A CRITICAL REVIEW OF THE BUSINESS AND PROPERTY COURTS OF
ENGLAND & WALES*

The Business and Property Courts ("B&PC")\(^1\) were formally introduced on 1\(^{st}\) October 2018. They bring together the specialist ‘commercial’ courts\(^2\) of the High Court of England and Wales.\(^3\) It was an initiative conceived and led by the senior judiciary\(^4\) with strong encouragement and support from the UK government.\(^5\) Sir Geoffrey Vos\(^6\) and Sir Brian Leveson,\(^7\) the principal architects of the new B&PC, explained that it would provide the specialist courts with an intelligible user-friendly umbrella term, whilst at the same time preserving the valuable existing brand of individual specialist courts, most specifically that of the Commercial Court.\(^8\) The B&PC also aim to guard the specialist courts from increasing competition from foreign international business courts which have increased noticeably following the UK’s decision to leave the European Union (Brexit).\(^9\) The B&PC also serve an equally valuable domestic function by decentralising the specialist jurisdictions from the Rolls Building\(^10\) in London, to High Court District Registries across England and Wales.\(^11\) Consequently, domestic business litigants may have their disputes heard by specialist judges at their regional B&PC centres rather than incurring the substantial cost, time, and inconvenience of having them listed at the Rolls Building.

Although various aspects of the B&PC have been discussed in the practitioner literature,\(^12\) there is a distinct absence of a detailed, comprehensive, and critical analysis of its structure, design, and of its most recent procedural innovations. This chapter seeks to fill that lacuna.

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1 CPR Part 57AA governs the B&PC which was introduced by the Civil Procedure (Amendment No. 3) Rules 2018 (SI 2018/975). The B&PC were launched on 4\(^{th}\) July 2018 by the senior judiciary and the government.

2 The specialist jurisdictions included the Commercial Court; the Chancery Division; and the Technology & Construction Court.

3 Hereinafter ‘England’ and the “English courts”.

4 Namely the Lord Chief Justice, Lord Thomas; the Chancellor of the High Court, Sir Geoffrey Vos; and the President of the Queen’s Bench Division, Sir Brian Leveson.


6 Chancellor of the High Court.

7 President of the Queen’s Bench Division.


9 Sir Geoffrey Vos, Chancellor of the High Court, Lecture to the Faculty of Advocates ‘The UK Jurisdictions After 2019’, The Judiciary of England and Wales, 20\(^{th}\) June 2017. Recently, English-speaking courts have been established in Germany, Netherlands, France. Beyond Europe, New York, Singapore and various court centres in the Middle East and China are competing for international commercial dispute resolution business.

10 The Rolls Building is part of the Royal Courts of Justice and opened in London in 2011 to bring together specialist judges from the Commercial Court, Technology and Construction, Patents and the Chancery Division and is the visual representation of the Commercial Bar.

11 The High Court is a single unitary court for England and Wales. It primarily sits in London at the Royal Courts of Justice. Its District Registries are regional centres based in courts in major cities outside London. The current district registries are: Manchester; Birmingham; Leeds; Bristol; Cardiff; Newcastle; and Liverpool.

It is argued that certain aspects of the reforms, such as the umbrella name and the disclosure pilot, are largely superficial, and – while reflecting timely modernisations – are mainly cosmetic. It is also argued that the true strengths of the B&PC lie with the continuing ability of the specialist courts to work with users of the courts in formulating and implementing procedural improvements which are truly innovative, such as the Financial List, and which aim to effectively address the perennial problems of disproportionate litigation costs, delay, and complexity. These user-led reforms also enable the specialist courts to keep abreast with practical developments in the market and to ultimately enhance access to justice for both international and domestic business litigants.

THE SPECIALIST COURTS AND THE NEED FOR CHANGE

To appreciate the current design and structure of the B&PC and the factors which influenced the senior judiciary to introduce reforms, a brief overview of the specialist courts is required.

The specialist courts

The High Court, Crown Court, and the Court of Appeal comprise the Senior Courts of England and Wales. The High Court consists of three Divisions, namely the Queen’s Bench Division (‘QBD’), Chancery Division (‘ChD’), and the Family Division (‘FamD’). Specialist courts exist within the QBD and the ChD. These specialist courts include the Commercial Court (‘CC’); the Technology and Construction Court; and the specialist courts in the ChD, such as the Intellectual Property and Enterprise Court. In London, these specialist jurisdictions operate together at the Rolls Building. While they are governed by the Civil Procedure Rules (‘CPR’), the specialist courts have also developed their own court guides to supplement the CPR by providing litigants with additional procedural guidance in bringing and defending claims in those particular courts.

A distinguishing feature of the specialist courts is that they are presided over by judges with expert legal, practical and commercial knowledge of a diverse range of commercial sectors and markets to which the dispute may relate, including banking and finance; shipping; insurance and reinsurance; construction and engineering; intellectual property; corporate; and insolvency. The CC is also the supervisory court for international arbitration and is

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13 Successive civil justice reforms have grappled with trying to increase access to justice by attempting to eliminate the three enemies of justice: delay, disproportionate litigation costs, and complexity. For a detailed discussion, see J. Sorabji English, Civil Justice after the Woolf and Jackson Reforms: A Critical Analysis (2014); J. Sorabji, ‘The Road to New Street Station: fact, fiction and the overriding objective’, 1 European Business Law Review 77 (2012).
14 s59(1) Constitutional Reform Act 2005.
15 s61 and Sch. 1 of the Senior Courts Act 1981 details how cases are allocated between the three High Court Divisions.
16 Including the Admiralty Court.
17 Including those dealing with financial services; intellectual property; competition; and insolvency.
18 The Civil Procedure Rules 1998 (CPR) came into force on 26 April 1999. Subject to certain exceptions, they apply to all proceedings in the County Court, the High Court (except in relation to its jurisdiction under the Extradition Act 2003), and the Court of Appeal (Civil Division).
19 The Commercial Court Guide; The Technology and Construction Court Guide; The Queen's Bench Guide; The Chancery Division Guide; and The Patents Court Guide. The Guides do not supplement the CPR and they do not have the force of law but litigating parties will be expected to act in accordance with the applicable Guide.
20 The primary legislation governing arbitration is the Arbitration Act 1996 and Part 62 of the CPR and the accompanying Practice Direction govern arbitration claims.
presided over by judges with detailed knowledge and experience of dealing with arbitral matters including granting interim measures, considering appeals of arbitral awards, and dealing with applications concerning the recognition and enforcement of foreign arbitral awards under the New York Convention.21

