Case Management Changes in Lord Justice Jackson's Brave New World

Introduction

On 1 April 2013 the vast majority of the Jackson reforms on costs in English civil litigation came into force when the 60th and 61st updates to the Civil Procedure Rules were implemented.[1] Broadly speaking, these changes touch upon three key areas of civil litigation practice:

1) Funding arrangements;
2) Controlling the litigation process through active costs management; and
3) Controlling the litigation process through active case management.

Unsurprisingly, the focus of most commentators has been on the implications of the changes to funding and costs arrangements. It is important not to ignore case management, however, because under the Jackson Reforms the first CMC plays a pivotal role in the more robust and pro-active approach to case management which is now likely to be seen across all courts. Whilst construction practitioners are already familiar with active case management based on experience in the TCC, there are some variations to procedure (and some new obligations on the parties) which should be noted well before preparation starts for the first CMC. They apply to the majority of CMCs held on or after 16 April 2013.[2]

Notice of Proposed Allocation and Directions Questionnaires

As was the case prior to 1 April 2013, the focus of a first CMC is upon the parties providing the judge with sufficient information to enable effective case management directions to be given, so as to ensure that, in the vast majority of cases, the parties did not need to return to court until the Pre-Trial Review. Previously the parties were required to complete and serve case management information sheets and case management directions forms in advance of the CMC.

For non-TCC actions, CPR 26.3 (as amended) now requires the parties to compile a Directions Questionnaire (form N181) in advance of the first CMC. Under the new regime the Court will:

[1] These changes were introduced through four statutory instruments: The Civil Procedure (Amendment) Rules 2013 [SI 2013/262]; The Civil Procedure (Amendment No 2) Rules 2013 [SI 2013/515]; Conditional Fee Agreement Order 2013 [SI 2013/609] and Damages Based Agreements Regulations 2013 [SI 2013/689].
[2] The requirement that parties must endeavour to agree directions in accordance with CPR 29.4 applies where a CMC is due to be held on or after 9 April 2013 and amendments to disclosure directions apply to CMCs due to be held on or after 16 April 2013 (see Civil Procedure (Amendment) Rules 2013 [SI 2013/262] r.22(1)(a), r.22(4) and r.22(5)).

- Where the parties are represented, serve a notice of proposed allocation on the parties which will inform the parties how to obtain the directions questionnaire (CPR r.26.3(1)(b)); or
- Where either of the parties is unrepresented, serve the appropriate directions questionnaire on the unrepresented parties (CPR r.26.3(1B)).

However, CPR Part 26 does not apply to TCC claims (CPR r.60.6(1)) and TCC practice is likely to continue in accordance with previous practice. No amendment has been made to the Practice Direction to Part 60, which includes a Case Management Information Sheet at Appendix A.

When will the first CMC be convened?

It is common practice for Case Management Conferences to be fixed at an early stage in TCC proceedings, often before defences have been filed and, in any event, 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.
  (see Part 60 PD para 8.1 and the TCC Guide para 5.2.1)

Whilst the Jackson reforms have not effected any amendments to paragraph 8.1 of the Part 60 Practice Direction it is unlikely (in light of the timetables stipulated) that first CMCs will be listed as promptly as has been the case prior to April 2013. The notice of proposed allocation discussed above must be served at least 28 days prior to the date by which the parties are required to take any steps identified in the notice (CPR r.26.3(6)). This would appear to be at odds with previous timescales for the first CMC given that CPR r.26.3(1)(a) envisages that the notice of proposed allocation should only be issued once a defence has been filed. It remains to be seen whether this will have any effect on current TCC practice.

Proposed Directions

The Jackson Reforms now envisage, as standard, that *both* the parties and the Court should take as their starting point, and thereafter adapt, any relevant model directions and standard directions.[3]

Para 5.4.1 of the TCC Guide already sets out a (non-exhaustive) checklist of the matters which judges are likely to consider at the first CMC. Amendments have now been made to the CPR in relation to:

- Disclosure
- Factual witness statements; and
- Expert evidence

Whilst the changes to disclosure and evidential issues will serve to increase workloads in advance of the CMC, clearer understanding of the elements required at an early stage should assist the parties when compiling costs budgets (also required at the CMC).

[3] Which can be found at www.justice.gov.uk/courts/procedure-rules/civil

Disclosure

Consideration of disclosure now needs to be much more extensive at an early stage, requiring both the relevant issues between the parties to be grappled with, and the nature of the available documentation to be fully understood, from the outset.

