

## Changes to the Third Edition of the TCC Guide

### Summary

On 12 October 2022, the latest version of the Technology and Construction Court (TCC) Guide was published. The Guide is intended to provide straightforward, practical guidance on the conduct of litigation in the TCC and is designed to ensure the effective management of proceedings a give practical guidance on conducting litigation in the TCC and covers the main aspects of the process. It does what it says on the tin. It is invaluable to the practitioner. It will apply to a wide range of claims including IT, procurement cases, professional negligence, nuisance, as well as the more humdrum building and engineering disputes. It is for guidance only and is not a substitute for consulting the Civil Procedure Rules or their Practice Directions.

Most of the changes, in the previous second edition were necessary to bring the TCC Guide in line with the Jackson reforms, which took effect from April 2013<sup>1</sup>

There was a minor change in the second edition, fourth revision that was published in June 2019. However, this latest third edition is the first major revision of the TCC Guide since 2015, see Notes at the end of this summary. The changes reflect developments relating to electronic working (more detail on this in PD51O), virtual hearings, e-disclosure and e-bundles, the new rules governing trial witness statements under CPR PD 57AC and the Business and Property Courts disclosure scheme under CPR PD 57AD. The guide also encourages greater use of junior advocates where appropriate.

The Guide continues to contain useful checklists like at Section 5.4 of Matters likely to be considered at the first CMC and as to Timetabling and Trial Logistics at section 14.5.

Also for very urgent and emergency business Section 4.8 covers Contacting the court out of hours when it is occasionally necessary to contact a TCC judge out of hours. For example, 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 and so judicial resource expended

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<sup>1</sup> See <http://constructionblog.practicallaw.com/tcc-guide-catches-up-with-jackson/>

efficiently. Appendix D to the Guide contains Contact details for Technology and Construction Court with email addresses and telephone numbers.

There is also a used Section 18, the TCC judge as arbitrator. A judge of the TCC 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.

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

### **Electronic filing**

The Guide at Section 3.8 has been updated to ensure e-filing under CPR 510 is mandatory. Unless the judge otherwise requests a hard copy bundle, all bundles should be submitted electronically. There is guidance for this in a new Appendix J.<sup>2</sup> Previously, under paragraph 3.8.1, ‘claims in the TCC and Commercial Court Registry in London could not be issued electronically.’

### **Scope of TCC claims**

The Guide has been updated to reflect the types of claims which are appropriate to bring as TCC claims. Claim value guidance has been updated to reflect that the TCC in London will not usually accept cases with a value of less than £500,000. However, this limit does not apply outside of London. Therefore, a party may consider issuing proceedings at a regional Centre outside London, for example Birmingham, Bristol, Cardiff, Chester, Exeter, Leeds, Liverpool, Manchester, Newcastle or Nottingham. Previously, the claim value was £250,000.

### **King’s Bench**

Following the accession of His Majesty King Charles III, references have been amended from ‘Queen’s Bench’ to the ‘King’s Bench’ or ‘Queen’s Counsel’ to ‘King’s Counsel.’

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<sup>2</sup> To summarise, the guidance in Appendix J highlights the requirements of an e-bundle. For example, it needs to be in PDF format, pagination computer generated, numbering should start at page 1 of the PDF, even if this page is an index – the purpose of this is so that pagination matches that to the pdf, each entry in the index must be hyperlinked, bookmark each section with a short description, must be subject to OCR, default view for all pages should be 100%, resolution should not greater than 300dpi, to avoid rendering. Once a bundle has been lodged, new pages should be added to the end – an enquiry should be made as to the best way of providing additional material.

### **Interim Injunctions**

In the Guide there is a new section for interim injunctions, which has been included at paragraph 6.11. It provides guidance on how a party could make an application, as well as guidance for the respondents impacted by the application. Remember for example an affidavit, and not a witness statement, is required on an application for a freezing order (PD 25A)

### **Trial witness statements**

There is emphasis of a witness statement only containing evidence as to matters of fact, that need to be provided at trial. As far as practicable, it should be in the witness's own words, even when prepared by a legal representative. Section 12.1.3 directs that the witness statement must set out only matters of fact of which the witness has personal knowledge that are relevant to the case, and must identify by list what documents, if any, the witness has referred to or been referred to for the purpose of providing the evidence set out in their trial witness statement. Unless otherwise directed by the court, witness statements should not have annexed to them copies of other documents, save where a specific document needs to be annexed to the statement in order to make that statement reasonably intelligible. Previously, a witness statement often included matters which were within the witnesses' own knowledge and those that were of matters of information and belief.

### **Litigants in person, remote hearings and video conferencing**

Litigants in person are not required to file or provide documents electronically. There is a new Appendix K,<sup>3</sup> which sets out the procedure for remote and hybrid hearings. The default position for all hearings under half a day will be a remote hearing unless there is a reason why an in-person hearing is required. For longer hearings, the parties will be able to express a preference as to the mode of hearing, but the ultimate decision rests with the judge.