The global reputation of the specialist courts as centres of judicial expertise in commercial dispute resolution ensures that London continues to remain an attractive forum of choice for international business disputes.22 According to the recent Commercial Courts Report,23 the number of commercial cases heard in London, which involved one or more international parties, rose by 7% in the year to April 2018. The number of international litigants increased by 22%, with 656 parties from 69 different countries represented in 158 cases in London. The most important region for growth was Europe, with the number of litigants growing from 340 in 2016-2017 to 423 in 2017-2018. London also continues to be the most popular seat of arbitration for international commercial parties involved in cross-border disputes. In a recent survey of international businesses, 64% of respondents preferred London as the seat for their arbitrations.24

As well as judicial expertise in commercial dispute resolution, the specialist courts have been instrumental in formulating and implementing procedural innovations and improvements to increase access to justice and to meet the challenges and demands of the evolving international and domestic business community. Before Lord Woolf’s major procedural reforms of the 1990s, which made judicial case management an integral part of the court process, the CC had, since its creation in the late nineteenth century, introduced case management which was later adopted in the Technology and Construction Court. Also, before the formal incorporation of alternative dispute resolution (ADR) within the CPR, the Technology and Construction Court had pioneered judge-led settlement through early neutral evaluation.25 More recently, the Admiralty Court The most recent development of practice is the introduction of a fast track procedure for collision actions where both vessels have voyage data recorders which record the track of each vessel. The purpose of this development is to promote the rapid and cost-effective resolution of dispute arising out of collisions.26

24 White & Case and Queen Mary University of London 2018 International Arbitration Survey: The Evolution of International Arbitration (for the full report, see http://www.arbitration.qmul.ac.uk/research/2018/ (Last visited 12th March 2019)). The five most preferred seats of arbitration are London (66%), Paris (53%), Singapore (39%), Hong Kong (28%) and Geneva (26%). A significant proportion of the claim issued in the Commercial Court (approximately 25%) relate to matters arising out of arbitration – see The Business and Property Courts: The Commercial Court Report 2017-2018 (Including the Admiralty Court Report) Judiciary of England and Wales (2019).
26 This development was summarised by the Admiralty Judge in his judgment in Nautical Challenge v Evergreen Marine [2017] EWHC 453 (Admlty) at paragraph 2 as follows: “The prevalence of electronic data which records the navigation of each vessel has led the court, with the assistance of the Admiralty Bar and the Admiralty Solicitors Group, to propose (i) the early disclosure and inspection of such data so that the navigation of vessels in collision can be agreed at an early stage and (ii) in the event of there still being a dispute as to liability, the adoption of trial procedures designed to achieve a speedy and cost effective resolution of that dispute. The required changes to CPR 61 and PD 61 came into force on 28 February 2017; see the Civil Procedure (Amendment) Rules 2017 SI 95 of 2017 and the 88th update to the Practice Directions. The effects of
Explaining the new procedure, Teare J, the judge in charge of the Admiralty Court, hoped that this development “will demonstrate that the Admiralty Court, though an ancient institution, is up to date with modern developments in the industry.”

Consistent with the tradition of introducing procedural innovations and improvements, the B&PC have recently introduced: e-filing of court documents; the Financial List; the Flexible and Shorter Trial Schemes; the Disclosure Scheme; and the Costs Capping Pilot Scheme. These procedural innovations will be critically analysed later in the chapter.

**International competition and decentralisation**

Two principal factors influenced the senior judiciary’s decision to restructure the specialist courts. The first was the ‘international factor’ which stemmed from increasing competition for international commercial disputes from foreign jurisdictions. These jurisdictions were seeking to further enhance their already established international standing in commercial dispute resolution whilst others had taken steps to establish new international business courts where the medium of communication is English, the language of international commerce. In the Middle East, for example, the Dubai International Financial Centre (DIFC) and the Qatar International Court and Dispute Resolution Centre (QICDRC) drew inspiration from the international reputation and success of the English CC. The DIFC and the QICDRC provide a fully integrated dispute resolution service in the English language and draw some of their judges from the most senior ranks of the English judiciary. The QICDRC, for example, was, until 2018, led by the former President of the UK Supreme Court, The Lord Phillips of Worth Matravers. It is now led by former Lord Chief Justice of England and Wales, The Lord Thomas of Cwmgiedd.

Regional competition has also substantially increased, and this has been particularly noticeable following the UK’s decision to leave the European Union (Brexit). New specialist business courts offering their services in the English language have recently been established in the Netherlands, France and Germany. In 2018, the Belgian government submitted a bill to Parliament for the creation of the Brussels International Business Court (BIBC) which will hear cross-border commercial disputes in English. It is not surprising, therefore, that Sir Geoffrey Vos alluded to the potential threat from European competitors when he said ‘Many competing jurisdictions are throwing a great deal of money at the problem and setting up new courts which we must respond to.’

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27 The Business and Property Court: The Commercial Court Report 2017-18 (Including the Admiralty Court Report) at [23].
28 Officially referred to as CE-File.
29 For example, the Singapore International Commercial Court; Abu Dhabi Global Markets Court; and the China International Commercial Court to deal with disputes arising from the One Belt, One Road initiative.
30 https://www.difc.ae/about/ (Last visited 12th March 2019).
32 The Netherlands Commercial Court.
33 An English-language chamber for international commercial matters was established at the Court d’appeal in Paris, adding an appellate review to the English-speaking chamber of commerce at the Tribunal de commerce in Paris.
34 Germany has established the District Court in Frankfurt and Hamburg which permit, if both parties agree, for proceedings to be conducted in English.
commercial and business courts with magnificent facilities. If one were a cynic, one might think that some of them were hoping to capitalise on the uncertainties created by Brexit.35

The regional threat to the business of the specialist courts becomes even more acute with the call for the establishment of a European commercial court. Ruhl has recently argued that a European Commercial Court (ECC) would unify the regional business courts to provide a stronger and more diverse post-Brexit dispute forum for international business litigants.36 An ECC would establish a court that unifies regional courts which would compete more effectively on the international level as a major centre for commercial dispute resolution. This ECC would, Ruhl contends, be a ‘truly international forum’ that could ‘better position itself as a highly experienced and neutral forum for the settlement of international disputes: just like an international arbitral tribunal, it could be equipped with experienced commercial law judges from different (member) states.’37 However, the creation of an ECC is, fundamentally, a contradiction in terms. It is contradictory because it seeks to achieve procedural unification and harmonisation by drawing on the strengths of each member state. Thus, seeking unification and harmonisation through diversity is contradictory and confusing, and would create procedural uncertainty which would, in the eyes of international business litigants, make the EU an undesirable forum for court-based dispute resolution.

