Introduction to civil proceedings in England and Wales

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Introduction to civil proceedings in England and Wales

The object of this note is to provide an overview for clients, in particular international clients who are not familiar with the English law system, of the main elements of the procedures that are followed in the English courts, and the technical expressions that are often used.

Basis of law

English civil law essentially comprises legislation by Parliament and decisions by the courts. There is no civil code. English courts may not override Acts of Parliament and are usually required to follow decisions on the same legal issue by a court of equivalent or higher status.

Court system

In civil matters, jurisdiction is divided between the High Court and the county courts, according to the size and complexity of the claim. This note is principally concerned with procedure in the High Court.

Normally, claims worth less than £100,000 (or £50,000 for personal injury cases) will be heard in a county court, and claims worth more than £100,000 (£50,000 for personal injury cases) will be heard in the High Court.

Cases are also allocated to different procedural "tracks" depending on the value and complexity of the claim – the "small claims track", the "fast track", the "intermediate track" (since 1 October 2023) and the "multi-track". Outside the multi-track, claims may be subject to fixed recoverable costs, which means that it is only possible to recover from opponents a set amount of costs for different stages of the case. More complex claims and claims for more than £100,000 will usually be allocated to the multi-track, and High Court cases are generally multi-track claims. Only cases in the multi-track are covered in this note.

The High Court is divided into three divisions: the Chancery, King's Bench and Family Divisions. Family proceedings are beyond the scope of this note.

Both the Chancery Division and the King's Bench Division ("**KBD**") are further divided into a series of courts and lists which deal with different types of case.

The Chancery Division deals with companies generally and specialist matters such as wills, property, trusts, insolvency, tax, copyright, trademarks and patents.

The KBD deals with all other civil matters, for example personal injury cases, industrial accidents, defamation cases, negligence claims and other cases which are required to be heard in the High Court, such as applications for a "judicial review" of decisions by governmental bodies. The issue of the correct division in which to bring a claim is determined according to criteria laid down in the Civil Procedure Rules 1998 (see below under "Rules of procedure and the overriding objective").

The Commercial Court is a section of the KBD which has judges who are particularly knowledgeable about commercial matters, including shipping, insurance, commodities, banking and other specialised financial issues.

Another part of the KBD, the Technology and Construction Court ("**TCC**"), deals with disputes involving information technology, engineering and construction.

The Financial List ("**FL**") is a joint initiative between the Chancery Division and the KBD. The aim of the FL is to use the financial expertise and experience of judges from both divisions. Disputes are eligible for inclusion in the FL if they principally relate to financial disputes worth over £50m or equivalent, require particular market expertise or raise issues of general market importance.

In London, the Chancery Division and some courts and lists of the KBD are in the Rolls Building on Fetter Lane. The remaining parts of the KBD are in the Royal Courts of Justice, located on the Strand. In October 2017, the term "Business and Property Courts" ("**B&PCs**") was

introduced to refer to the specialist courts and lists of the High Court in the Rolls Building and in regional centres elsewhere in England and Wales.

In most parts of the KBD and the Chancery Division, case management issues which arise in the course of an action are generally dealt with by "masters", who are junior to judges. Trials and other important matters such as applications for freezing injunctions may only be heard by judges, who also hear appeals from the decisions of masters. In the Commercial Court and TCC there are no masters, and all matters, including interim or pre-trial issues, are heard by a judge. This is often perceived to be one of the advantages of proceeding in these courts.

In civil cases, a judge usually hears a case on their own. There is no right to trial by jury, with the exception of fraud (where it is hardly ever exercised) and some defamation cases (where it is more frequently exercised).

An appeal from the decision of a High Court judge is heard by the Court of Appeal, which will comprise either two or (more likely) three more senior judges, known as Lords (or Ladies) Justices. On issues of public importance, there is a further and final stage of appeal to the Supreme Court. Appeals are heard by an odd number of Supreme Court justices, usually five but sometimes (in very rare cases) as many as eleven justices.

Lawyers

The legal profession is divided between solicitors and barristers. In a typical civil action, the solicitors will investigate the matter; collect together and exchange with the other parties relevant documents; obtain statements of evidence from witnesses; consult experts; advise on the relevant procedure, law and tactics; correspond with the solicitors for the other parties; select a barrister when necessary; attend interim hearings (with or without a barrister); and generally be the contact point for the client. Solicitors normally practise in a partnership. The partners will have working for them a number of qualified solicitors and trainee solicitors. The division of the work amongst those involved will depend on the complexity and size of the case.