### **The role of junior advocates**

The Guide encourages greater use of junior advocates. For example, parties should consider whether senior advocates are reasonably required or whether more junior advocates can deal with matters.<sup>4</sup> In

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<sup>3</sup> Provides defined terms within the Protocol, guidance on preparing for a remote or hybrid hearing, attendance, conduct of the hearing, witnesses, experts and other third parties, bundles/ documents for the hearing and third party providers such as transcribers, hearing support services and interpreters.

<sup>4</sup> In *Associated Newspapers Ltd v Buckingham Group Contracting Ltd (Cost Budgeting)* [2022] EWHC 2767 (TCC) paragraph 50, Mr Roger ter Haar KC states "*In my judgment, the amount estimated is disproportionate to the issues arising in the case, even allowing for the presently estimated amount of the claim. It is of course open to ANL to make use of expensive and experienced lawyers, but in doing so, ANL's legal team will need to consider the extent to which work can be delegated either to more junior members of the solicitor team, or to members of the Bar who*

addition, where a party has more than one advocate, the Guide encourages that oral advocacy be undertaken by the junior advocate. It is possible to share advocacy, although permission of the court is needed for more than once advocate to cross-examine the same witness. Previously there was no mention of junior advocates.

### **Disclosure scheme**

The new scheme for disclosure, which came into force on 1 October 2022 under CPR PD 57AD has been reflected in Section 11 of the Guide. The new guidance emphasis on the requirement to provide initial disclosure with statements of case and the requirement to complete the Disclosure Review Document in advance of the first CMC and to provide extended disclosure subsequently. Moreover, it goes on to state that parties should file their Disclosure Certificate and Extended Disclosure List first and then documents to be filed as a confidential document in the Electronic Working Case File. The Guide emphasises in Section 11 that PD 57 is intended to affect a culture change, is driven by reasonableness and proportionality.

### **Costs and case management**

Although this largely remains the same, the guidance has been updated to provide examples,<sup>5</sup> whereby if there is not enough time for the parties to comply with the disclosure scheme and costs budgeting requirements, before the first CMC then it may be possible to delay it.

### **Urgent applications**

There is a new section in relation to urgent applications, paragraph 4.7 states 'if an application is urgent, the applicant should contact listings to discuss judicial availability and to fix a provisional date and time for the hearing. If an urgent application is on notice, the applicant should liaise with the respondent to agree the bundle, timing of skeletons and time estimate.'

### **Adjudication business**

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*are likely to charge lower hourly rates than the Grade B and C Senior Associates at Baker and McKenzie.*" Therefore, more use of junior advocates could also have a positive outlook from a cost budget perspective.

<sup>5</sup> The examples are: the need for reasonable additional time to complete the exchange of statements of case, the need for reasonable additional time to comply with the disclosure pilot (now since October 2022 permanent) the need to comply with the timetable for costs budgeting, the need for additional time to be allocated to the first CMC, the parties' wish to discuss transferring the case to the Capped Costs List or the Shorter or Flexible Trials Scheme and the parties' wish to engage in ADR before the CMC.

Paragraph 1.3.8 states 'enforcement of adjudicator's decisions should ordinarily be commenced in the County Court when the sum in issue is less than £100,000. Where an enforcement action concerns significant points of principle or allegations of fraud, it may be more appropriate to commence it in the High Court.' This is reassuring as in the past year in the London TCC there had been a concern that adjudication enforcements of cases involving less than £1m would be pushed to the County Court if no compelling reason given why not. The guidance has also been updated to state where a Claimant has made an application for an enforcement hearing and not specified a time, the judge will commonly give a 2 hour estimate for the hearing.

The updated guidance also clarifies that parties should not attempt to use the label, 'an adjudication application', on any application connected with adjudication, in order to obtain an expedited hearing.

Previously, 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. This is still the case, but specific guidance has been added.<sup>6</sup>

This update implements guidance on the use of CPR 8 in relation to adjudication enforcement given by the TCC in *Hutton Construction Limited v Wilson Properties (London) Ltd* [2017] EWHC 517 (TCC).

### **TCC User Group**

The Guide emphasises that 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.

The Judge in Charge chairs annual meetings of the London TCC Users' Committee. The judge's clerk acts as secretary to the Committee and takes the minutes of meetings. That Committee being made up of representatives of the London TCC judges together with two representatives of TECBAR, TECSA and the SCL. Approved Minutes can be published on the TECSA, TECBAR and SCL websites.

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<sup>6</sup> Such cases are limited to those where, there is a short and self-contained issue which arose in the adjudication and which the defendant continues to contest, that issue requires no oral evidence, or any other elaboration beyond that which is capable of being provided during the interlocutory hearing for enforcement; and the issue is one which, on a summary judgment application, if would be unconscionable for the court to ignore, and further that there should in all cases be proper proceedings for declaratory relief.



The TCC regards these channels of communication as particularly important. Any suggestions or other correspondence raising matters for consideration by the Users' Committee should, in the first instance, be addressed to TECBAR/TECSA, or to the clerk to the Judge in Charge at the Rolls Building or to the clerk to the appropriate TCC judge outside London.