The second factor which motivated the introduction of the B&PC was the ‘domestic factor’: the need to decentralise the business of the specialist courts in the Rolls Building to the regional centres for the benefit of domestic business litigants. Briggs LJ gave impetus to the need to decentralise when he contended that no claim was too big to be resolved in the regions.38 The importance of the need to decentralise work from London was also emphasised by Lord Thomas who, in 2013, argued that delivering justice outside London was paramount in providing greater access to justice for all.39 Decentralisation would, Sir Geoffrey Vos explained, create a more flexible judiciary which could be utilised across the country rather than being concentrated at the Rolls Building.40 Ultimately, it would enhance access to justice.

Prior to the B&PC, domestic litigants would either issue claims in the regional courts which would then be transferred to the Rolls Building or they would be directly issue in London in order for those parties to secure a specialist judge to hear their matter. This was common practice even though the parties themselves, nor the dispute had no connection to London. The adverse consequences of this was clear: a large number of cases were concentrated at the Rolls Building which meant waiting times for hearings were longer; the court’s finite resources would come under pressure; and the parties’ costs would substantially increase. The cumulative effect of this was to undermine access to justice for domestic litigants. There was, therefore, a powerful argument to decentralise the Rolls Building.

37 G. Ruhl at 58.
40 Sir Geoffrey Vos, n. 8 (2017).
ANALYSIS OF THE STRUCTURE AND DESIGN OF THE B&PC

At the time of the launch of the B&PC, a new CPR Part 57A came into effect.41 The rule is short and sets out the broad structure of the B&PC and confirms that the existing CPR and court guides continue to apply to the specialist courts within the B&PC. 42 The accompanying Practice Direction (“PD”) 57AA provides greater detail on the B&PC including details on commencing proceedings and transferring cases between jurisdictions.

The umbrella name

The most visible change is the new umbrella name which brings together the specialist courts.43 The umbrella name aims to further enhance the reputation of the specialist courts and increase the attractiveness of England as a forum of choice for international commercial litigants. The name has been marketed as “an intelligible name” that is user-friendly and easily understandable for international commercial litigants. The change of name has also provided the opportunity to finally review and dispose of archaic court names and titles which were alien to both domestic and international litigants. Thus, the Mercantile Court has been renamed the ‘Circuit Commercial Court’ and Mercantile judges have been renamed ‘Commercial Circuit judges.’

The courts and lists

The work of the B&PC is divided into specialist courts and lists,44 some of which have sub-lists,45 as follows: the CC; the Business List;46 the Admiralty Court; the Commercial Circuit Court (previously the Mercantile Court);47 the Technology and Construction Court; the Financial List; the Insolvency List; the Companies List;48 the Competition List; the Intellectual Property List;49 the Property, Trusts and Probate List (cases in Chancery); and the Revenue List.50

For claims issued electronically51 (which will apply to all claims issued at the Rolls Building),52 the claimant must select the court or list it wishes the case to be assigned to. Litigants issuing proceedings outside London must determine the appropriate location for the claim. In doing so, litigants must consider whether the claim has any “significant links” with

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41 Entitled ‘Business and Property Courts.’
42 Sir Geoffrey Vos, n. 8 (2017); PD 57A.3; PD 57AA 1.5.
43 There are different ways of referring to the B&PCs, depending on whether reference is being made to all B&PCs; the B&PCs in London, those located in District Registries (other than Cardiff) of the B&PCs in Wales (PD 57AA,1.2).
44 PD57A.2.
45 PD 57AA, 1.4.
46 Sub-list includes Business; Financial Services and Regulatory; and Pensions.
47 Includes the Commercial Court; London Circuit Commercial Court; Circuit Commercial Court (other than London).
48 Includes the Insolvency List and Companies Court.
49 Includes the Patents Court and Intellectual Property and Enterprise Court.
50 PD 57AA, 1.3.
51 It should be noted that CE-File is currently being piloted in several district registries of the B&PC and is being introduced across all district registries.
52 Electronic filing outside of London is currently being rolled out – PD51O.
any circuit. The PD explains that a link to a circuit will be established where, for example, one or more of the parties has an address or registered office in the circuit area.53

The PD also provides for the transfer of proceedings from the B&PC in London to district registries and vice-versa.54 The PD supplements the transfer factors in CPR 30.3 to include the nature of the claim and the availability of a judge specialising in the relevant type of claim to sit in an appropriate court in the circuit.55 In the recent case of Arif & others v Berkeley Burke SIPP Administration Ltd,56 HHJ Jonathan Russen QC considered the guidance on transfer of proceedings in the B&PC, including CPR 30.3. He held that his decision to retain the case in the Bristol district registry was consistent with the ethos that no case should be too big for the regions. He also emphasised that one of the core tenets of the B&PC structure was to give due recognition to regional specialism and expertise. Acknowledging that there will be cases where the value or procedural complexity may justify a transfer to London, the judge held that there will equally be cases where a regional trial before a High Court judge will be appropriate.

It is clear from the structure of the courts and the lists that commercial disputes have been extracted from the jurisdiction of the existing QBD and the ChD and brought together under one umbrella. This creates a clear divide between those types of disputes which require the attention of the specialist courts and those which do not (such as clinical negligence, judicial review, personal injury, and defamation matters). Prior to the B&PC, the divisional structure of the High Court was unclear and overlapping, so that certain disputes could either be dealt with in the QBD or the ChD. Indeed, Briggs LJ in his Civil Courts Structure Review lamented that the divisional structure of the High Court was a “historical relic” and that it was “virtually impossible to create a water-tight dividing line in terms of workload which will neatly separate two groups of High Court judges on any entirely satisfactory or logical basis.” The current structure of the B&PC streamlines the work between the various divisions and as such introduces greater clarity for users as well as for the judiciary.

The decentralisation of litigation business from the Rolls Building to regional B&PC centres certainly increases access to justice for both local, domestic business litigants and international litigants. It means that cases which do not have any link to London can be issued and heard by

53 Claims with significant links to a circuit must be issued in the District Registry located in the circuit. Although a claimant must base a decision on any information available about links to a circuit, there is no obligation to make extra enquiries to determine whether there may be other links outside the claimant’s current knowledge. Other factors include: at least one of the witnesses expected to give oral evidence is located within the circuit; the dispute occurred in a location within the circuit; the dispute concerns land, goods or other assets located in the circuit; or the parties’ legal representatives are based in the circuit.

54 Parties wishing to have their case transferred from a B&PC district registry must make an application to the district registry from which transfer is sought and, at the same time, give notice to the intended “receiving B&PC.” This allows discussions to take place between the two district registries on the merits of the transfer.