Para 11.2 of the TCC Guide already recognises that standard disclosure might not be appropriate in many cases conducted in the TCC. CPR r.31.5(7) now expressly recognises that the court will decide, at the first or any subsequent CMC, which of six possible orders should be made in relation to disclosure. The possible orders are:

- Dispensing with disclosure;
- Requiring a party both to disclose the documents on which it relies and to request any specific disclosure it requires from any other party;
- Directing, where practicable, disclosure to be given by each party on an issue by issue basis;
- Requiring each party to disclose any documents which it is reasonable to suppose may contain information which enables that party to advance its own case or to damage that of any other party, or which leads to an enquiry which has either of those consequences;
- Requiring a party to give standard disclosure;
- Any other order in relation to disclosure that the court considers appropriate.

In addition, the court may also give directions as to how disclosure is to be given (i.e. what searches are to be undertaken, if lists of documents are required, how and when the disclosure statement is to be given, in what format documents are to be disclosed, what steps are required to be taken in relation to documents that once existed but no longer exist, and whether disclosure should take place in stages) – see CPR r.31.5(8).

In order to assist the Court in reaching an appropriate decision, the parties are now required to comply with a two-stage process prior to the first CMC (see CPR r.31.5(3) and CPR r.31.5(5)):

- First, no less than 14 days prior to the CMC, the parties must file and serve a disclosure report (verified by a statement of truth) which:
    - Describes briefly what documents exist or may exist that are or may be relevant to the matters in issue;
    - Describes where and with whom those documents are or may be located;
    - In the case of electronic documents, describes how those documents are stored;
    - Estimates the broad range of costs that could be involved in giving standard disclosure (including the cost of searching for and disclosing any electronically stored documents); and
    - States which of the directions / orders outlined in CPR r.31.5(7) and (8) are sought from the Court.
- Secondly, no less than 7 days prior to the CMC, the parties must (at a meeting or by telephone) discuss and seek to agree a proposal in relation to disclosure. Significantly this process is not to be carried out in correspondence.

Factual evidence

The directions which are made by the court at the first CMC in the TCC have commonly included directions for the exchange of witness statements of fact. Limited amendments have now been made to CPRr.32.2(3) by the Jackson reforms such that the court is expressly entitled to:

- Identify or limit the issues to which factual evidence may be directed;
- Identify the witnesses who may be called or whose evidence may be read; or
- Limit the length or format of the witness statements.

Party representatives will need to have understood the relevant issues between the parties upon which factual evidence will be required in advance of the first CMC and be in a position to justify why particular witnesses are required to give evidence and/or why particular issues need to be addressed in factual witness statements.

Expert evidence

It is well known that expert evidence is only required and permitted for matters which are outside the court's knowledge - although given the nature of proceedings, expert evidence is required in relation to most actions which are heard in the TCC. Given that the costs of preparing expert evidence can be very high, the TCC Guide already recognises that the parties and the court must seek to make effective and proportionate use of experts and that the scope of any expert evidence must be limited to what is necessary for the requirements of a particular case (para 13.2.1).

CPR 35.4 previously required parties seeking permission to rely upon expert evidence to identify only the field in which expert evidence was required and, if practicable, the name of the proposed expert. The Jackson reforms now amend CPR r.35.4(2) such that if permission to rely upon an expert is sought by a party it must, in addition to this, provide an estimate of the costs of the proposed expert evidence and identify the issues which the expert evidence will address. CPR 35.4(3) now also recognises the Court's power (which always existed) to specify the issues which the expert evidence should address.

In practical terms, the amendment to CPR r.35.4 will have only a limited effect on existing practice in the TCC (which is an indication of the extent to which Jackson LJ's proposals drew heavily on his experience as High Court Judge in Charge of the TCC).

Agreement of directions

Parties to TCC proceedings have, hitherto, sought to agree directions in advance of the first CMC, and the TCC Guide already encourages a structured exchange of proposals and submissions for CMCs in advance of any hearing (see paragraphs 5.1.4, 5.7, 6.8.3 and 11.2). However, although it was previously commonplace for discussions regarding directions to commence 7 days prior to a CMC, agreement was often not reached until the eleventh hour. The Jackson reforms seek to ensure that those agreements are reached much earlier:

- CPR r.29.4 stipulates that the parties must endeavour to agree appropriate directions and submit those agreed directions (or their proposals if no agreement is reached) at least 7 days before the first CMC; and
- CPR r.31.5(5) requires the parties (at a meeting or by telephone) to discuss and seek to agree a proposal in relation to disclosure at least seven days before the first CMC.