Barristers, often referred to as "counsel", are specialist advocates who have the right to appear in all levels of civil court. They also draft statements of case (also known as "pleadings" – see below), give opinions on areas of the law in which they have particular expertise and prepare "skeleton arguments" (see below) for hearings. Barristers are generally instructed by solicitors rather than by clients direct. Senior barristers may be appointed as King's Counsel ("KCs" or "silks"). All other barristers are known as juniors. Barristers are self-employed and practise with other barristers in sets of "chambers".

Solicitors may also appear as advocates in hearings in the higher courts ("solicitor advocates"), provided they have been authorised to do so by the Law Society. Authorisation is granted to those solicitors able to demonstrate the appropriate advocacy experience and expertise.

Barristers and solicitors are eligible, after seven years in practice, for appointment as High Court judges. Traditionally, most appointments are of barristers.

Rules of procedure and the overriding objective

The procedures in the county courts, the High Court and the Court of Appeal are laid down in the Civil Procedure Rules 1998 ("**CPR**"). The CPR are sub-divided into Parts, which deal with the different stages of a civil action and are supported by detailed Practice Directions ("**PDs**").

The CPR begin by stating in Part 1 the "overriding objective" of the Rules, which is "enabling the court to deal with cases justly and at proportionate cost". The court has to give effect to this overriding objective whenever it is exercising its discretion or interpreting the meaning of any rule. Parties are required to help the court to achieve this objective.

Part 1 also states that "dealing with a case justly and at proportionate cost" includes, so far as is practicable:

- ensuring that the parties are on an "equal footing" and can participate fully in proceedings, and that parties and witnesses can give their best evidence;
- saving expense;
- dealing with the case in ways which are proportionate:
  - to the amount of money involved;
  - to the importance of the case;
  - to the complexity of the issues; and
  - to the financial position of each party;
- ensuring that it is dealt with expeditiously and fairly;
- allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases; and
- enforcing compliance with rules, practice directions and orders.

Pre-action conduct

There are a number of provisions in the CPR which govern the way in which the parties should conduct themselves before court proceedings are issued. These provisions are designed to encourage parties to act reasonably in exchanging information and documents at an early stage and generally to try to settle their dispute without resorting to litigation. Sanctions (particularly costs sanctions) may be imposed against litigants who fail to comply with these requirements.

In addition there are a number of "pre-action protocols", which set out the procedure that parties are expected to follow before proceedings are issued in certain categories of case, for example, judicial review or professional negligence. These protocols are designed to ensure that litigation is a last resort. Also, the Practice Direction – Pre-Action Conduct and Protocols sets out how parties should conduct themselves and what steps they should take before starting proceedings in all cases (including those where no specific pre-action protocol applies).

Case management

The CPR require the court to engage in active case management. This includes:

- identifying the issues at an early stage;
- encouraging the parties to use alternative dispute resolution (ADR), such as mediation;
- helping the parties to settle their dispute;
- fixing timetables; and
- considering whether the likely benefits of taking a particular step justify the cost of taking it.

Early in the life of a multi-track case, there will be a case management conference ("**CMC**") hearing with a master or judge, at which these issues will be discussed and directions will be made for the conduct of the case going forward. Where a party is legally represented, a solicitor and/or barrister who is familiar with the case and has sufficient authority to deal with any issues that are likely to arise must attend the CMC.

In advance of the CMC, in many cases each party will be required to prepare a costs budget, which is sets out the costs that have been incurred to date and are estimated to be incurred up until the conclusion of the proceedings. The parties must then file a "budget discussion report" setting out which figures have been agreed with the other parties for each future stage of proceedings, which have not been agreed and what the reasons are for any disputes. To the extent that the budgets are not agreed, the court will record its approval of the budgets subject to any revisions it requires. This process is known as "costs management". Failure to file a budget on time when one is required may lead to that party being unable to recover its costs from other side if it is ultimately successful in the case.

To assist the court at the CMC, the parties and their solicitors will usually be expected to:

- ensure that all documents that the court is likely to ask to see are brought to the hearing;

- consider whether the parties themselves should attend;
- consider whether a case summary will be useful; and
- consider what orders each wishes to be made and give notice of them to the other parties.