55 CPR 30.3(2) transfer factors include (a) the financial value of the claim and the amount in dispute, if different; (b) whether it would be more convenient or fair for hearings (including the trial) to be held in some other court; (c) the availability of a judge specialising in the type of claim in question and in particular the availability of a specialist judge sitting in an appropriate regional specialist court; (d) whether the facts, legal issues, remedies or procedures involved are simple or complex; (e) the importance of the outcome of the claim to the public in general; (f) the facilities available to the court at which the claim is being dealt with, particularly in relation to – (i) any disabilities of a party or potential witness; (ii) any special measures needed for potential witnesses; or (iii) security; (g) whether the making of a declaration of incompatibility under section 4 of the Human Rights Act 1998 has arisen or may arise; (h) in the case of civil proceedings by or against the Crown, as defined in rule 66.1(2), the location of the relevant government department or officers of the Crown and, where appropriate, any relevant public interest that the matter should be tried in London.

56 Arif & others v Berkeley Burke SIPP Administration Ltd [2017] EWHC 3108 (Comm).
a specialist judge in the regional centres without the parties having to incur the substantial cost, time and inconvenience of having the matter listed in London. Retaining cases that have links to a particular centre means that hearing times for cases listed in the regional centres and those listed in the Rolls Building will be shorter. As a consequence, the pressure on listing times and delays are reduced, which allows international commercial disputes to be dealt with more effectively and efficiently at the Rolls Building.

The emphasis on decentralisation also ushers in a significant culture shift away from the commonly held view among the profession and domestic business litigants that London is the only centre for court-based commercial litigation. The flexibility of deploying specialist judges to the regions means that regional centres can develop their reputations and specialism in commercial dispute resolution. Further, the structure of the B&PC means that each dispute is tried by the right level of judge with the appropriate specialism: where those trials take place is no longer dictated by where the specialist judges are physically based.57

There are, however, potential weaknesses and challenges with the B&PC. The judiciary must ensure that there is procedural consistency across the regional district registries and the Rolls Building. Since the introduction of the B&PC, Manchester and Leeds district registries have issued local practice guidance in the form of Practice Notes.58 Although there have been local procedural differences between courts for many years, this was an issue that Lord Woolf sought to eliminate through the CPR. Despite this, local practice continues to exist, and some may argue that it is necessary because it provides litigants with important procedural guidance on practice in certain regional centres. However, if left unchecked, allowing too much discretion to regional centres to add to the procedural architecture of the B&PC runs the risk of inconsistencies emerging in the manner in which cases are managed, and will therefore undermine the structure of the B&PC. One way in which a more consistent approach can be ensured is for the creation of a B&PC guide similar to the existing specialist court guides that are used in, for example, the CC and the Technology and Construction Court. The court guides have been successful in providing users, whether in London or the regional centres, with procedural details on the practices of each division and specialist courts. The guides are also updated by the senior judiciary with the assistance of the profession and therefore seek to maintain procedural consistency, while reflecting the latest developments. Similarly, a B&PC guide would assist in promoting consistent procedural practice and therefore reinforce certainty for users.

To ensure that the B&PC continue to compete on the global level as well as serving domestic litigants, it is imperative that the senior ranks of the judiciary are replenished. Currently, there is a ‘crisis’ in the recruitment of senior judges from the profession and successive Lord Chief Justices and former and current members of the senior judiciary have consistently warned of the dangers this poses to the civil justice system and the administration of justice. The starkest warning recently came from Sir Geoffrey Vos when he argued that if the highest quality barristers practicing in the B&PC failed to “step up to the plate” in seeking appointments to the bench then they would be “destroying the very infrastructure that has allowed them to

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57 The Practice Direction states “A judge of the Commercial Court may, where appropriate…..be made available to hear a claim issued in a Circuit Commercial Court.”

58 Practice Notes do not have the same status as Practice Directions (see Bovale v Secretary for the Communities and Local Government [2009] EWCA Civ 171 and Civil Procedure 2018 Vol. 2 para. 12-43).
Improving the number of appointments to the senior judiciary will require serious and continued investment from government.

While it may well be timely to bring the courts under one, modern umbrella name, the change in name does not add anything of substance to the operating practices of the specialist courts, and there is even a risk that the well-established names and reputations of these courts could be lost. The CC, for example, has a long and distinguished history of leading the way in introducing procedural reform and innovation and has, as a consequence, built a reputation of excellence in international dispute resolution. Chief Justice Hwang of the DIFC has described the English CC as “arguably…the most successful Commercial Court in the world.” Indeed, the international success and reputation of the CC has heavily influenced other states to also establish business courts and to compete directly for business with the CC. As the individual names of the specialist courts become invisible at the international level and from the eyes of potential international business litigants and practitioners, they may be attracted to the business courts of competitor jurisdictions instead.

As stated above, the working practices of the individual specialist courts have not changed, and there is no revolutionary alteration of how cases are managed in each of the specialist courts. While there are various procedural innovations within the B&PC, they have not altered the day-to-day working practices of the courts. The superficial nature of the umbrella name was recognised in Mezvinsky & Anor v Associated Newspapers Ltd when Chief Master Marsh observed ‘The creation of the B&PCs has changed nothing other than adding an umbrella title to a wider cadre of work than is found in a Division or Specialist List and the [Media & Communications List] is merely internal to the workings of the Queen's Bench Division.’

Thus, the umbrella name and the emphasis on its perceived benefits to international business litigants has been over-sold. It is a timely, but cosmetic, change to an already successful group of specialist courts that have established and distinguished international reputations. The true strength of the reforms lies with the ability of the specialist courts to continue to innovate and to evolve their practices and procedures to meet the challenges and demands of business litigants and thereby to increase access to justice. That success is underpinned by the active participation of users and the senior judiciary in formulating and implementing procedural innovations and improvements.

**ANALYSIS OF PROCEDURAL INNOVATIONS IN THE B&PC**

The specialist courts have historically led the way on formulating and implementing procedural innovations and reforms and this has enabled them to maintain and enhance their international reputation in the management and resolution of international business disputes. The most recent

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59 Sir Geoffrey Vos, ‘Chancellor of the High Court, Judicial Diversity and LawTech: Do we need to change the way we litigate Business and Property Disputes?’ Speech to Chancery Bar Association Annual Conference Friday 18th January 2019.

60 M. Hwang, ‘Commercial courts and international arbitration—competitors or partners?’ 31 *Arbitration International* (2015) 193 at 197.

61 e.g. The Abu Dhabi Global Markets Court.

