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A guide to the litigation process in England and Wales

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Introduction

If you are involved in a dispute in England and Wales you need to know:

- what options there are for resolving the dispute;
- what litigation involves;
- the steps from the start of proceedings to trial;
- what parties to proceedings have to do;
- the fundamentals of court procedure;
- how to use legal advisers efficiently and cost effectively; and
- what happens after judgment.

The civil justice rules, which had been developed over centuries, were discarded in 1999 and replaced by new rules of court procedure.

These rules are known as the Civil Procedure Rules ("CPR"). The aim of the CPR is to make civil justice more accessible, fair and efficient. The CPR are not just another set of rules tacked on to an existing way of doing things: since their inception they have demanded a completely new code of behaviour and attitude to dispute resolution. In particular there is an emphasis on the need to focus on investigating and preparing the case at an early stage of the dispute, and commit management resources to the resolution of the dispute.

In April 2013, following a review of the CPR by Lord Justice Jackson, the Legal Aid Sentencing and Punishment of Offenders Act 2013 (LASPO) was enacted. This has resulted in major changes affecting many areas including costs, delays and documentary and factual evidence. All of these changes including all revisions made up to and including April 2021 have been incorporated into this note. For cases being heard in the High Court there are, in addition to the CPR, court guides for each of the divisions. These provide further guidance on procedure as well as, from time to time, Practice Notes which practitioners are required to follow.

All cases which proceed to litigation are subject to the "overriding objective" brought in by the CPR (see below "The overriding objective").

The CPR provide for three categories of case: the small claims track, the fast track and the multi-track (see "Allocating Cases" below). Most of this note is concerned with the most substantial category of case, the multi-track.

The note does not detail the different courts in which a claim may be heard. We will discuss this with you if you intend to commence or defend any proceedings.

Many of the courts are now subject to electronic working so proceedings are commenced and continued electronically, allowing parties to issue and file applications 24 hours a day, every day of the year.

In a general note such as this, our aim is to provide an overview rather than a detailed guide. The litigation process has many variables. Inevitably, points will arise which have not been covered in this note. It should therefore be used as an overview and not as an ultimate authority on any of the points covered. We will give advice on specific matters as and when they arise.

Before the issue of proceedings and the duty to preserve documents

We set out below some of the key issues which should be addressed before the issue of proceedings.

Is there an alternative to litigation?

There are ways of resolving disputes other than through court proceedings. Structured alternatives are sometimes described as alternative dispute resolution ("ADR") and include mediation, early neutral evaluation ("ENE") and expert determination, as well as arbitration. The role of ADR has become increasingly important.

The court will expect all parties, subject to some limited exceptions, to consider the use of ADR during the course of proceedings. In some cases, it may be appropriate to initiate negotiations to resolve a dispute before the issue of proceedings, so long as in so doing the other party does not misconstrue such an approach as a sign of weakness. Indeed, the courts expect parties to consider whether some form of ADR would be more suitable than litigation before proceedings are commenced.

Is your opponent worth anything?

If you are a claimant you should investigate whether the defendant will have any assets available to satisfy any judgment that you may obtain. If you are a defendant faced with an impecunious claimant, you should consider whether to apply for security for costs (see "Some possible steps before trial" below).

Publicity

Publicity considerations may be important in determining the strategy in proceedings. Today, as a general rule of thumb, one should assume that a non-party might be able to obtain a copy of any document filed at court, although it may be possible to apply for an order restricting access.

Broadly speaking, each party is entitled to have heard in open court all the relevant issues in the case, although there are some very limited exceptions. For example, in cases involving highly confidential matters or trade secrets, it may be possible to persuade the court to hear the matter in private. However, changes to the rules have highlighted the principle of open justice and that hearing cases in private will be the exception.

Confidential documents and disclosure

It is important for you to appreciate at the outset that if you are issuing court proceedings you may have an obligation to disclose to your opponent all documents relevant to the issues to be tried, even though those documents might be harmful to your case and even though those documents might be confidential (see below "Disclosure of documents" for a fuller explanation).