The court has a positive obligation to help the parties settle their dispute, rather than litigate it, where possible. Where settlement is not possible, the court will take positive steps to ensure that all necessary steps are taken to prepare the case so that it is ready to start on the trial date. The court will fix that date (or at least a "trial window"), usually after the CMC. The emphasis is on disposing of cases quickly and efficiently.

This approach means that a lot of work and expense will be required during the early stages of a case. For example, in preparation for the CMC the parties will be required to file copies of all statements of case (see below) and other documents with the court. To assist the court, the claimant may (if useful) prepare and file a short summary of the issues in the case, and a skeleton argument giving a concise statement of its case on the points in issue at the hearing.

In general, the parties will have to keep to a timetable laid down by the court. Some time limits may be extended by agreement between the parties. In the case of serious non-compliance with a time limit, the court may order that the claimant's action should be dismissed or that judgment should be given against the defendant.

Claim forms

Proceedings are started by the issue of a "claim form". This is a formal court document which must:

- contain a concise statement of the nature of the claim;
- specify the remedy which the claimant seeks;
- where the claim is for money, contain a statement of the value of the claim;
- where the only claim made is for a specified sum, state the interest accrued on that sum.

The claimant prepares the document, submits it to the court and pays a fee which is usually equal to 5% of the sum claimed, capped at the time of writing at £10,000. A copy of the claim form is kept on the court record. In general, claim forms (and other statements of case – see below) are available for public inspection, although in certain cases the court may be prepared to limit public access on the application of a party.

Service

The claimant must serve the claim form on the defendant(s) within four months of the date on which it was issued (or six months if the claim is to be served out of the jurisdiction), after which time the validity of the claim form will lapse. A claim form may be served on the defendant within the jurisdiction (that is, in England or Wales):

- by leaving it with the defendant personally;
- by delivering it to a solicitor who has instructions to accept service on behalf of the defendant;
- by sending it to the defendant by first class post, document exchange or other service which provides for delivery on the next business day;
- by leaving it at the defendant's residence or business address;
- by electronic means, eg e-mail (if certain conditions are met); or
- by any method authorised by the court.

Where the claimant has been notified that the claim may be served on a solicitor within the jurisdiction, the claim form must usually be served on that solicitor. Subject to that, it may be possible to serve at a place and by a method specified in a relevant contract, or in other ways.

A claim form may, in certain circumstances, be issued for service on a defendant outside the jurisdiction. The rules governing jurisdiction are complicated, and there are various regimes which apply depending on the circumstances of each case. For example, a claimant may have the right to pursue a claim for breach of contract in the place where the contractual obligation was

to be performed, or the contract may contain an exclusive jurisdiction agreement in favour of the English courts. It may, however, be necessary to obtain permission from the court to serve the claim form on a defendant outside the jurisdiction. Permission will usually be given if the claim relates to a contract made within the jurisdiction, or to a tort committed within the jurisdiction, provided the claim is not a weak one and the court sees England and Wales as the proper place in which to try the claim. However, the case must fall within the circumstances specified in the relevant rule in the CPR. It is not sufficient, for example, to show simply that the defendant has business interests within England and Wales.

Statements of case

The documents in which the parties state their positions are referred to as "statements of case" or "pleadings". One of these is the "particulars of claim", which must contain a concise statement of the facts on which the claimant relies. If, as is usual, the claimant is also seeking to recover interest, the particulars of claim must also state the basis on which interest is claimed and calculate the correct sum, and any costs claimed are usually stated as well.

The particulars of claim must either be contained in/served with the claim form or be served separately within 14 days afterwards (but in any event no later than the latest possible time for serving the claim form). They must also be filed with the court.

Within 14 days after service of the particulars of claim, the defendant must file with the court (and serve on the other side) a "defence". In its defence, the defendant must say which allegations it denies, which it admits and which it is unable to admit or deny but requires the claimant to prove. Most importantly, where the defendant denies an allegation, it must state its reasons for doing so. If it intends to put forward a different version of events from that given by the claimant, it must state its own version.

The defendant may, if appropriate, make a counterclaim against the claimant or join a third party to the main action. These claims are referred to as "additional claims". If the defendant makes a counterclaim, it must pay a fee as if it were making a claim in a separate action. Again, this will vary according to the size of the claim up to a maximum of £10,000 (at the time of writing).

Acknowledgment of service

If the defendant is unable to file a defence within 14 days it may file an "acknowledgment of service". It will then have 28 days after service of the particulars of claim to file a defence.

