tel: 029 2037 6412, amanda.thomas6@hmcts.gsi.gov.uk

TCC Judges
His Honour Judge Andrew Keyser QC (principal TCC judge)
His Honour Judge Milwyn Jarman QC
His Honour Judge Anthony Seys Llewellyn QC

Central London Civil Justice Centre

26 Park Crescent, London W1B 1HT
(but as from 20 May 2014 Thomas More Building, Royal Courts of Justice, Strand, London WC2 2LL)

TCC/Chancery Section: Geanette Rodney
Tel: 0207 917 7821
(from 20 May 2014: 020 7947 7800; and for counter appointments 020 7947 7502)
Fax: 020 7917 7935
Goldfax: 0970 330 571
Email for e-applications: CLCCTCC@hmcts.gsi.gov.uk

Circuit Judge Listing: 020 7917 7932
Email: hearingsatcentrallondon.countycourt@hmcts.gsi.gov.uk
Email for skeleton arguments: CentralLondonCJSKEL@hmcts.gsi.gov.uk

TCC Judges
His Honour Judge Edward Bailey (principal TCC Judge)
His Honour Judge John Hand QC
His Honour Judge Timothy Lamb
Her Honour Judge Deborah Taylor
His Honour Judge Marc Dight

Chester District Registry: Chester County Court

The Chester Civil Justice Centre
Trident House
Little St John Street
Chester CH1 1SN

Tel: 01244 404200
Fax: 0870 324 0311
email: hearings@chester.countycourt.gsi.gov.uk

TCC Judge
His Honour Judge Derek Halbert

Exeter District Registry: Exeter County Court

Southernhay Gardens
Exeter
Devon EX1 1UH

Tel: 01392 415 350
Fax: 01392 415645
email: hearings@exeter.countycourt.gsi.gov.uk

TCC Judge
His Honour Judge Barry Cotter QC

Leeds Combined Court Centre

The Courthouse
1 Oxford Row
Leeds LS1 3BG

TCC Chancery and Mercantile Listing Officer: Richard Sutherland
Tel: 0113 306 2440 / 2441
Fax: 08707617740
e-mail: richard.sutherland@hmcts.gsi.gov.uk

TCC Judges
His Honour Judge Mark Raeside QC (Judge in Charge of TCC in North East Region)
His Honour Judge John Behrens
His Honour Judge Roger Kaye QC
His Honour Judge Andrew Saffman

Liverpool District Registry: Liverpool Combined Court Centre

Liverpool Civil & Family Courts
35 Vernon Street
Liverpool L2 2BX

TCC listing officer: Jackie Jones
Tel: 0151 296 2444
Fax: 0151 295 2201

TCC Judges
His Honour Judge Wood QC

Manchester District Registry
Manchester Civil Justice Centre
1 Bridge Street West
Manchester M60 9DJ

TCC clerk: Isobel Rich
Tel: 0161 240 5305
Fax: 0161 240 5399
e-mail: manchester.tcc@hmcts.gsi.gov.uk

TCC Judges
His Honour Judge Philip Raynor QC (full time TCC judge)
His Honour Judge Stephen Davies (full time TCC judge)

The following judges at Manchester are nominated to deal with TCC business:
HHJ David Waksman QC
HHJ Mark Pelling QC
HHJ David Hodge QC
HHJ Nigel Bird
HHJ Graham Platts
HHJ Allan Gore QC

Mold County Court

Law Courts
Civic Centre
Mold
Flintshire
Wales CH7 1AE TCC

Listing officer: Selina Wilkes
Tel: 01352 707405
Fax: 01352 753874

TCC Judges
Will attend from Cardiff when required

Newcastle upon Tyne Combined Court Centre

The Law Courts
The Quayside
Newcastle upon Tyne NE1 3LA

Tel: 0191 201 2029

Listing Officer: Mrs Carol Gallagher
Email: carol.gallagher@hmcts.gsi.gov.uk
Tel: 0191 201 2047
Fax: 0191 201 2001