No ownership of witnesses

There is no "property" in a witness of fact. This means that there is nothing to prevent your opponent approaching any potential witness of fact if they may have relevant evidence to give. That may, depending on the circumstances of the case, involve your employees and clients. Your opponent might try and do this for genuine evidential reasons or for tactical reasons. If these are matters of concern for you, you must raise them with us at the outset to enable us to formulate the appropriate tactics in conjunction with you.

Pre-action protocols

Pre-action protocols explain the conduct and set out the steps the court would normally expect parties to take before commencing proceedings for particular types of civil claims which include professional negligence, personal injury, media and communication claims, construction and engineering disputes, housing disrepair, possession and mortgage arrears, debt claims and judicial review.

Even if no pre-action protocol exists, there are rules that require parties in all cases to act reasonably.

The objective of these rules is to:

- try to avoid the need for legal proceedings by considering another form of ADR to assist with settlement; and
- encourage the exchange of information and documents that are relevant to the claim from the outset so that the parties understand each other's position. This will assist parties in making decisions as to how to proceed, as well as support the efficient management of any proceedings and reduce the costs of resolving the dispute.

Parties to a potential dispute not covered by a pre-action protocol should follow a reasonable procedure, suitable to their particular circumstances. This will normally include:

- the claimant writing to give details of the claim, enclosing copies of documents relied upon and asking for copies of those key documents which the claimant believes the defendant has and identifying what the claimant wants from the defendant;
- the defendant responding within a reasonable time - 14 days in a straightforward case and no more than three months in a complex one; and
- complying with the other party's reasonable requests for further information.

These rules should not be used as a tactical device to obtain an unfair advantage over the issues. If these initial steps do not produce a settlement then the parties should review their position and at least seek to narrow the issues.

If the court considers that a party has not complied with a relevant pre-action protocol (or the general rule where there is no relevant pre-action protocol) and this has led to unnecessary commencement of proceedings or costs, it can order the party in default to:

- stay the proceedings until the steps which have to be taken have been taken;
- pay the costs of the proceedings or part of the other party's costs; and
- pay the costs on an enhanced basis (known as the indemnity basis).

The costs provisions of the CPR require the court to take into account the conduct of the parties when making an order for costs. This includes conduct before as well as during proceedings. One of the factors that the court will take into account is the extent to which the parties have followed any relevant pre-action protocol or the general rule. In appropriate cases, this could mean that the court could deprive a successful party of some or even all of its costs.

Before the event insurance

Many people have insurance policies that may cover the pursuit or defence of litigation and associated costs. It may even cover the substantive liability for a claim. Prospective parties to litigation should review all insurance policies that they have. If a policy may respond, early notification of a claim is critical. Otherwise the insurer may decline cover.

After the event insurance

The insurance market has developed and is continuing to develop products to deal with the insurance of risks and payment of costs in litigation.

Broadly speaking, in return for the payment of an appropriate premium a party can obtain insurance for their potential liability to pay costs up to a certain level. This can include:

- that party's own legal costs up to a specified level; and
- that party's liability to pay the opponent's costs up to a specified level.

Changes to the law in April 2013 mean that recovery of these premiums from an opponent if you are successful is no longer possible in most, but not all claims.

Duty to preserve documents

Once a party becomes aware of the likelihood of litigation, that party is under a duty to preserve and keep all documents that may be relevant to the issues. This includes the suspension of any relevant document destruction process. Indeed, you will probably be required to explain when you gave instructions to preserve documents.

This obligation extends to electronic documentation. A failure to preserve documents at the outset, or to give proper disclosure once litigation is commenced, can result in judicial criticism, financial penalties or adverse inferences which may be very harmful to the case. The process known as disclosure is covered in more detail under "Disclosure of documents" below.