The defendant must also file an acknowledgment of service if it wishes to dispute the court's jurisdiction. The application to dispute jurisdiction must be made within 14 days after filing the acknowledgment of service. This may be appropriate particularly in the case of a defendant served outside the jurisdiction.

Statements of truth

The CPR require that certain documents, including all statements of case, are verified by a "statement of truth". Normally, the statement of truth will be signed by the party itself, not by a solicitor on its behalf. This requirement underlines the spirit of the CPR that the parties should be actively involved in the litigation and should take care to ensure that factual assertions are correct before they are put forward.

Interim injunctions and other remedies

Before the case reaches trial, the court may be willing to grant interim relief, ie an immediate order which will remain in force until the trial takes place or until a further order is made. An example of interim relief is an injunction, which is an order requiring a party to refrain from doing a specific act or (more rarely) requiring a party to do a specific act. For an injunction to be granted, the applicant would need to satisfy the court that there is a serious question to be tried, that damages would not be an adequate remedy and that certain other criteria are met.

Another order of this kind, frequently sought in commercial cases, is a "freezing injunction" (or "freezing order"). This restrains a defendant from disposing of its assets in order to avoid paying a judgment given against it later at the trial. Similarly a "search order" may be granted

to enable the solicitors of a claimant (eg a copyright owner) to enter the defendant's premises and remove goods which infringe the claimant's rights. Freezing orders and search orders are draconian measures and the tests to be met are more difficult than the test for other injunctions. Even when the relevant test is satisfied, it is at the court's discretion whether or not to make an order.

The hearing for the order or injunction can often take place within a few days after the application is made. In appropriate cases, the application can be made without notice being given to the other side and an order obtained immediately. In such cases the party against which the order was made may later come before the court to challenge the order and give its version of events.

The evidence for freezing injunctions and search orders must be given in an affidavit sworn on behalf of the party concerned and must set out not just the facts on which the applicant relies but also all material facts of which the court should be made aware, even if they are adverse to the applicant's own case. This is because the respondent to the application will not usually be present at the application to make such points itself.

To obtain any interim injunction, the applicant must usually also give an "undertaking" to pay any damages which the respondent suffers and which the court considers the applicant should pay if the order is subsequently found by the court not to have been justified.

Security for costs

In certain cases, for example, where the claimant is resident abroad (other than in certain countries), the defendant may seek an order requiring the claimant to provide "security" for the costs which the defendant will incur in defending the action and which the claimant will have to pay if the claim fails. This can be a significant deterrent to a claimant, although the courts have limited the circumstances in which an order for security for costs will be made. It is usual for the defendant to seek security at an early stage, and the action may be "stayed" (ie put on hold) until the security is given.

The amount of the security and the way in which it is to be given will be determined by the court. Possible methods of giving security include paying the appropriate amount into a fund at the court, providing a guarantee or arranging a deposit at a bank in the joint names of the parties' solicitors.

A claimant may not apply for a defendant to be ordered to give security for the claimant's costs unless the defendant has made a counterclaim, which puts it in the position of a claimant for the purpose of that claim.

Summary judgment

If the claimant considers that the defendant has no real prospect of successfully defending the claim, it may, after a defence or an acknowledgment of service has been filed, make an application for "summary judgment" in its favour. Equally, the defendant may apply for summary judgment if it considers that the claim against it has no real prospect of success. Where successful, this procedure avoids the additional work, expense and delay involved in proceeding to a full trial. Applications for summary judgment are, for example, made frequently on simple debt claims.

The respondent to the application for summary judgment must be given at least 14 days' notice of the hearing and may file and serve on the applicant any evidence on which it relies. The respondent will very frequently serve such evidence in an attempt to show that there are serious disputes over the facts and the relevant law, and that the action should be allowed to proceed to trial in the normal way.

At the hearing of the application, the master or judge may give judgment for the applicant or dismiss the application and give further directions about the management of the case.

Disclosure of documents

Each party has an obligation to "disclose" to the other parties documents which may be relevant to the dispute, which are or have been in its control. A party discloses a document by stating that it exists or has existed.

The parties must also identify what form of disclosure they believe would be proportionate, and try to agree this with the other parties. At

the CMC, the court will decide what order for disclosure to make.