62 *Mezvinsky & Anor v Associated Newspapers Ltd* [2018] EWHC 1261 (Ch).

63 *Ibid* [17].
procedural innovations that will be analysed are the: Financial List; Shorter and Flexible Trials Schemes; Disclosure reforms; and the Costs Capping Pilot Scheme.

The Financial List

Prior to the introduction of the Financial List\(^64\) in 2015,\(^65\) there was no guarantee that parties to complex financial disputes would have their matter listed before a judge who would have specialist knowledge and experience of the financial markets and of managing financial disputes.\(^66\) As a consequence, cases could take longer to manage to trial and thereby increase costs for the parties. The introduction of the Financial List was motivated by the increasing demands from the international financial community for judges with specialist legal and practical knowledge of complex financial disputes. Thus, as with the other major procedural innovations, the introduction of the Financial List was both user and judge led. As such, the reforms reflect the joint efforts of the senior judiciary and those from within the international financial community in implementing procedural reforms which address the demands and concerns of the financial markets. It provides a specialist dispute resolution forum for claims of £50m or more, or cases that raise issues concerning domestic and international financial markets.

Cases may be transferred into or out of the Financial List at the request of the parties or at the judge’s initiative. Once a case is in the List, it is allocated at the first case management conference to a designated judge who will manage it through to trial and, if required, enforcement. Recent cases heard in the Financial List included cases concerning the interpretation of standard form documents or terms in market-wide use; complex financial instruments and derivatives; financial structuring; sovereign debt; emissions trading; and Islamic finance. It is not designed to be a high-volume list and has on average 15 cases listed each year.\(^67\)

The Financial List represents a significant procedural innovation which seeks to further enhance the global reputation of London as a centre of excellence and judicial expertise in resolving complex financial disputes. Although the docketing of cases is not a unique feature, the docketing of financial disputes means that a select group of highly trained and experienced judges will manage a range of complex disputes which demand specialist knowledge of the law and market practice. This allows consistency in judicial case management of disputes and therefore reinforces user confidence in the procedures and the ultimate outcomes.

The major distinguishing feature of the Financial List is the Financial Markets Test Case Scheme.\(^68\) The Scheme allows issues of general market importance to be resolved by the judge without the parties having to litigate in a specific case. The scheme is intended to deal with claims that raise issues of general importance to the financial markets in relation to which

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\(^64\) The Right Hon. The Lord Thomas of Cwmgiedd Lord Chief Justice of England and Wales Dinner for Her Majesty’s Judges Wednesday 8th July 2015.

\(^65\) The Financial List became operative on 1st October 2015 and is governed by CPR Part 63A.

\(^66\) CPR Part 63A (2) (a)-(c) set out the types of disputes dealt with by the Financial List and include disputes relating to loans, project finance, banking transactions, derivatives and complex financial products, financial benchmark, capital or currency controls, bank guarantees, bonds, debt securities, private equity deals, hedge fund disputes, sovereign debt, or clearing and settlement, and is for more than £50 million or equivalent.


\(^68\) Practice Direction 51M. The Scheme is subject to a pilot which is due to end in 2020.
immediately relevant authoritative English law guidance is needed. Claims can be brought, by mutual agreement, between market participants with opposing interests in relation to the relevant issue, but without requiring a present cause of action. The court must be satisfied that the arguments of all those with opposing interests will be properly put before the court, and for that purpose may allow relevant trade, professional or regulatory bodies, or affected third parties, to be joined as a party or otherwise represented. The general rule is that each party bears its own costs.

The Scheme is a unique procedural innovation in the resolution of international financial dispute resolution and therefore sets the B&PC apart from competitor business courts. It is an innovative and interesting procedural mechanism that assists in the development of the law in line with market demands and needs. It is, as Lord Thomas succinctly described it, “fire prevention rather than fire-fighting.” The Scheme is also a flexible procedural mechanism that acknowledges that significant third parties, such as trade organisations, may have an interest in a particular matter for its members and the wider commercial community and therefore permits those parties to participate in relevant cases and to make submissions. This practice also assists judicial understanding of the latest developments and customs within the market and therefore will produce judicial reasoning and guidance which will benefit the financial markets. As part of this innovative process and to achieve authoritative certainty, in matters of particular urgency or importance, the court may sit as a two-judge court, with one judge a member of the Financial List and one from the Court of Appeal. It thus provides a further way in which the courts can properly develop the law in the commercial and financial arena with absolute and transparent authority.

Judges utilising the Scheme must, however, proceed with care for two reasons. First, judges must ensure that any hypothetical scenario proceeding under the Scheme is wide enough to provide general application, yet clear enough to determine issues that arise in subsequent disputes. Secondly, allowing interested third parties to intervene potentially creates its own challenges for the judge, including the need to strike the correct balance between the interests of the parties to the actual case and those of the intervening party so that the costs and time of the litigation remain proportionate.

**Shorter and Flexible Trials Schemes**

The Shorter Trials Scheme (STS) and Flexible Trials Scheme (FTS) were introduced to achieve shorter and earlier trials for business related litigation, at reasonable and proportionate cost. The schemes seek to achieve proportionality of cost by reducing and simplifying the procedural steps the parties are required to take before the matter reaches trial and limiting the length of the trial. In the first case on the STS, Birss J helpfully explained the wider policy rationale underpinning the STS when he said “The initiative as a whole also seeks to foster a change in litigation culture: a recognition that comprehensive disclosure and a full, oral trial is

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70 Ibid.
71 The STS and the FTS are governed by PD57AB.
72 Short and Flexible Trial Procedures Pilot Schemes Announcement, 30 September 2015, 1. Both schemes became permanent following three years of piloting.
often unnecessary for justice to be achieved. That in turn should improve access to justice by producing significant savings in the time and cost of litigation.73

The impetus for the two schemes came from the consultation which led to the introduction of the Financial List.74 Respondents to the consultation expressed a wish for shorter and earlier trials, at a reasonable and proportionate cost.75 The reforms, like the Financial List, were motivated by the concerns and needs of business users, and were led and implemented by those users and the senior judiciary.