CPR 29.4 now also provides that, where the court approves agreed directions, or issues its own directions, the parties will be notified by the court and the CMC will be vacated. Whilst the TCC Guide previously recognised that vacation of a hearing was possible if agreed terms were submitted to the judge three days in advance of a hearing, it was normally necessary for the court to consider the case together with the parties. It is unclear, as yet, whether the amendment to CPR 29.4 will lead to the TCC agreeing more readily to vacate a CMC where directions are agreed.

Postscript on costs budgeting – will it be required in all TCC proceedings?

This topic – with the myriad of issues which emerge – is too extensive for this Construction Newsletter but the small matter of the £2 million cap requires something to be said! As all practitioners are now aware, and also with effect from 1 April 2013, CPR r 3.12(1) has been amended to provide that costs budgeting provisions required by CPR 3 and CPR PD 3E do not apply to:

- Cases in the Admiralty and Commercial Courts;
- Such cases in the Chancery Division as the Chancellor of the High Court may direct; and
- Such cases in the TCC and the Mercantile Court as the President of the Queen's Bench Division may direct.

In all cases, however, the court retains the power to *"order otherwise"* and CPR r.3.12(1) stipulates that CPR 3 and CPR PD 3E *"will apply to any other proceedings (including applications) where the court so orders"*.

The current direction given by the President of the Queen's Bench Division and the Chancellor of the High Court is that Section II of CPR 3 and CPR PD 3E shall not apply where, at the date of the first CMC, the sums in dispute exceed £2 million (excluding interest and costs), save where the court so orders. The amendment was the result of concerns raised in the Commercial Court over the potential loss of high value international litigation (which might potentially be driven away by concerns about the irrecoverability of high costs) and was carried across to the TCC because of the cross-over in the work of both courts.

This direction may only be a temporary stop gap measure; at a recent presentation to a joint meeting of TecSA and TECBAR on 20 March 2013, Ramsey J highlighted that:

- TCC Judges were likely to invite parties to actions where the sum in dispute exceeds £2 million to opt into the costs budgeting process prior to the first CMC; and
- Coulson J is chairing a sub-committee to consider whether there should be an exemption for actions where the sum in dispute exceeds £2 million. This sub-committee will report in July 2013 (with a view to its recommendations being implemented in October 2013).

Whilst the preference in the TCC appears to lie in favour of a removal of the upper cap, only time will tell whether it will remain – and practice is likely to be dictated as much by experience in the Commercial Court as in the TCC itself.

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Referring multiple disputes to adjudication may be acceptable, provided the Scheme for Construction Contracts does not apply

Willmott Dixon Housing Ltd v Newlon Housing Trust [2013] EWHC 798 (TCC)

The TCC has indicated in a recent decision of Mr Justice Ramsey that referring multiple disputes to adjudication may be acceptable even without the other party's consent, where the adjudication is not conducted under the Scheme for Construction Contracts. Further, Ramsey J held that failure to serve a referral notice on the responding party within seven days does not deprive the adjudicator of jurisdiction (although issues may arise in relation to natural justice). **Alex Hickey** represented the Defendant, Newlon.

Willmot Dixon was a contractor employed by Newlon. On 9 October 2012, Willmot Dixon served two notices of intention to refer to adjudication. The same adjudicator was appointed in relation to both notices, and the two adjudications ran in parallel. On 11 October 2012, Willmot Dixon sent bundles of documentation to the adjudicator and to Newlon. Willmott Dixon also prepared Referral Notices, which Newlon subsequently denied having received. The adjudicator thought initially that he had not received the Referral Notices either, but later realised he had received them. Newlon did, however, provide a full Response to the bundles of documentation. Willmot Dixon provided a copy of the Referral Notices with its Replies, and Newlon was able to respond to them in Rejoinders. The adjudicator found in Willmot Dixon's favour on both adjudications.

In enforcement proceedings, Newlon argued that the adjudicator's decisions should not be enforced because the Referral Notices had not been validly served on the adjudicator or on Newlon within seven days of the notices of intention to refer to adjudication.