Traditionally, parties have been ordered to give "standard disclosure", that is disclosure of all documents on which they rely and all documents which adversely affect their or another party's case or support another party's case. This can be a lengthy and expensive process.

However, on 1 October 2022 a disclosure pilot scheme operating in the B&PCs was adopted as a permanent part of the CPR, and has been implemented as Practice Direction 57AD "Disclosure in the Business and Property Courts". This new regime in the B&PCs requires parties to consider and try to agree a "menu" of different disclosure models (ranging from very limited to more wide-ranging disclosure where justified) with reference to the different issues in the case that have been identified as requiring disclosure. The pilot and PD 57AD were intended to promote a radical culture change in the approach to the disclosure process, requiring increased co-operation and engagement by the parties and greater oversight by the courts.

The Part 31 regime is still operating in the courts/cases where PD 57AD does not apply.

In all cases, the other parties are entitled to see copies of all of the disclosed documents still held by the party disclosing them, except documents which the latter may legitimately withhold from being seen by the other parties, eg because they are privileged (see below). The process of showing documents to the other parties is called "inspection" or "production", depending on which set of rules applies. Parties must also indicate what has happened to any disclosable documents which are no longer in their control.

For the purposes of disclosure, a document means anything in which information of any description is recorded. It therefore includes electronic documents, e-mails, voicemail, video recordings, sound recordings, photographs, drawings, electronic documents which have been deleted and metadata.

Disclosure is a vital stage of the proceedings. Many cases settle following disclosure, when the strengths and weaknesses of the parties' cases have become apparent from their documents.

It is essential that all possibly relevant documents and electronic data are preserved by a party as soon as it knows that litigation is contemplated.

Privilege

Some documents that are otherwise disclosable may properly be withheld from the other party on the ground of "privilege". Whether or not a document is privileged can be a matter of argument between the parties. It is often necessary for lawyers to give careful consideration to the issue.

There are two main types of privilege:

– "legal advice privilege", which arises in respect of confidential communications between a client and its lawyers for the dominant purpose of giving/receiving legal advice, whether or not this relates to contentious proceedings; and

– "litigation privilege", which arises in respect of confidential communications between a client and its lawyers or between either of them and a third party if (i) contentious proceedings were pending, in existence or reasonably contemplated at the time the communications were made; and (ii) the communications were made for the dominant purpose of those proceedings.

The following confidential documents will in general be protected by legal advice privilege:

– documents containing legal advice to the client;

– communications between the client and its lawyers made for the purpose of obtaining and receiving such advice; and

– file notes and drafts made by the client's lawyers, and their instructions and briefs to counsel, and counsel's opinions and notes.

The following confidential documents will in general be protected by litigation privilege, in addition to any documents which fall within the

categories above which were generated in connection with litigation:

- communications with a third person such as a witness in connection with the litigation;
- witness statements prepared in connection with the litigation, unless and until disclosed to the other side.

Correspondence with an expert witness in relation to the preparation of an expert report for use in court is not privileged. However, the court will only allow inquiry about it in very limited circumstances.

Confidential communications (both internal and external) with in-house lawyers at a client company will normally be privileged, unless they relate to business matters outside the relevant legal context, or to administrative matters, and so are not essentially concerned with legal advice.

Not all of the employees of a client organisation will be classified as "the client" for the purpose of claiming legal advice privilege. The identity of those employees who constitute "the client" must be considered for each specific matter.

The following documents are unlikely to be privileged:

- board minutes, internal reports and internal notes regarding the litigation prepared by the party for information purposes, unless they are:
  - reporting when strictly necessary to others within the party's organisation on advice received from lawyers, or
  - seeking information requested by lawyers for the purposes of the litigation;
- notes to the published accounts concerning the litigation and any provision for the proceedings in the accounts (whether or not privilege ever existed, it will have been waived by inclusion in the published accounts), and related correspondence with accountants.

"Without prejudice" correspondence is correspondence arising in connection with settlement negotiations. Such correspondence cannot be shown to the court as evidence and production to/inspection by the other side will usually be withheld on the grounds of privilege.

Sometimes a party may claim privilege for part of a document only, or only part of the document may be relevant to the issues in the case. In such a case, the privileged or irrelevant part of the document may usually be blanked out (redacted) before the document is shown to the other parties.

Witness statements

In English court proceedings, there are generally no pre-trial depositions (in which the lawyers for each party question witnesses about the evidence they will give). Instead, the parties exchange written "witness statements". This process is subject to the overall control of the court, which may give directions as to:

- the issues on which it requires evidence;
- the nature of the evidence which it requires; and
- the way in which the evidence is to be placed before the court.