The STS is aimed at cases which will take no longer than four days at trial with judgment within six weeks of trial. The pre-action protocols do not apply, and the requirements of pre-action conduct are limited in scope. There are restrictions on the time periods for service of pleadings and limits on their length. The claimant must aim to fix the case management conference approximately 12 weeks after acknowledgment of service. The scope and length of expert and witness evidence is restricted. Where oral expert evidence is required, it will be limited to identified issues. The case is managed by a docketed judge with a trial date fixed for not more than eight months after the case management conference. The ordinary disclosure order in STS cases is for the production of documents upon which the parties rely. Although the claimant does not require the defendant's agreement to adopt the STS, it must, in its letter of claim, notify the defendant of its intention to 'opt in', and the defendant may subsequently apply for a court order to 'transfer out' of the STS on grounds of unsuitability. The court has the jurisdiction to transfer cases into as well as out of the scheme.76

The FTS aims to achieve a more streamlined trial procedure compared to the full trial process, by adopting flexible case management procedures which are subject to the approval of the court. The scheme encourages the parties to modify the process by consent, so that the proceedings are managed using simple procedures and conducted in a short timeframe. As in the STS, the scheme provides for limited disclosure and confines oral evidence and cross-examination at trial to a minimum, thereby reducing costs and expediting the trial timeline. The parties can agree to deviate from the FTS procedures and can, subject to the court’s approval, agree to adopt a different procedure if proposed before the CMC.

The schemes serve a wider significant purpose of increasing access to justice for business disputes that may not necessarily be categorised as ‘heavy weight’ commercial litigation or where a dispute may not require the full rigour of the litigation process which would incur substantial time and costs for the parties. Successive English civil justice reforms have struggled to grapple with the issue of disproportionate costs, delay and complexity which have

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73 *Family Mosaic Home Ownership Ltd v Peer Real Estate Ltd* [2016] EWHC 257 (Ch), *Vitol E & P Ltd v Africa Oil and Gas Corporation* [2016] EWHC 1677 (Comm) was decided shortly after *Family Mosaic* followed by *National Bank of Abu Dhabi PJSC and BP Oil International Ltd* [2016] EWHC 2892.


75 [2016] EWHC 2892 at [5].

76 In *Family Mosaic* Birss J held that the court’s power to transfer cases is implicit in PD51N, and in any event the court has power under CPR 3.1(2)(m) to take any step or make any order for managing the case and furthering the overriding objective. The overriding objective includes, as far as practicable: saving expense, dealing with cases in ways which are proportionate and allotting to a case an appropriate share of the court's resources. Since having an appropriate case conducted in the Shorter Trials Scheme is, the judge noted, likely to reduce cost, deal with the case in a proportionate way, and free up the court's resources for other litigants, CPR 3.1(2)(m) provides an express basis on which the court can make the necessary order.
severely undermined access to justice. The procedural frameworks offered by these schemes assist in reducing the time and cost of seeking justice by providing a more streamlined procedure with clear timeframes. This allows lawyers to provide better informed and accurate advice on costs, and for business clients to better plan their finances. The clear expectations around length of the procedure to trial, duration of the trial, and the likely time for judgment also provide business litigants with finality (subject to any appeal) and instil confidence in the court process. In National Bank of Abu Dhabi, a case which took nine months from commencement to judgment, the presiding judge, Carr J, expressed her appreciation to the parties for their ‘co-operative spirit’ which she said resulted in an ‘effective and speedy process.’

The schemes also seek to foster a change in litigation culture. The streamlined procedural frameworks and tighter timeframes on court directions, together with the giving of evidence and the length of trial indicate a recognition that complete disclosure and a full trial with oral evidence may not be necessary for justice to be achieved.

The procedural frameworks of both schemes encourage the parties to focus on the key issues in their respective cases, to narrow those issues, and to work in a less adversarial and more cooperative manner in progressing the case to trial. Working in this manner and narrowing the issues also has the potential benefit of encouraging settlement between the parties. It may, however, be legitimately argued that the schemes, like the change of name, does not add anything of substance to the procedural framework of the specialist courts because they introduced procedures, albeit in a streamlined manner, which have existed and worked effectively for many years. Certainly, there is weight in these criticisms. The existing case management powers under the CPR provide the courts with a wide range of powers to manage cases in a more efficient and effective manner including, with the participation of the parties, narrowing the issues in dispute, deciding the scope of disclosure, and determining the appropriate timeframes for the disposal of the matter at trial. Thus, one could convincingly argue that the STS and FTS do not, in fact, introduce procedural innovations or a culture change in the management of business disputes. However, the schemes do reinforce Lord Woolf’s philosophy of reducing the adversarial nature of litigation which often causes an increase in costs and delays. They usher in a far closer working relationship between the parties and the courts. Although the Woolf reforms enhanced the powers of the courts case management powers and placed a positive duty on the parties to assist the courts in furthering the overriding objective, the schemes go further. The FTS enhances and strengthens the principle of party autonomy in litigation, by giving the parties the freedom to modify and tailor individual and well-established procedures by consent. Interestingly, this aspect of the FTS reflects parallels with arbitration, which is defined by the principle of party autonomy. Although the FTS does not provide the same degree of autonomy as arbitration, because it is subject to the court’s role in sanctioning the parties’ agreements, it does significantly depart from traditional litigation with the degree of flexibility it provides to the parties, a feature which is likely to be attractive to international businesses litigants.

The continued success of the schemes will be heavily reliant on party cooperation in identifying and narrowing the key issues in dispute and to ensure that they are dealt with in the most

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77 The Rt Hon Lord Woolf, Access to Justice Interim Report (Lord Chancellor’s Department 1995) ch 2, para 7(a) (Interim Report).
efficient manner. The parties must, therefore, approach the pre-trial stage in a far more cooperative and less adversarial manner than they may be accustomed to. The case of *L’Oréal SA v RN Ventures Ltd* is illustrative of the need for the parties to adjust their litigation behaviour in cases that are subject to the STS. In that case, Henry Carr J lamented at the parties’ failure to cooperate with each other which undermined the ethos of the STS ‘Unfortunately, a good part of the first morning of the trial was spent on resolving procedural disputes between the parties…”

**Disclosure pilot**

In May 2016, the then Chancellor of the High Court, Sir Terence Etherton, established a Working Group in response to widespread concerns regarding the excessive scale and costs of disclosure. As with the Financial List and the STS and FTS, this was a user-led reform and emanated from the increasing concern from court users and the legal profession that the disclosure regime under the CPR was far too complex, costly, and time consuming. These problems were potentially damaging the attractiveness of England as a forum of choice for international commercial dispute resolution, as well as restricting access to justice for both domestic and international litigants.

