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The English Court Process: A guide for parties from outside the jurisdiction

Inside

Introduction

The English courts are regularly chosen as the forum for the resolution of disputes, even between parties who do not have any other link to the jurisdiction. English judges are used to dealing with cases where one or both parties are not located within the jurisdiction and regularly deal with cases where initial applications concern a dispute over jurisdiction. This guide provides an outline of the civil litigation process in the English courts. It sets out the key points to bear in mind when bringing or defending a claim in England.

The Civil Procedure Rules (the "CPR") and case management

All civil claims in the English courts are subject to the CPR, a procedural code with the overriding objective of dealing with cases justly and at a proportionate cost. The CPR impose on the courts an express duty to manage cases to ensure their efficient progress. This includes, for example:

- encouraging co-operation and settlement between the parties (including the use of Alternative Dispute Resolution ("ADR") if appropriate);
- identifying the issues in the case and deciding the order in which these issues should be dealt with;
- deciding on timetables and directions to ensure the efficient handling of the case; and
- where possible minimising court attendance by the parties and dealing with as many aspects of the case as is possible on the same occasion.

The courts monitor cases from commencement through to trial to ensure that they are managed efficiently and proportionately according to the amount of money involved, the importance of the case, its complexity and the financial position of each party.

In addition, the courts will expect parties to cooperate with each other and failure to do so may result in a costs order being made against a party who is acting unreasonably.

Before proceedings are started

The CPR require parties in all cases before proceedings are commenced to act reasonably in:

- trying to avoid the necessity for legal proceedings by attempting to reach an agreement where appropriate; and
- exchanging information and documents which are relevant to the claim within a specified time period.

Failure to follow these rules may lead to a party being penalised by the court by way of an adverse costs order.

Who pays the costs?

The general rule is that the loser pays the winner's costs. This has many attractions, not least that it acts to deter weak and speculative claims. However, this is only the starting point as the court will consider other factors such as the parties' conduct, whether the winning party lost on certain issues, the respective parties' approach to negotiations and the circumstances of the case generally. Additionally, for all claims (except where the value of the claim is £10 million or more or other, very limited, exceptions apply), parties are required to prepare a detailed costs budget to be agreed with their opponent or subject to a costs management order of the court. Any variations of the budget need to be agreed or ordered by the court. Following the end of the claim, the court will order (or the parties will agree) who should pay the costs and in what proportion. If the parties are unable to agree the amount of costs to be paid, the court will carry out a detailed assessment taking into account the budget which has been set.

In addition, during the course of a claim the court may, in appropriate circumstances, make summary orders in respect of costs which are payable within 14 days of the order being made.

Public or private?

All hearings, whether a trial or application, are open to the general public subject to very limited exceptions (e.g. in cases involving highly confidential matters or trade secrets).

A non-party (e.g. a journalist) may obtain, sometimes without the permission of the court, a copy of any document filed at court (subject to certain limitations). However, it is possible to apply for an order restricting access.

Mediation

The courts actively encourage parties to take part in some form of ADR and will stay (i.e. adjourn) proceedings if necessary to allow them to do so. Failure to provide good reasons as to why a party refused to enter into ADR may result in an adverse costs order. It is the duty of all lawyers in this jurisdiction to advise their clients to consider ADR.

The most common form of ADR is mediation. There are many highly regarded mediators in England who can assist in this process. A mediation normally takes place at an agreed venue on an agreed date. Any mediation will be confidential and if no agreement is reached, the content of the mediation meeting will remain confidential and cannot be referred to in court.

Commencing a claim

Once a claim is issued the parties will file detailed Particulars of Claim, a Defence and a Reply. These documents are collectively called "Statements of Case". The time periods for the filing of these documents may be extended by the court and in certain circumstances by agreement between the parties.

Disclosure (known as "discovery" in the US)

Disclosure is the process whereby the parties to a dispute formally state to one another which documents they hold that are relevant to the proceedings, and provide copies of those documents which are not privileged.

Currently, there are two different disclosure regimes in operation in the English Courts, following the introduction of the Disclosure Pilot Scheme ("DPS") in the Business and Property Courts (which encompass the Chancery Division, the Commercial Court and the Technology and Construction Court).

The "standard disclosure" regime

The "standard disclosure" regime was introduced with the CPR in 1999. Whilst "standard disclosure" is, strictly speaking, one of a menu of different disclosure options it is in effect the default option, with other options seldom utilised if at all. Standard disclosure requires the parties to disclose to each other:

- the documents upon which each party relies; and
- the documents which adversely affect each party's own case or another party's case, or which support another party's case.

For the purposes of standard disclosure a party:

- need only give disclosure of documents which are or have been in that party's control; and
- is only required to disclose those documents which have been found by a "reasonable search".

The Disclosure Pilot Scheme ("DPS")

The DPS was introduced with the objective of changing the culture around disclosure, with a move away from "standard disclosure" as the default option. The DPS spells out in clear terms the duties owed by parties, and their legal representatives, in relation to the preservation of documents (including in relation to documents held by third parties) and when carrying out the disclosure exercise.