A witness statement should set out the evidence intended to be relied upon in relation to the facts to which the witness will testify orally at the trial. It must be certified to be true by the witness by a statement of truth. Proceedings for contempt of court may be brought against a person who makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth. Possible penalties where a finding of contempt of court has been made include a maximum of two years' imprisonment and an unlimited fine.

Changes to the rules on witness statements for trial were introduced in the B&PCs in April 2021. These included new requirements to list any documents that the witness has referred to, or been referred to, in preparing the witness statement, and for a certificate of compliance from the legal representative and a separate statement of compliance from the witness. Parties are also required to prepare witness statements in accordance with a "Statement of Best Practice", which contains general guidance and practice points for witness statements.

Expert reports

There is a positive duty on all parties to restrict expert evidence to that which is reasonably required to resolve the proceedings. Every expert has a duty to help the court, which overrides any obligation the expert has to the client.

No party may call an expert without the permission of the court (usually given at the CMC), which may also limit the amount which may be recovered from another party by way of fees and expenses of the expert. Usually, each expert is instructed by one of the parties.

Generally, the evidence of an expert will be given in a written report. For the purpose of clarifying a report, an opposing party may, once only and within 28 days, put written questions to the expert about the report. The court may order the experts for both parties to discuss with each other and (as far as possible) agree the issues.

An expert's report must state the substance of all material instructions, whether written or oral, on the basis of which the report was written. The instructions are not privileged from disclosure, although the court will not order disclosure of a specific document or permit questioning at the trial regarding the instructions unless there are reasonable grounds to consider that the statement of instructions is inaccurate or incomplete.

Part 36 offers to settle

Throughout the dispute, the parties will be encouraged to try to settle their action out of court. The settlement of disputes is encouraged by a mechanism providing for a formal offer to settle, whether made by the claimant or by the defendant, under Part 36 of the CPR. The amount and timing of an offer to settle under Part 36 may have very significant costs consequences.

By way of example, the defendant may make a Part 36 offer to pay a sum to the claimant. If the claimant accepts the offer within 21 days, it is entitled to also receive the legal costs it has incurred up to the time of acceptance. If it accepts the offer after the 21 days are over, it is entitled to receive the settlement sum and its legal costs up to the end of the 21 day period, but will generally have to pay the defendant's legal costs after that time.

If the claimant does not accept the offer at all, the action proceeds in the normal way. Then, if at the end of the trial, or on summary judgment, the claimant fails to beat the defendant's offer (ie the judge awards to the claimant damages at a level equal to or lower than the sum offered), the claimant will still receive those damages and its costs up to the end of the 21 day period, but can expect to pay both its own costs and the defendant's costs after that time.

The rationale for such a result is that, since the judge awarded no more than the defendant had previously offered, all the costs incurred afterwards were unnecessary. These later costs, especially the costs of the trial, can be substantial, and so from the point of view of the claimant the existence of a defendant's Part 36 offer can be a powerful inducement to settle.

If the judge awards more than the sum offered by the defendant, the offer is not taken into account under Part 36, because it is clear that the offer was not high enough, and the normal rules on costs will be applied (ie the loser pays the winner's costs – see "Legal costs" below).

From the point of view of the defendant, the Part 36 offer needs to be sufficiently high to create a substantial risk for the claimant that the judge will not award more.

Similarly, the claimant may make its own Part 36 offer, agreeing to take less than the total of its claim. If the defendant accepts the offer before judgment is given, it will generally have to pay the claimant's costs in addition to the settlement sum. If the defendant does not accept the offer, then the action proceeds in the normal way. The risks for the parties are different, however. A defendant who decides not to accept a claimant's Part 36 offer, and is ultimately ordered to pay the same or more than the settlement sum proposed in that offer, will generally have to pay the claimant's costs on the indemnity basis (see below under "Legal costs") plus enhanced interest on those costs and on the claimant's damages (for the post-offer period only) and an additional amount of up to £75,000.

Whichever party makes the offer, the judge must not be told about it until the case has been decided and costs are being considered – Part 36 offers are made "without prejudice save as to costs".