The Working Group, chaired by Lady Justice Gloster, reported that, while the Jackson reforms had introduced a menu of options for disclosure as set out at CPR 31.5(7), both lawyers and judges had failed to utilise those options, with Standard Disclosure remaining the default. As a result, "large amounts of wholly irrelevant documents had often been produced leading to a considerable waste of time and costs". The difficulties with disclosure were highlighted by the *The RBS Rights Issue Litigation* in which Hildyard J severely criticised the parties for “an unfocused disclosure process, which has fanned out exponentially and extravagantly without sufficient control and direction.” The existing Rules were also "conceptually based on paper" and out-of-date with the digital age. The Working Group concluded that Rule 31 was not fit for purpose and undertook to draft an entirely new Practice

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78 *L’Oréal SA v RN Ventures Ltd* at [8].
79 The disclosure pilot is governed by PD51U.
80 Now the Master of the Rolls. The Master of the Rolls is the second-most senior judge in England and Wales after the Lord Chief Justice and serves as President of the Civil Division of the Court of Appeal and Head of Civil Justice.
81 As Sir Terrance Etherton explained “It is imperative that our disclosure system is, and is seen to be, highly efficient and flexible, reflecting developments in technology. Having effective and proportionate rules for disclosure is a key attraction of English law and English dispute resolution in international markets.”
82 The Working Group comprised a wide range of judges, lawyers, experts and representatives of professional associations and court users in the Rolls Building jurisdictions.
85 CPR 31(5)(7) states “At the first or any subsequent case management conference, the court will decide, having regard to the overriding objective and the need to limit disclosure to that which is necessary to deal with the case justly, which of the following orders to make in relation to disclosure –(a) an order dispensing with disclosure; (b) an order that a party disclose the documents on which it relies, and at the same time request any specific disclosure it requires from any other party; (c) an order that directs, where practicable, the disclosure to be given by each party on an issue by issue basis; (d) an order that each party 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; (e) an order that a party give standard disclosure; (f) any other order in relation to disclosure that the court considers appropriate.
86 *The RBS Rights Issue Litigation* [2015] EWHC 3433 (Ch).
Direction with a focus on proportionality and technology. A newDisclosure Practice Direction for a Pilot was released on the 2 November 2017.

Under the Scheme, Basic Disclosure is intended to be straightforward and will be made early when a party serves its first statement of case. Basic Disclosure is not required if complying with the rule would involve the disclosure of more than 500 pages. The parties may dispense with or defer Basic Disclosure, subject to the court’s approval. If the court decides that there may be “significant benefit” in disclosing the documents, then it may order disclosure contrary to the parties’ wishes. At the time of serving the statement of case, a party must state whether it is likely to request Extended Disclosure. The power to allow Extended Disclosure rests with the court and there is no guarantee that such an order will be made. There are five Models for Disclosure and there is no requirement at that early stage to detail the potential Model being requested, or the issue in relation to which it is sought.87

There is an obligation to disclose, within 30 days of the first Case Management Conference, any adverse documents that are known to the disclosing party. This obligation arises whether Basic Disclosure is given and regardless of any order for Extended Disclosure. Different models can be requested in respect of each issue (a list of which must be agreed between the parties). In deciding what order to grant, the court will consider whether the requested Model is appropriate to resolve the issue, whilst having regard for the overriding objective of the CPR and other matters, such as the complexity of the issues, number of documents, ease of retrieval, cost implications and the financial positions of the parties.

The pilot also introduces a Disclosure Review Document (DRD) which replaces the Electronic Documents Questionnaire. The DRD must be completed by the parties before the first Case Management Conference, setting out the list of issues for disclosure and proposals for the appropriate model for Extended Disclosure, and sharing information about how documents are stored and how they might be searched and reviewed.

The underlying policy of the reforms aims to usher in a radical culture change by making disclosure a more focused and proportionate procedural exercise. However, these noble aims are in danger of being compromised because the changes do not fundamentally alter the existing regime. In fact, a closer analysis of the pilot reveals that some of the rules are simply a repackaging of the existing rules and procedures which were the cause of the increase in costs, delay and complexity. As with the STS, FTS, and the change of name, certain aspects of the disclosure reforms not only appear to be superficial, but may exacerbate the problems that users and the judiciary want to resolve.

The disclosure models (A-E) are similar to the disclosure menu under CPR 31(5)(7) and therefore appear to simply re-package the existing rules. Take, for example, Model D under the pilot. This is an order to disclose documents that are likely to support or adversely affect any party’s case in relation to one or more of the issues for disclosure. It requires parties to undertake a reasonable and proportionate search. Narrative documents, defined as those that

87 The five Models are: Model A – No order for Disclosure; Model B – Limited Disclosure (i.e. Basic Disclosure); Model C – Request-led Search-based Disclosure. This involves disclosure of a narrow classes of documents, or specific individual documents, in response to requests from the opposing party; Model D – Narrow Search-based Disclosure. This involves the disclosure of documents which are likely to support or undermine the party's case or that of another party; Model E – Wide Search-based Disclosure. This is a much wider disclosure exercise and will only be ordered in exceptional circumstances.
are relevant only to the background or context and not directly to the issues for disclosure, should not be disclosed unless specified in the order. With its emphasis on the need to disclose documents that support as well as undermine a party’s case, Model D appears to simply repeat the current rules on Standard Disclosure. Although Model D makes explicit reference to proportionality, it does not fundamentally alter the existing regime and will, by requiring parties to disclose the same range of documents as under Standard Disclosure, undermine the aims of the Scheme to control the costs of the disclosure exercise.

A further re-packaging of the existing rules on disclosure is evident when considering the rules governing the right of a party to withhold documents. A party wishing to withhold documents must describe the document with “reasonable precision” and explain the grounds upon which that right to withhold is being exercised. This does not change the existing rules and practice of describing privileged documents in generic terms and therefore does not add anything of substance to the disclosure exercise.

The rules on Basic Disclosure require the parties and their lawyers to be ‘disclosure aware’ from the outset of the dispute and to take active steps to preserve documents and to disclose documents at a far earlier stage in the litigation process. The emphasis on disclosure from the outset can have the potential adverse effect of causing litigation costs to be frontloaded. This problem is compounded where the parties have already incurred the time and costs of complying with pre-action protocols which require the disclosure of relevant documents before proceedings are issued.88

The pilot rules place greater emphasis on the role of the courts in managing the disclosure process and ensuring that it remains proportionate. Consequently, the rules require the courts to adopt a more interventionalist approach when dealing with disclosure demands and potentially requires greater court resources to be dedicated to dealing with disclosure issues. For the courts to discharge their duties effectively and efficiently, there must be a serious commitment to invest in judicial training and an investment in court resources.