Statements of truth

It is a requirement of the CPR that parties (or, in certain circumstances, their legal representatives) should sign statements of truth in relation to all manner of steps in the proceedings. This is a statement that the party putting forward the document believes the facts stated in the document are true. For example, whenever a party to proceedings puts forward a formal statement of case, an application notice in certain circumstances or a witness statement that party must sign a statement of truth verifying that they believe the contents of the documents to be true. Following changes to the CPR any document requiring a statement of truth must also state that proceedings for contempt of court may be brought against anyone 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. It should be noted that anyone found guilty of contempt of court could ultimately be imprisoned.

In the case of a corporate party, a person who holds a "senior position" in the company or corporation must sign the statement of truth. The definition of those in a "senior position" includes management staff.

The overriding objective

Cases that proceed to litigation are subject to the overriding objective.

It is the duty of the parties to help the court to further the overriding objective. The overriding objective is applied to enable the court to deal with cases justly and at proportionate cost.

This specifically includes, so far as practicable:

- ensuring the parties are on equal footing;
- 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 a case is dealt with expeditiously and fairly;
- allotting to a case 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.

The court will at all times consider whether the parties are acting reasonably in connection with the dispute, both before and after the issue of proceedings.

A party who conducts litigation other than in accordance with the overriding objective risks severe costs penalties.

Further discussion of proportionality is dealt with below under "Costs".

Starting proceedings

Time limits for service

Once issued (i.e. lodged at the court office with the fee paid), a claim form is only valid for 4 calendar months (6 months if being served out of the jurisdiction of the court i.e. outside England and Wales). In practice this means that the claimant must despatch the claim form, if serving it within the jurisdiction, before 12:00 midnight on the calendar day 4 months after the date of issue of the claim form otherwise it will lapse.

There are certain circumstances in which the validity of a claim form may be extended, but an application to the court is required and this should be made prospectively, before the claim form expires. If there are any specific concerns about, for example, limitation periods, then it is absolutely imperative that the claim form is served in time. Proceedings are only properly instituted once they are despatched.

Where a claim form is to be served out of the jurisdiction, different rules apply but the claim form must be served within a 6 month period.

Acknowledging service

Once the particulars of claim are served on a defendant (this may be simultaneous with the claim form or it can be done separately), the defendant must within 14 days either file an acknowledgement of service form or file a defence. If the defendant is located outside of the jurisdiction then a different period may apply. Once the defendant lodges an acknowledgment of service form, they must serve the defence within a further 14 days. If a defendant does not comply with these time limits, the claimant may apply for judgment in default without a hearing. In the case of a claim for a specified sum, this can be for the amount claimed in the claim form. If judgment in default is for an unspecified sum (e.g. damages for libel), the amount of the damages will have to be determined by a judge.

Case management by the court

The court has an express duty to manage cases. This includes, for example:

- encouraging co-operation and settlement between the parties

(including the use of 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;
- making appropriate use of information technology;
- where possible minimising court attendance by the parties and dealing with as many aspects of the case as is possible on the same occasion; and
- undertaking a cost benefit analysis in relation to each proposed step in the case.

The court can take any step or make an appropriate order for the purpose of managing the case and furthering the overriding objective.

The court can exercise its authority on its own initiative, and it does not have to wait for either party to take a particular step.

Before the CPR came into effect, it used to be the case, by and large, that the pace and conduct of the litigation was under the control of one or the other or both of the parties to the litigation. That is no longer the case. Once commenced, litigation is under the control of the court. The CPR encourages parties to act more reasonably and agree between themselves procedural stages, but this is subject to the court's much tighter overall control over the proceedings. To avoid the court imposing its control, the litigation should be pursued diligently.

Allocating cases

There are three categories of cases, or "tracks":

1. the small claims track;
2. the fast track; and
3. the multi-track.

The rules in the CPR which apply will vary depending on which track the case is allocated to, with increasing levels of formality and process required the more complex and valuable the case. There are proposals for a fourth track which would be called the "intermediate track" for those claims up to £100,000 but these are not yet implemented.

The small claims track

This is the normal track for most claims up to £10,000 which will be heard in the County Court. It will also cover certain low value personal injury cases and claims of £1,000 or under by tenants of residential premises against their landlords over repairs to premises.