Offers to settle made outside the Part 36 rules (known as "Calderbank offers") may also result in favourable costs consequences for the party making the offer where the offer is not accepted, but this is at the judge's discretion. When deciding what order to make regarding costs, one of the factors to be taken into account by the judge is any offers to settle.

Preparation for trial

At a time set by the court, but not less than eight weeks before the date fixed for trial, the parties will generally need to file a completed "pre-trial checklist". The court may decide to hold a "pre-trial review", a hearing conducted by the judge who is to preside at the trial which may take place up to two months before trial. The object of the pre-trial checklist and review is for directions for the conduct of the trial to be given by the court, including:

- the evidence to be given, especially expert evidence;
- a timetable for the trial, which may specify the time allowed for the presentation of particular issues; and
- preparation of the "trial bundle", a set of files containing copies of all the documents needed at the trial.

The parties' solicitors should seek to agree directions between themselves, but the court has an overriding power to make an order in different terms if appropriate.

In the remaining time before the trial, the solicitors and barristers will be making the final preparations in accordance with the directions, negotiating for a possible settlement, making arrangements for the attendance of witnesses, researching legal points and preparing skeleton arguments. For large trials, the skeleton arguments will be major documents identifying all the issues which are to be argued, all the propositions of law to be advanced and all the legal authorities (eg earlier court rulings or statutory provisions) to be cited. The trial bundle will usually be prepared by the claimant's solicitors and will be lodged at the court shortly before the trial.

Trial

The style of the trial is predominantly oral, although some written submissions will be made in skeleton arguments. Before the start of the trial, the judge will generally have read the statements of case, witness statements, experts' reports, lists of issues and skeleton arguments lodged with the court. The judge does not make their own investigations.

At the opening of the trial, the claimant's barrister may describe to the judge the nature of the dispute and take them through the particulars of claim, the defence and the trial bundle. The defendant's barrister will usually then be invited to make a statement in response.

The claimant's barrister will then call the claimant's first witness of fact and examine them "in chief". Normally, the witness statement of each witness will be taken as their evidence in chief for this purpose, so this examination-in-chief is usually very brief. With the court's permission, the claimant's barrister may, without leading the witness, ask them questions to amplify their witness statement or to obtain their evidence on any matters not covered in the witness statement. The defendant's barrister may (on rare occasions) invite the court to require that the witness be taken through all their evidence in this way if for some reason the witness statement is inadequate.

The witness is then "cross-examined" by the defendant's barrister. These questions will be "leading" and will challenge the witness. They will be designed to show that the witness's written statement or oral evidence is unreliable, even untruthful, perhaps by showing that the witness's recollection is at fault, that they did not have close knowledge of the facts or that the evidence is contradicted by a contemporaneous document.

The claimant's barrister may then "re-examine" the witness to deal with any new points arising from the cross-examination.

The other witnesses follow and there is the same sequence of questioning. The judge may interject with their own questions. Each of the defendant's witnesses of fact will be examined in the same way as the claimant's witnesses.

There is a presumption that experts' evidence will be their written reports, and the permission of the court is needed for them to give oral evidence at trial (which is common). When experts give oral evidence it is usually given in a similar way to the evidence of fact witnesses. However, the court can order that experts for opposing parties give evidence at the same time as each other, a process called concurrent evidence or "hot-tubbing".

The order in which witnesses and experts give evidence is generally up to the parties and their lawyers, and is often determined by the availability of the witnesses. Usually, the claimant's witnesses of fact will give evidence first, followed by the defendant's witnesses of fact and then both parties' expert witnesses.

The defendant's barrister will then sum up the evidence and make submissions on the relevant law. Finally, the claimant's barrister will sum up the evidence from their client's point of view and make submissions on the law.

The judge may give judgment immediately or, in a more complicated case, may reserve judgment until a later date when they have reflected on the issues (this is very common). The judgment will usually contain a review of the evidence, including the judge's conclusions on what the truth is where there is conflicting evidence, an analysis of the relevant law and, finally, their decision regarding which party has won and the remedy that will be awarded.

The text of a reserved judgment may be delivered to a party's solicitors and barristers (and the parties, unless the judgment is embargoed so that it cannot be circulated further than the lawyers) some days before it is due to be formally delivered, to allow time for costs applications to be considered and minor errors to be corrected. The judgment will usually be provided on the basis that there is to be no communication with third parties regarding the result until the judgment is formally announced in court.

Remedies

In its statement of case, the claimant will have specified the legal remedies it is seeking, eg specific performance of an obligation owed by the defendant, or an injunction to restrain the defendant from doing a particular act.