TCC Judges
His Honour Judge Christopher Walton
District Judge Atherton

Nottingham District Registry: Nottingham County Court

60 Canal Street
Nottingham NG1 7EJ

Tel 0115 910 3500
Fax: 0115 910 3510

TCC Judges
His Honour Judge Richard Inglis
His Honour Judge Nigel Godsmark QC

Sheffield Combined Court Centre

The Law Courts
50 West Bar
Sheffield S3 8PH

Tel: 0114 281 2419
Fax: 0114 281 2585

TCC Judge
His Honour Judge John Bullimore

Winchester Combined Court Centre

The Law Courts
Winchester
Hampshire SO23 9EL

Switchboard: 01962 814 100
Fax: 01962 814 260
Diary Manager: Mr Wayne Hacking
Email: wayne.hacking@hmcts.gsi.gov.uk
Tel: 023 8021 3254
Civil Listing Officer: Mrs Karen Hart
Email: karen.hart@hmcts.gsi.gov.uk
Tel: 01962 814 113

TCC Judge
His Honour Judge Iain Hughes QC

Appendix E – Draft ADR Order

1. By [date/time] the parties shall exchange lists of three neutral individuals who have indicated their availability to conduct a mediation or ENE or other form of ADR in this case prior to [date].

2. By [date/time] the parties shall agree an individual from the exchanged lists to conduct the mediation or ENE or other form of ADR by [date]. If the parties are unable to agree on the neutral individual, they will apply to the Court in writing by [date/time] and the Court will choose one of the listed individuals to conduct the mediation or ENE or other form of ADR.

3. There will be a stay of the proceedings until [date/time] to allow the mediation or ENE or other form of ADR to take place. On or before that date, the Court shall be informed as to whether or not the case has been finally settled. If it has not been finally settled, the parties will:

   a) comply with all outstanding directions made by the Court;

   b) attend for a review CMC on [date/time].

DATED this day of 201

Appendix F – Draft directions order in adjudication enforcement proceedings

BEFORE the Hon Mr Justice [ ] sitting in the High Court of Justice, Queen's Bench Division, Technology and Construction Court

UPON reading the application notice dated [ ], and the witness statement of [ ] dated [ ],

IT IS HEREBY ORDERED THAT:

1) The Claimant shall as soon as practicable after receipt of this Order serve this application upon the Defendant together with:
   a) The Claim Form, Response Pack and any statement relied upon
   b) This Order.

2) The time for the Defendant to file its Acknowledgement of Service is abridged to [four] working days. The Defendant is advised that failure to comply with the requirement to file this Acknowledgment can lead to judgment in default being entered against it. The Claimant is reminded that if there is such failure, serious consideration should be given to entering judgment in default as a cheaper option than taking the matter through to a hearing.

3) Any further evidence shall be served and filed:
   a) By the Defendant, on or by [about 14 days after order]
   b) By the Claimant, in response to that of the Defendant, on or by [7 days later];
   and in either case no later than 4.00 pm that day.

4) The Claimant has permission to issue an application for summary judgment prior to service by the Defendant of either Acknowledgement of Service or a Defence, pursuant to CPR Rule 24.4. The period of notice to be given to the Defendant is abridged to [four] working days.

5) There shall be an oral hearing on [ ] at [ ] with a time estimate of [ ] for the hearing of the Claimant's summary judgment application (this time may be varied at short notice to accommodate the listing requirements of the court).

6) The Claimant shall serve and file a paginated bundle comprising all relevant documents, statements, pleadings and otherwise by 1.00 pm on [ ].

7) Any skeleton arguments and any authorities to be relied upon (an agreed bundle, if possible) shall be served and filed by 1.00 pm on [ ].

8) The costs of and incidental to these directions are reserved.

9) The parties have permission to apply to set aside or vary these directions on [two] working days' written notice to the other.

Dated this day of 201

Appendix G – Draft Court Settlement Order

Court Settlement

1. The Court Settlement Process under this Order is a confidential, voluntary and non-binding dispute resolution process in which the Settlement Judge assists the Parties in reaching an amicable settlement at a Court Settlement Conference.

2. This Order provides for the process by which the Court assists in the resolution of the disputes in the Proceedings. This Order is made by consent of the Parties with a view to achieving the amicable settlement of such disputes. It is agreed that the Settlement Judge may vary this Order at any time as he thinks appropriate or in accordance with the agreement of the Parties.