In small claims cases successful parties do not recover their costs from the loser unless there are exceptional circumstances. As a result, the use of lawyers is discouraged. This is intended to increase access to justice and make for a level playing field.

The fast track

This is the usual track for claims between £10,000 and £25,000. It applies if the court considers that:

- the trial is likely to last no more than a day;
- oral expert evidence at trial will be limited to one expert per party in relation to any specialised field; and
- the case involves no more than two different fields of expert knowledge in total.

There will be fixed timetables and fixed costs (that is, limited cost recovery even if you win) for fast track cases. The cost structures are intended to have the effect of streamlining lawyer involvement and/or assisting the parties where possible to do much of the work without assistance from lawyers at all.

The multi-track

This is the standard track for all other cases. When allocating a case to this track the court may either give directions about how the case is to be managed and specify a timetable or fix a case management conference and give directions about the management of the case. At the case management conference the court will also set the trial date or specify the period within which the trial is to take place (see later).

Factors the court will take into account in allocating a case to a particular track include:

- the value of the claim;
- the nature of the legal remedy asked for;
- the complexity of the case;
- the number of parties;
- the value and strength of any counterclaim;
- the amount of oral evidence that may be needed;
- the importance of the case; and
- the views of the parties.

Claims with no monetary value will be allocated to the track which the procedural judge considers most suitable to enable cases to be dealt with justly, taking into account the factors listed above.

Shorter and flexible trials schemes

The courts have also introduced schemes to allow for shorter or flexible trials for business related litigation at a reasonable and proportionate cost. These are only available to claims brought in the Rolls Building which deals with claims in the Commercial, Admiralty, Chancery and Mercantile Courts and the Technology Construction Court.

The shorter trials scheme allows the court to manage claims with a docketed judge assigned to the claim with restrictions on disclosure, witnesses and experts. The case will be heard within eight months of the case management conference and the intention is that the judgment will follow within six weeks. The CPR set out those claims that are suitable for these schemes.

The flexible trials scheme allows the parties to determine the procedural steps and encourage parties to limit disclosure and confine oral evidence to the minimum necessary.

Summary procedures

The general rule

The general rule is that all cases must go to trial to be finally decided. This is particularly so where any element of your case involves a disputed issue of fact. This is because under the legal system for England and Wales, it is considered that the only way to decide issues of fact is for the court to hear live evidence with witnesses being the subject of cross-examination. However, there are some exceptions.

Some exceptions to the general rule

The following are some examples:

Summary judgment

Either party can make this application. To succeed they need to persuade the court that the other party's claim or defence has no real prospect of success.

If the other party wishes to resist the application, they must satisfy the court that there is an issue or question genuinely in dispute that ought to be tried or that there should be a trial for some other reason. Evidence is given by written witness statements rather than by witnesses in person. This feature means that cases involving disputed facts are unlikely to be appropriate for determination summarily.

There is a range of possible orders. For example, the court may give judgment for the applicant. The court may also allow the action to continue but attach conditions such as a payment into court by either party. It may give judgment on or strike out a part of the matters in dispute, leaving the remaining issues to be tried in full.

The key feature of summary judgment applications is that they present the applicant with an opportunity to determine the case in their favour at an early stage and at a short hearing. Even if it is unsuccessful, in some cases it may be a tactical advantage to require the opponent to set their case out in detail in written witness statements at an early stage.

Where an issue arises in relation to timing and prosecution of the underlying case: until the application is heard, the further pursuit of other stages in the action is suspended. This means that the timetable is inevitably delayed if the application fails. This may or may not be a good thing tactically.

There is also a risk to consider when making such an application. If the application is unsuccessful, the applicant will probably be ordered to pay some of the respondent's costs immediately, even though the applicant may ultimately be successful at trial.

Default judgment

The court will enter judgment against a defendant who fails to file an acknowledgement of service or file or serve a defence within a specified time or if certain court fees are not paid.