Most frequently, the claimant will be seeking damages. Under English law, damages are intended only to compensate the claimant for its loss. Punitive damages are available only in very exceptional cases. There are no circumstances at all in which multiple damages, for example treble damages, may be awarded.

Legal costs

Subject to the special provisions relating to fixed recoverable costs and the Part 36 rules explained above, the normal rule in English proceedings is that the loser pays the winner's costs. Such costs include not only court fees but also the fees of the winner's solicitors, barristers and expert witnesses and various incidental expenses.

This rule is also subject to the fact that the parties will often have been asked to produce a budget of their costs early on in the case (see above under "Case management"). If so, the parties must at that point have agreed between themselves that the budgets are proportionate to the claim at stake or, where they could not agree, the court will have approved the budgets (having amended them if necessary). Where the court has imposed costs management/budgeting, it will not usually depart from the last agreed or approved budget unless satisfied that there is a good reason to do so.

There may also be a variation on the normal rule if the judge finds in favour of one party but considers its conduct unmeritorious. For this purpose the judge will take into account conduct before as well as during the proceedings. The judge may decide, for example, that it was unreasonable to pursue a particular allegation, that the claimant exaggerated its claim or that a party failed to make a proper effort to settle the matter through ADR. In such a case the order may be that each side pays its own costs, or that

the costs relating to only some of the issues can be recovered.

The order for costs is usually on the "standard" basis. This means that all the legal costs reasonably incurred by the receiving party and reasonable in amount must be paid by the paying party, unless disproportionate. The burden of proving reasonableness is on the receiving party. The amount which may be obtained on this basis is generally between one half and two thirds of the total costs which the receiving party has actually incurred. As noted above, the position is different if the parties have been subject to the costs budgeting regime, in which case the receiving party will generally not obtain more than what was in its agreed or approved budget.

Alternatively, the judge may award costs on the "indemnity" basis. This means that all the legal costs must be paid except to the extent that they are of an unreasonable amount or have been unreasonably incurred. The difference between this and the standard basis is that on the indemnity basis the burden of proof of reasonableness is reversed, so that any doubt about whether or not the costs were reasonable will be resolved in favour of the receiving party instead of the paying party. The question of proportionality does not arise.

Where the court orders one party to pay costs to the other party, it may specify the amount of the costs there and then, or it may order the costs to be assessed later on, at a separate hearing if necessary. In the latter case the parties' solicitors will normally try to agree the costs by negotiation and avoid the further cost of "detailed assessment" proceedings to determine the amount of costs payable, which may be expensive and time-consuming.

Appeals

Following judgment, the losing party may try to appeal against the ruling or part of the ruling, that is ask a more senior court to overturn it, on the basis that the decision was wrong in law or unjust because of a serious procedural or other irregularity. Permission to bring an appeal is needed from either the judge or the higher court (and sometimes both) and it will only be given where the appeal has a real prospect of success or there is some other compelling reason. Usually the appeal court will not review the judge's decisions on the facts of the case.

Enforcement of judgments

Subject to any appeal, when a judgment has been given against it the defendant will often make payment voluntarily. If it does not, various enforcement procedures are available to the claimant, for example: arranging for an enforcement officer to seize and sell the defendant's goods; diverting debts due to the defendant from third parties; obtaining a charging order over property owned by the defendant; or obtaining an order for payment to the claimant of any sums which were previously made the subject of a freezing injunction.

As with the rules on jurisdiction, the rules governing the enforcement of English judgments in other jurisdictions are complicated and vary depending on the place where the judgment is being enforced.

Alternative dispute resolution

Parties are strongly encouraged by the courts to use mediation and other forms of ADR to attempt to settle their disputes. For example, parties that unreasonably refuse to mediate may be penalised in costs. All parties engaged in litigation should therefore give serious consideration to ADR as a means of resolving their disputes throughout the litigation process. For more information about ADR, see our client notes: Alternative dispute resolution in England and Wales and Implementing an effective dispute resolution strategy which promotes the use of ADR.

Further information

If you would like further information on any aspect of civil proceedings generally, please contact the person mentioned below or the person with whom you usually deal. CPD points are available for reading this note if it is relevant to your practice. If you would like any live training on this subject, we would be happy to give you a presentation or organise a seminar, webinar or whatever is most convenient to you.

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