Ramsey J found that there was no real doubt as to whether the adjudicator had received the Referral Notices within seven days. Accordingly, the adjudicator had jurisdiction in both adjudications. Any failure to serve the Referral Notices on Newlon would not have invalidated jurisdiction. Accordingly, absent other considerations, the decisions should be enforced.

Ramsey J also noted that, whilst arguments in relation to natural justice might arise in an appropriate case, here Newlon had received the Referral Notices later and so had an opportunity to respond. In any event, the bundles of documentation and covering letter received by Newlon would have been sufficient for the purpose of providing a Referral Notice. Further, Ramsey J commented that Newlon should have

contacted Willmot Dixon alerting them that they had not received any Referral Notice and could not rely on its failure to do so in resisting enforcement.

Newlon also argued that referring two adjudications was contrary to s108 of the Construction Act, on the basis that only a single dispute can be referred to an adjudicator. Ramsey J dismissed this, on the basis that Willmott Dixon had referred two separate disputes to adjudication, which was not prohibited by s108. He further stated *obiter* that he would have enforced the decision in any event, on the basis that the cases stating that only a single dispute can be referred all arise out of the Scheme for Construction Contracts, and not out of the wording of s108. Ramsey J concluded that the reference to a dispute in s108 *"is more likely to be a generic reference to 'a dispute', without seeking to limit it to a singular dispute."* Ramsey J concluded that referral of multiple disputes was acceptable under the rules that applied in the present case (the Construction Industry Rules).

This judgment raises two issues of particular note:

- Where a responding party receives supporting documentation, but no statement of case entitled 'referral', it will be expected to alert and seek clarification from the referring party. In any event, provided that the adjudicator has received a sufficient referral notice, the failure to serve all the documents on the responding party will not itself invalidate the adjudicator's decision.
- The traditional approach (however loosely interpreted) has been that only one dispute may be referred to an adjudicator under s108 of the Construction Act. However, Ramsey J has suggested that this may be incorrect. Whilst parties should refer only a single dispute to adjudication under the Scheme for Construction Contracts (unless the parties agree otherwise), it may be acceptable under other adjudication rules to refer multiple disputes.

Insurance Appeal – New evidence introduced late and not put to witnesses

Ace European Group Ltd v Chartis Insurance UK Ltd [2013] EWCA Civ 224

The Court of Appeal took a firm line in dismissing an appeal founded on the metadata of incomplete and unclear photographs, where the Defendant's case as to what the metadata demonstrated had not been put to the Claimant's witnesses at the first instance trial. The Claimant was represented by **Rachel Ansell** and **Simon Goldstone**.

The case concerned the fracture of pipes in industrial 'Economisers' at the Lakeside Energy from Waste plant in Slough. The issue was whether it fell to the Erection All Risk Insurers (the Claimant) or the Marine Insurers (the Defendant) to cover the losses flowing from the damage, i.e. whether the pipes were cracked in transit, or by exposure to the elements on site. At first instance, following evidence from experts in the fields of metallurgy, welding, wind and transport, Mr Justice Popplewell held that the damage had not been caused on site, and it was more likely than not that the damage was caused in transit. He therefore found the Defendant liable to cover the loss.

On appeal, the Defendant sought to rely on the metadata (i.e. time and date information) in relation to photographs which had been disclosed only two days before the first instance trial. Although the photographs themselves had been put to the Claimant's witnesses at the trial, they were not a complete

record, there was no admissible evidence as to the provenance of the photographs, and it was not clear which aspects of the property were shown by each photograph. The Defendant had not put to the Claimant's witnesses the metadata, or its theories as to what the metadata demonstrated, but sought to rely on this metadata for the first time in its closing submissions, and then on appeal.

Dismissing the appeal, the Court of Appeal rejected the Defendant's submission that the photographs could speak for themselves in the absence of cogent evidence as to their provenance. Longmore LJ held that the first instance judge was justified in rejecting the Defendant's closing submissions, which were based on theories about the metadata not put to the Claimant's expert witnesses at trial. In a highly critical judgment, Moses LJ disapproved of the "*audacity, if not effrontery*" with which the appeal was brought, stating that in the circumstances the Defendant should never have been permitted to rely on the photographs either at trial or on appeal.

This decision of the Court of Appeal emphasised that parties must comply with disclosure obligations; and appeals should not be brought based on available evidence which had not been put to witnesses in cross-examination, in particular when that evidence could not be said to speak for itself.

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