Interim payments

This enables a party to seek an order for payment of money on account of a claim before the full trial takes place.

Strike-out

The court has a general power to attach extreme sanctions when faced with disobedience to its orders. This includes striking out all or part of a defaulting party's case. The powers help the court to actively manage and control conduct of the case. If, for instance, a party consistently fails to serve its list of relevant documents despite extensions of time to allow them to do so, the court may order a final extension with such a sanction attached in the event of further default. If that party then does not comply with the order, the opponent may obtain judgment against them without need for a trial.

Sometimes a statement of case (or part of the case) can be struck out upon an application made by one of the parties or by the court's own initiative where no reasonable grounds for bringing or defending the claim are set out in it or where the claim or defence is an abuse of process of the court. This is in addition to the power mentioned above, where there has been a failure to comply with a procedural rule or court order.

Objectionable matters included in a statement of case (for instance insulting allegations about the other party which are not relevant to the matters in issue) can also be struck out.

Interim declarations

A declaration is a formal statement by a court of the legal significance of a given set of facts. This procedure is not appropriate where there is a dispute as to any material facts.

Statements of case

What is the function of a statement of case?

The purpose of a statement of case is to define the legal issues upon which the court has to decide and set out the essential facts supporting the party's position. The first statement of case is the particulars of claim; then comes the defence and subsequently others may be served. To make sure that your statement of case is correct and effective, it is important that you provide us with all of the facts relevant to your case. We will then determine which of these facts should be mentioned in the statement of case.

Each statement of case is concluded with a "statement of truth". This is standard wording by which the party on whose behalf the document is prepared certifies that the facts in it are true. It is absolutely essential the facts contained in any statement of case are correct in all respects. (See "Statements of truth" above in "Before the issue of proceedings and the duty to preserve documents".)

Amending statements of case

It is possible to amend a statement of case at various stages of an action. An amendment can usually be made without a hearing for permission to amend if the other party consents. If the other party does not consent then, save in limited cases, an amendment can only be made with permission of the court.

Generally speaking, an amendment will be allowed at any time up to trial (and

in very limited circumstances during trial) so long as it does not prejudice the other party or the trial date, and usually with the condition that the party seeking the amendment pays all costs which are incurred by reason of the amendment.

Defences

If you wish to defend a claim brought against you, it is essential to serve a formal defence on time. If you fail to do so, the claimant may succeed not only in securing judgment against you in your absence but may also begin the process of enforcing that judgment against you and your property.

You may experience enormous pressures of time when preparing a defence. The courts no longer regard it as acceptable practice to serve a defence that consists wholly of bare denials and refusals to admit unpalatable or damaging allegations made in a claim.

If, for example, the claimant has served a very full particulars of claim or you work for a large organisation at one location and the claim relates to matters in another division based at another location, you may find it very difficult in the narrow time frame permitted under the CPR to put together a full defence. It is possible to agree an extension of time with the other side of up to 28 days. A further extension of time may be obtained by making an application to court provided it is made before the time period for service expires.

Attacking your opponent's statement of case

Sometimes a statement of case fails to include essential ingredients of a particular claim, and failure to provide those details can be fatal to a claim. To elicit these details the party attacking a statement of case can ask for "further information" to be provided and, if it is not supplied, apply to the court for an order striking out that part of the claim (see above). Sometimes further information can be asked for so that the party making the request can be clearer about the case that has to be met.

Disclosure of documents

What is disclosure?

Disclosure is a process by which 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. This is a very important part of English procedure and should be undertaken with great care as it may determine the outcome of litigation.

The idea is that the court is able to determine the case with all the relevant information before it. Disclosure can also promote settlement as the parties become more aware of the relative strength of their cases.

The current regime

The "standard disclosure" regime was brought in with the CPR in 1999. Standard disclosure requires a party to undertake searches for, and to disclose, documents upon which it relies or which are adverse to its case or another party's case.

Whilst changes have been made in the intervening period, with the result that "standard disclosure" is now one of a menu of disclosure options, it remains in effect the default option and other options are seldom utilised if at all.