Under the DPS:

- as a general rule, when filing and serving its Particulars of Claim or Defence, each party must provide "Initial Disclosure" of the key documents it has relied upon whilst preparing its statement of case, and the key documents required to enable the other party to understand the case they have to meet;
- after reviewing the initial disclosure, within 28 days of the closure of the Statements of Case, the parties must state if they believe further disclosure is required. If so, the parties must liaise to complete a joint Disclosure Review Document, setting out their respective positions on what "model" for disclosure should be ordered, what the "Issues for Disclosure" are, how documents are stored and how they might be searched and reviewed.

The models for disclosure range from "Model A" which requires parties to only disclose "known adverse documents" (i.e. those documents which are unhelpful to a party's case and the party is aware of without having conducted any further searches), to "Model E" which is a very wide search based disclosure, whereby parties must disclose not only the documents covered by the "standard disclosure" test, but also documents which may lead to a train of enquiry which may result in the identification of other documents for disclosure.

Preservation

Once litigation is contemplated, a party is under a duty to preserve all documents (including electronic documents) which may become disclosable in that action. A failure to preserve documents at the outset, or give proper disclosure once litigation has commenced can result in judicial criticism, penalties or adverse inferences which are harmful to the case. A party (or expected party) to litigation in England must therefore be warned at the outset to: maintain all copies of relevant documents, not to mark or annotate relevant documents, and not to create any new documents without speaking to their lawyer first.

Withholding documents

It is possible to withhold certain documents from being inspected by the other side on the grounds that they are "privileged". Privilege is a complex area of law and advice should be sought as to whether particular documents are privileged. The two most common grounds of privilege relied upon are legal advice privilege and litigation privilege. Legal advice privilege covers confidential communications between lawyers and their clients which are created for the dominant purpose of seeking, providing or receiving legal advice. Litigation privilege

covers confidential communications between lawyers and their clients, or the lawyer or client and a third party, which come into existence for the dominant purpose of being used in connection with actual or pending litigation.

Confidential documents

Documents which are confidential but not privileged must be disclosed. However, confidentiality in disclosed documents is preserved by an express rule in the CPR which provides that no ancillary or collateral use may be made of any disclosed documents without the consent of the party who gave disclosure of the document unless and until they are:

- read out in court;
- referred to in a public hearing; or
- the court gives permission.

In some cases where the confidentiality of the documents goes to the root of the case the court may order that evidence is not given in open court, thereby protecting the confidentiality.

Witness statements and cross-examination of witnesses

Parties to proceedings are required to prepare and exchange with the other parties witness statements relating to any evidence of fact they wish to rely on at trial. The court may limit the issues a witness may deal with. Great care must be taken in the preparation of witness statements to ensure that they cover all the points which the party calling that witness needs that witness to prove. A witness who is called to give evidence at trial may be cross-examined on their witness statement to test the accuracy and completeness of their evidence. Cross-examination can be a very useful tool in testing an opponent's evidence. Witness statements provided by non-English speakers must be prepared in the witness' own language and be accompanied by an English translation unless the witness is sufficiently fluent in English. Where witnesses (and sometimes documents) are located outside of the jurisdiction, it is possible to apply for the English court to request the relevant foreign court to obtain the evidence and transmit that evidence back to it.

Expert witnesses

It may be necessary to call expert evidence in order to prove or disprove a case. If it is required, a party will have to provide the court with an estimate of the costs of an expert as well as the issues the expert will address. It is the overriding duty of an expert to assist the court on the matters within their expertise. Expert evidence presented to the court should be, and should be seen to be, independent. The substance of the expert's evidence in the form of an expert's report will be served on the other side before trial to ensure that each party is fully aware of the nature and extent of the expert evidence to be given by the other side.

The court will also encourage, by order if necessary, discussions between experts with a view to promoting agreement and a narrowing of the issues for trial.

The trial

This is the culmination of the action, assuming it has got this far. Each party presents its case to the Judge. The Judge considers the evidence which is tested by cross examination of the witnesses of fact and the experts. There is no jury in English civil court trials. It is crucial that all material facts are investigated because (with a few exceptions) the findings of fact which are made at trial are final.

Appeals

The English legal system gives only a limited ability to appeal a judgment, resulting in greater legal certainty for the parties. Permission to appeal will only be granted if the court considers that the appeal would have a real prospect of success or that there is some other compelling reason why it should be heard.

How long will it all take?

There are obviously a large number of variables which dictate how long a claim will take from start to finish. However, in the case of a High Court trial, from the issue of a Claim Form until trial is likely to be at least nine months, and in all but the most complex cases should be less than two years.

Enforcement

English judgments can be enforced in many jurisdictions around the world by international agreement. Following Brexit, the procedure for the enforcement of UK judgments in EU countries has changed, as the UK no longer benefits from the enforcement regime set out in the Brussels Regulation (Recast). Advice should be sought at the outset of a claim about whether and how a judgment may be enforced in a particular jurisdiction.

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