The true innovation and culture change required to adequately grapple with the problems of disproportionate costs, delay and complexity is the focus and emphasis on the use of technology and, in particular, the use of predictive coding. In essence, predictive coding89 is the review of documents undertaken by computer software which analyses the documents and then ‘scores’ them for relevance to the issues in the case. The purpose of the process is to identify the documents relevant to the case while reducing the time and cost of the review by reducing the number of irrelevant documents. Predictive coding was embraced by the High Court in Pyrrho Investments Limited v MWB Property Limited90 in which Master Matthews recognised and praised the ability of predictive coding in saving substantial costs in carrying out the disclosure process. It is this element of the disclosure scheme which will reduce and, as the software develops in the future, eliminate the problems of disproportionate costs and delay which were the hallmark of the previous regime and will, as a consequence, enhance access to justice for domestic and international business litigants.

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89 Also described as ‘technology assisted review’, ‘computer assisted review’, or ‘assisted review.’
90 [2016] EWHC 256 (Ch).
The promotion of technology is also consistent with the wider digital reforms that are currently being implemented across both the civil and criminal justice systems and will enhance efficiency, proportionality and access to justice. A modern disclosure system also reinforces the reputation of the B&PC as a leading jurisdiction for procedural innovation that seeks to control disproportionate costs which are commonly associated with international business disputes. The reforms also enhance the role of the judiciary in controlling the disclosure process by requiring them to be more interventionist than they currently are, especially when one or both of the parties are seeking Extended Disclosure. In *PJSC Tatneft v Bogolyubov*, the court ordered the parties to file a List of Issues for Disclosure ahead of the reforms. The parties had prepared a List of Common Ground and Issues in accordance with the Commercial Court Guide, setting out the main issues of fact and law in the case. One of the issues in this case was whether the issues should be further clarified through an amendment to the List of Common Ground and Issues. The defendant argued that the list of issues is a reference point both for disclosure and for evidence and it would be sensible therefore to incorporate the additional issues into the general document. However, Mrs Justice Moulder disagreed and held ‘having regard to the approach which this court will be adopting from 1 January when the pilot scheme on disclosure comes into operation I can see merit in having the scope of disclosure set out in a separate document, particularly in a case like this where the list of issues would otherwise become so lengthy it risks losing utility for other purposes.’ Further, in *Canary Riverside Estate Management Ltd v Circus Apartments Ltd*, Master Shuman criticised the “verbal brawl” between the parties regarding disclosure. She stated that ‘This case provides a good example of why the disclosure pilot was necessary’ in order for cases to be dealt with justly and at proportionate cost as required by the overriding objective.

**Costs Capping Pilot Scheme**

The Costs Capping Pilot Scheme was formally launched on 14th January 2019 and will run for two years. The pilot implements one of the most significant recommendations of Sir Rupert Jackson, who advocated the introduction of a cost capping regime to control litigation costs. The aim of the Scheme is to streamline the procedures of the pilot courts, lower the costs of litigation, increase the certainty of costs exposure, and to speed up the resolution of claims. The scheme introduces capped costs of £80,000 for cases worth up to £250,000. Cases will be exempt from the pilot if they require a trial of more than two days after appropriate case management, involve allegations of fraud, are likely to require extensive disclosure or reliance upon extensive witness or expert evidence, or involve numerous issues and numerous parties.

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91 HMCTS and OCMC.
92 *PJSC Tatneft v Bogolyubov* [2018] EWHC 3249 (Comm).
93 *PJSC* at 62.
94 *Canary Riverside Estate Management Ltd v Circus Apartments Ltd* [2019] EWHC 154 (Ch).
95 The Scheme is governed by Practice Direction 51W.
96 The voluntary pilot will run in Business and Property Courts in Leeds and Manchester (Chancery, Circuit Commercial and the Technology and Construction Court) and the London Circuit Commercial Court.
Statements of case are limited in length and must be accompanied by the documents upon which the party proposes to rely. There will be no automatic disclosure, witness statements or expert evidence; the need for these will be considered at the case management conference. If witness evidence is ordered it will be limited in length, will deal only with issues set out in the list of issues, and there will be a general rule that a party may rely on the oral evidence of no more than two witnesses at trial. The general rule is that expert evidence will not be permitted, but if it is, then the evidence will be given in the form of a report from a single joint expert. Applications other than at the case management conference will be dealt with without a hearing, unless the court considers it necessary to hold a hearing.

So far as it is practical, there will be full docketing, and the trial will take place no more than eight months after the CMC and will last no longer than two days. Within 21 days of the trial, the parties will prepare a schedule of costs by reference to various stages of the litigation, which will be assessed summarily by the court. A cap applies to each stage of the litigation process, with an overall cap of £80,000.98

The costs capping scheme takes positive steps in enhancing access to justice by rendering litigation costs more proportionate, certain and predictable for the parties and assists the courts in the allocation and management of their finite resources. It seeks to deal directly with the perennial problems of disproportionate costs in civil litigation which had blighted the English civil justice landscape and which successive reforms have struggled to remedy.99 This is particularly important for small and medium sized businesses who may not necessarily possess the resources to engage with disputes which will typically involve substantial legal costs. Making costs more certain also has the benefit of concentrating the minds of the parties on whether to proceed to litigation and can serve as a useful tool to promote earlier and more effective settlement.

CONCLUSION

Although the underlying aims of the B&PC of enhancing the reputation of the specialist court are to be welcomed, there are weaknesses and potential future difficulties. Although it is perhaps a timely modernisation, the umbrella name is a superficial change that potentially endangers the well-established brand name of the CC which has inspired the creation of business courts in competitor jurisdictions. The umbrella name makes the CC invisible to the eyes of the international business community and may indirectly enhance the visibility and attractiveness of competitor jurisdictions. There are also inherent problems with certain aspects of the recent procedural innovations introduced into the B&PC which may exacerbate the very problems they are trying to resolve: high costs, complexity and delay.

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98 Exclusive of VAT, court fees, wasted costs, and costs of enforcement.
99 In their joint statement ‘Transforming our justice system’ dated September 2016 the Lord Chancellor, the Lord Chief Justice and the Senior President of Tribunals stated: “More needs to be done to control the costs of civil cases so they are proportionate to the case, and legal costs are more certain from the start. Building on earlier reforms, we will look at options to extend fixed recoverable costs much more widely, so the costs of going to court will be clearer and more appropriate. Our aim is that losing parties should not be hit with disproportionately high legal costs, and people will be able to make more informed decisions on whether to take or defend legal action.”
The true strength of the B&PC lies with the ability of the specialist courts to work closely with court users in identifying the key challenges facing the business litigants and formulating and implementing procedural innovations that seek to address those challenges. Therefore, it is fundamental to the future success of the B&PC that the senior judiciary continues to work closely with users to keep abreast of the most recent developments, challenges and needs in the market and to formulate and implement reforms which ultimately increase access to justice for all litigants using the B&PC.