Concerns had been raised over the spiralling costs, complexity and scale of undertaking standard disclosure, especially given the prevalence and volume of electronic documents. It was felt that our system needed to be reformed to bring it up to date and to be able to maintain its position alongside rival jurisdictions. As a result, the system was reviewed and a new pilot scheme has been introduced. The Disclosure Pilot Scheme ("DPS") applies to cases in the Business and Property Courts only (i.e. the Chancery Division, the Commercial Court and the Technology and Construction Court with some exceptions) and will last for three years from 1 January 2019. The DPS will not run elsewhere, so it will not apply in the Queen's Bench Division of the High Court or the County Courts.

The changes are designed to usher in a change in culture around disclosure. The first principle of the new scheme is about disclosure's role in "achieving the fair resolution of civil proceedings". The court expects parties to cooperate with each other and assist the court in determining the scope of disclosure.

The notes below detail the existing scheme but we have created a separate "Guide to the Litigation Process" for those cases which are subjects to the DPS which you may access by clicking this link.

What documents are relevant?

The question of what documents are relevant is determined by the statements of case. Usually all relevant documents must be disclosed, no matter how unfavourable they may be to your case. However the court does have the power to decide the nature and scope of disclosure to be given including the power to dispense with it altogether. Before any decision is made the court expects the parties to discuss and, where possible, agree the nature and extent of the disclosure exercise appropriate for the claim.

Disclosure is usually made by preparing and serving a list describing the relevant documents. The list is supported by a disclosure statement. Each party typically offers the opponent an opportunity to inspect the originals in person or to supply copies of the documents requested by the opponent. It is usual to pay a fee for photocopies. It is increasingly common for parties to exchange their relevant documents by providing the materials in electronic form. The parties should agree the precise format.

What are "documents?"

A document is defined by the court rules as "anything in which information of any description is recorded". This includes (regardless of how confidential they are, or whether they are originals, drafts or copies) letters, e-mails (including those copied or forwarded), faxes ("hard" copy and electronic), notes (however rough), diary entries, audio or video recordings, photographs, drawings, spreadsheets,

presentations, databases and computer files on any type of storage media e.g. PDAs, mobile phones, voicemail facilities and printer histories. The definition of "document" extends to metadata (which is the additional information stored and associated with electronic documents), "deleted" documents and those stored on back up tapes and servers. This list is not exhaustive. You, as the client, will be most familiar with your documentary systems and you will be asked to examine them with a view to identifying all relevant documents.

Duty to preserve documents

Once the litigation has commenced or indeed once a party becomes aware of the likelihood of litigation, that party is under a duty to preserve and keep from destruction all documents which may become disclosable in that action. This includes electronic documents which must not be deleted from systems.

A failure to preserve documents at the outset, or give proper disclosure once litigation has commenced can result in judicial criticism, financial penalties or adverse inferences which are harmful to the case.

What documents must be disclosed?

The court has the power to decide the nature and extent of any disclosure to be given by the parties. In addition the parties can put forward their proposals as to what documents should be disclosed and how the disclosure should take place. When making its decision the court will consider the "overriding objective", taking into account the considerations of expense, speed and proportionality. One of the options for the court is to order "standard disclosure". This is limited to the following categories:

- the documents on which you rely;
- the documents which adversely affect your own case;
- the documents which adversely affect another party's case; and
- the documents which support another party's case.

Standard disclosure is no longer ordered as a matter of course and judges increasingly expect the parties to consider alternative forms of order that might save costs and/or be more appropriate. The court can simply order that each party disclose the documents they rely on and provide details of the specific documents it requires its opponent(s) to disclose. Alternatively the court can direct disclosure be given on an issue-by-issue basis or that it is given in stages.

A party need only give disclosure of documents which are or have been in that party's control, which means:

- it is or was in their physical possession;
- they have or have had a right to possession of it; or
- they have or had a right to inspect or take copies of it.

In addition, when giving standard disclosure, a party is only required to disclose those documents which have been found by a "reasonable search".