## TCC COURT GUIDE 2022

### NOTES

#### Section 1 - Introduction

- Purpose of the Guide – to provide practical guidance on the conduct of litigation in the TCC – it does not override the CPR or relevant practice directions
- The parties have an obligation to co-operate and to observe the overriding objective – unreasonable behaviour may attract sanctions, such as vacation or adjournment of hearings, or adverse cost orders
- Work has been done to seek to align the TCC Court Guide with those of the Commercial and Chancery Courts
- Feedback is invited from all judges and court users - the TCC Guide will be reviewed and revised by the end of the year

#### Section 1.3.2 – Threshold value guidance

- The guideline threshold for claims started in the High Court TCC in London is £500,000
- This does not apply to TCC courts outside London
- Other exceptions apply – adjudication and arbitration cases, international cases, injunctions, procurement, Part 8 claims, test cases and complex nuisance claims
- It is open to the parties to identify any alternative good reason
- The threshold has been set taking into account capacity in other TCC courts and will be reviewed over the next year

#### Section 4.3 – Mode of Hearing

- The default position for hearings under half a day is that such hearings will take place remotely, including the Friday procedural hearing lists and adjudication enforcement hearings
- The above position does not apply in Manchester and Leeds, where the default position for Friday applications is an 'in person' hearing (not yet reflected in the TCC Guide)
- All other hearings will be a matter for decision by the judge - the general position is that hearings with an estimate of more than half a day will be 'in person' subject to the circumstances of each case
- The TCC has adopted the BPC Protocol for Remote and Hybrid Hearings – Appendix K to the TCC Guide
- Remote or hybrid trials require preparation and co-operation – practical issues should be discussed and resolved at the PTR
- No person may access a remote or hybrid hearing remotely without the court's permission (although not addressed in the Protocol, this would include remote observation)
- A party calling a witness located outside the jurisdiction must ensure that any necessary permission is obtained

#### Section 4.5 – Electronic Applications

- Before issuing an application, the applicant should send a draft to the other party, inviting a response within 3 days or other specified time
- The responding party should indicate whether they consent to the application; if not, whether they agree to it being dealt with on paper and whether they wish to serve evidence or submissions in response
- If agreed, a draft consent order can be filed
- If opposed, the parties should try to agree whether it is suitable for determination on paper or by hearing, timetable for submissions and evidence and estimate for any hearing

#### Section 4.9 – Litigants in Person

- Neither the court staff nor the judges can provide advice or assistance in relation to the conduct of a claim or defence. However, there are a number of pro bono or other voluntary assistance schemes, which litigants in person are encouraged to contact.
- Litigants in person are not required to file or provide documents electronically, although they may do so.
- The court will expect solicitors and counsel appearing for other parties to ensure that all necessary bundles are prepared and provided to the court in accordance with the Guide, even where the litigant in person is unwilling or unable to participate.
- Although CPR 39.6 allows a company or other corporation with the permission of the court to be represented at trial by an employee, the complexity of most cases in the TCC generally makes that unsuitable.

#### Section 6 – Applications

- Save for urgent applications, a sensible notice period (usually at least ten working days) should be given for an application hearing to enable the other parties to respond and serve evidence
- When providing a time estimate for the hearing, the applicant should consider the reading time required by the judge; if longer than 1-2 hours, the court should be notified well in advance
- The permanent case management bundle and the application bundle should be provided to the court in electronic form not less than **two working days** before the hearing, unless otherwise directed by the judge.
- For a hearing of up to half a day, skeletons should be provided no later than 4pm **one clear working day** before the hearing
- For a hearing of more than half a day, skeletons should be provided no later than 4pm **two clear working days** before the hearing

#### Section 11 – Disclosure



- Practice Direction 57AD is substantially in the form of PD 51U and replaces PD 51U as from 1 October 2022
- The practice direction does not apply to Part 8 claims unless the court orders otherwise; a party seeking disclosure in a Part 8 claim must file a list of issues for disclosure and the models to be adopted
- The purpose of drafting the issues for disclosure is to avoid production of documents not relevant to the issues in dispute
- Model C may be used not just to request documents from another party but also for a party to define the scope of its own disclosure

### **Section 12 – Witness Statements**

- Practice Direction PD57AC and the Appendix to PD57AC apply.
- The witness statement must set out only matters of fact of which the witness has personal knowledge that are relevant to the case, and must identify by list what documents, if any, the witness has referred to or been referred to for the purpose of providing the evidence set out in their trial witness statement.
- The witness must verify the statement by a statement of truth and confirm compliance with PD57AC.
- The witness statement must be endorsed by a certificate of compliance by the legal representative, confirming compliance with PD57AC.

### **Section 15 – Trial**

- At the case management conference, the trial date will be fixed – the court will take account of party and counsel availability at this stage but it is not determinative
- The parties are encouraged to consider a reasonable estimate for the trial together with a realistic estimate for judicial reading time – these estimates will be included in the order for directions at the CMC
- Parties must notify the court as soon as possible if the estimate for the trial is insufficient or the trial date is in jeopardy BUT it is only in exceptional cases that the trial date will be moved once fixed.

The Guide is on this link <https://www.judiciary.uk/guidance-and-resources/technology-and-construction-court-tcc-guide-october-2022/>