3. The following definitions shall apply:
   (1) The Parties shall be [names]
   (2) The Proceedings are [identify]
   (3) The Settlement Judge is [name]

The Court Settlement Process

4. The Settlement Judge may conduct the Court Settlement Process in such manner, as the Judge considers appropriate, taking into account the circumstances of the case, the wishes of the Parties and the overriding objective in Part 1 of the Civil Procedure Rules. A Preliminary Court Settlement Conference shall be held, either in person or in some other convenient manner, at which the Parties and the Settlement Judge shall determine, in general terms, the procedure to be adopted for the Court Settlement Process, the venue of the Court Settlement Conference, the estimated duration of the Court Settlement Conference and the material which will be read by the Settlement Judge in advance of the Court Settlement Conference.

5. Unless the Parties otherwise agree, during the Court Settlement Conference the Settlement Judge may communicate with the Parties together or with any Party separately, including private meetings at which the Settlement Judge may express views on the disputes. Each Party shall cooperate with the Settlement Judge. A Party may request a private meeting with the Settlement Judge at any time during the Court Settlement Conference. The Parties shall give full assistance to enable the Court Settlement Conference to proceed and be concluded within the time stipulated by the Settlement Judge.

6. In advance of the Court Settlement Conference, each Party shall notify the Settlement Judge and the other Party or Parties of the names and the role of all persons involved in the Court Settlement Conference. Each Party shall nominate a person having full authority to settle the disputes.

7. No offers or promises or agreements shall have any legal effect unless and until they are included in a written agreement signed by representatives of all Parties (the “Settlement Agreement”).

8. If the Court Settlement Conference does not lead to a Settlement Agreement, the Settlement Judge may, if requested by the Parties, send the Parties such assessment setting out his views on such matters as the Parties shall request, which may include, for instance, his views on the disputes, his views on prospects of success on individual issues, the likely outcome of the case and what would be an appropriate settlement. Such assessment shall be confidential to the parties and may not be used or referred to in any subsequent proceedings.

Termination of the Settlement Process

9. The Court Settlement Process shall come to end upon the signing of a Settlement Agreement by the Parties in respect of the disputes or when the Settlement Judge so directs or upon written notification by any Party at any time to the Settlement Judge and the other Party or Parties that the Court Settlement Process is terminated.

Confidentiality

10. The Court Settlement Process is private and confidential. Every document, communication or other form of information disclosed, made or produced by any Party specifically for the purpose of the Court Settlement Process shall be treated as being disclosed on a privileged and without prejudice basis and no privilege or confidentiality shall be waived by such disclosure.

11. Nothing said or done during the course of the Court Settlement Process is intended to or shall in any way affect the rights or prejudice the position of the Parties to the dispute in the Proceedings or any subsequent arbitration, adjudication or litigation. If the Settlement Judge is told by a Party that information is being provided to the Settlement Judge in confidence, the Settlement Judge will not disclose that information to any other Party in the course of the Court Settlement Process or to any other person at any time.

Costs

12. Unless otherwise agreed, each Party shall bear its own costs and shall share equally the Court costs of the Court Settlement Process.

Settlement Judge's Role in Subsequent Proceedings

13. The Settlement Judge shall from the date of this Order not take any further part in the Proceedings nor in any subsequent proceedings arising out of the Court Settlement Process and no party shall be entitled to call the Settlement Judge as a witness in any subsequent adjudication, arbitration or judicial proceedings arising out of or connected with the Court Settlement Process.

Exclusion of Liability

14. For the avoidance of doubt, the Parties agree that the Settlement Judge shall have the same immunity from suit in relation to a Court Settlement Process as the Settlement Judge would have if acting otherwise as a Judge in the Proceedings.

Particular Directions

15. A Court Settlement Conference shall take place on [date] at [place] commencing at [time].

16. If by [date] the Parties have not concluded a settlement agreement, the matter shall be listed on the first available date before an appropriate judge who shall be allocated for the future management and trial of the Proceedings.

17. The Court Settlement Process shall proceed on the basis of such documents as might be determined at the Preliminary Court Settlement Conference and which may include the documents filed in the court proceedings and further documents critical to the understanding of the issues in the dispute and the positions of the Parties.

Dated this day of 201