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Review

Construction, Engineering and Projects

The 50th CPR update: What every construction litigator should know.

BACKGROUND

The Civil Procedure Amendment Rules 2009 were made on 28 July 2009 and came into force on 1 October 2009. Along with the rules came the 50th CPR update which contains amendments to the practice directions. The amendments have been introduced with Lord Woolf's Access to Justice Report as a backdrop; with policy makers striving towards the objectives of improving access to justice and reducing, or at least controlling, the cost of civil litigation.

Amendments have been made to a large number of policy areas. However, this article does not cover every amendment made but it provides an overview of some of the areas, going into more depth on the changes to Part 35 relating to expert evidence.

1 THE SUPREME COURT

Firstly, to get the easy bit out of the way, some of the amendments link back to the creation of the Supreme Court. All references to the old meaning of Supreme Court will be replaced with 'Senior Courts'. For example, the Supreme Court Costs Office will be known as "the Senior Courts Costs Office". References to the House of Lords will be replaced with references to the Supreme Court.

2 COST AND FUNDING ARRANAGEMENTS

The main relevant changes which have been made to the CPR relate to costs and funding arrangements.

Prior to the CPR update, if a party did not give notice of an additional liability, such as a success fee, which was entered into pre-action, this success fee could still be recovered in full. From 1 October 2009, this all changed, and all funding arrangements, even ones entered into pre-action, must be notified to all other parties within 7 days. This covers all additional liabilities from Conditional Fee Agreements and Collective Conditional Fee Agreements, to success fees and insurance premiums.

Paragraph 19.4(3) of the Costs Practice Direction sets out what information must be included in the notification of an insurance premium. This has been amended so that greater information must be provided:

- name and address of insurer;
- the policy number and date of policy;
- level of cover;
- premiums – including whether they are staged and when an increased premium is payable.

Failure to provide information about a funding arrangement or insurance premium in accordance with the rules leaves the parties unable to recover for any period when notice should have been given. One point to note is that the new rules only apply to funding arrangements entered into after 1 October 2009 and the old rules will still apply to any arrangements entered into before that date.

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3 CHANGES TO EXPERT EVIDENCE

In 2007, the Civil Justice Council undertook a consultation exercise on Part 35 and its practice direction relating to expert evidence in civil cases. The vast majority of respondents, which included the Law Society, the Bar Council, the Expert Witness Institute and the Academy of Experts agreed that fundamental reform was not required but what was required was clarification and strengthening of the rules and improvement of the guidance to experts. The Civil Procedure Rules Committee accepted these proposals and incorporated them into the 50th CPR update.

Most of the changes that have been made are stylistic with an attempt to become more gender neutral and make for easier reading. There have also been some actual changes introduced.

3.1 Small Claims and Fast Track

The new and updated Part 35 lays down in the CPR what has become current practice in civil litigation cases and makes clear that experts will not normally be directed to attend either fast track or small claims hearings. Rule 35.5(2) states that a court will not direct an expert to attend a hearing unless it is necessary to do so in the interests of justice.

3.2 Single joint expert

The update provides a new definition of 'expert' and 'Single Joint Expert' with a Single Joint Expert being an expert instructed to prepare a report for the court on behalf of two or more parties in the proceedings, one of whom must be the claimant. Previously the claimant did not have to be one of the parties instructing.

Rule 35.4(3A) is a new rule which states that if permission is given for expert evidence in the small claims or fast track, it will normally only be given for one expert on a particular issue. Practice Direction 35.7 sets out the eight circumstances that the court will take into account when deciding if a single joint expert must be used. These circumstances include:

- whether it is proportionate when looking at the amount, complexity and importance of the dispute;
- whether a single joint expert is likely to be able to resolve the dispute more quickly and cost-effectively; and
- the area of the dispute and whether there is likely to be a range of expert opinion.

3.3 Proportionality

The concept of proportionality has been directly introduced into Part 35 in line with the overriding objective of proportionality. This has been brought into a number of areas including the use of a Single Joint Expert and also questions to experts.

Rule 35.6(1) relating to putting written questions to experts now states that any written questions about an expert's report must be proportionate. This is designed to limit the number and/or type of questions that may be put to an expert. It will probably be of most assistance in lower value claims to restrict the questioning of experts and saving time and costs in the process. However, the rules will also apply equally to multi-track cases.

3.4 Statement of Truth

One of the changes which has generated the most interest in the legal press, is the change to the statement of truth. The new statement of truth is very similar to the previous version with two major changes.

The first is that the new statement is clearer and wider. The previous statement referred only to 'facts within the report' whereas the new one refers to 'facts and matters' within the report.

The second change is that previously it was only necessary to identify the "facts" which were within the expert's own knowledge. Now it is necessary to identify the "facts and matters" which are **not** within the expert's own knowledge. Commentary suggests that the wording has been tightened in this way to prevent experts from being coached during the preparation of their reports.

3.5 Discussion between experts

The CPR update has also provided some guidance on experts' discussion. Again, the amendments to Practice Direction 35.9 are more a clarification of existing procedure than a radical overhaul, but do potentially expand current practice, and provide a timetable to ensure events run smoothly.

Although discussions between experts are not mandatory (unless the court directs under rule 35.12) the parties need to consider whether the experts should meet, and when. The purpose of any discussion between experts is to narrow issues and identify areas of agreement and disagreement, but not to settle the case.

Where the experts are to meet, the parties must decide on a fair and unbiased agenda. At the meeting itself, the experts should be left alone to discuss the issues. Unless agreed otherwise by all parties, the lawyers should stay at home (or at the very least, stay out of the discussions and just advise on the law). After the meeting, the experts must prepare and sign a statement within seven days and provide it to the parties within 14 days of signing.

CONCLUSION

As District Judge Hill points out in his article in the Law Society Gazette, the update is not as daunting as its size suggests but every civil litigator will need to know some of it.

FURTHER INFORMATION

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