Disclosure report

In a multi-track case a party will usually be required to serve a disclosure report that must contain:

- a description of the relevant documents which exist or may exist;
- a description of where and with whom those documents are or may be located;
- in the case of electronic documents, a description of how the documents are stored;
- an estimate of the range of costs that could be involved in giving standard disclosure, including the cost of searching for and disclosing electronic documents; and
- a statement of the extent and nature of the disclosure order it believes ought to be given.

The report will help the court decide what disclosure order to make and will enable the parties to discuss the nature and extent of disclosure.

Soon after proceedings have been issued, the parties are expected to discuss any issues which arise regarding any searches that will be needed to be carried out in order to comply with their disclosure obligations and the preservation of all electronic documents. As a result, consideration as to how to fulfil the disclosure obligations has to be given at the outset and we will discuss with you the most proportionate ways in which you should seek to give disclosure in respect of your case. This may also involve the completion by you, with our assistance, of an electronic documents questionnaire. In order to do this, we will need to understand your electronic system and the working practices of those involved in the facts giving rise to the proceedings. We will also discuss with you the extent of any search and ask you to provide an indication of the quantity and location of relevant documents, as this will enable us to provide you with an estimate of the likely time and expense that may be involved in carrying out the search and disclosing the relevant documents.

We will also advise you on the use of technology to assist in the review of electronic documents.

At the end of the list of documents a representative of the party will need to sign a disclosure statement, confirming that a reasonable search has been carried out for all relevant documents.

What is a disclosure statement?

A disclosure statement is a statement made by a party to the litigation in relation to the disclosure given by that party. It must include details of:

- the extent of the search that has been made to locate the documents;
- a certificate stating that the party signing understands the duty to disclose the documents;
- a certificate stating that to the best of the party's knowledge they have carried out that duty; and

- where the category or class of documents have not been searched for on the grounds that it would be unreasonable to do so, this must be stated in the disclosure statement.

To ensure that the relevant person is in an appropriate position to sign a disclosure statement it is essential that a complete record be kept of the steps that have been taken to search for the categories of documents set out above. This will include details from the individuals in the organisation who conducted the search, recording the steps that have been taken to locate the documents.

Is there anything that need not be disclosed?

The answer is that, generally speaking, everything, which fits in the categories listed above, must be disclosed, but some documentation may be "privileged". If so, this means that although those documents must still be listed, they need not be shown to your opponent.

The broad grounds of privilege are: legal advice privilege, litigation privilege, privilege from self-incrimination, privilege related to "without prejudice" documents and public interest immunity (Crown privilege). We will explain these concepts to you in more detail in the context of your case. Please note that as a general rule there is no entitlement to withhold disclosure merely because the relevant documents are regarded as "sensitive" or "confidential".

Confidentiality in disclosed documents

Confidentiality is preserved by an express rule in the CPR which provides that no ancillary or collateral use will 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; or
- referred to in a public hearing; or
- the court gives permission.

This is intended to protect a party by seeking to ensure that the opponent cannot make collateral use of documents disclosed to them.

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.

When does the process of disclosure begin?

The parties exchange lists of documents soon after the last exchange of statements of case. These identify all relevant documents, and where appropriate distinguish between documents which a party is obliged to produce for inspection and documents which a party is not (because privilege is claimed for example).

Continuing obligation

There is a continuing obligation on parties to litigation to disclose, usually by way of supplemental lists, any relevant documents which later come to their attention during the course of proceedings. As a result, you should think carefully before creating any new relevant documents or annotating any existing documents since these may become disclosable in due course, once proceedings are underway.

Points to watch

- Carefully preserve all documents that are likely to be relevant to the case.
- Identify all sources of data.
- Appreciate that documents of a confidential or sensitive nature may still have to be disclosed.

The obligation to disclose extends to copies of originals with comments or annotations on them. You will appreciate that an inappropriate comment made on a document may have very serious consequences for your case, if the addition is relevant to the issues in the case. Accordingly, you should be careful not to mark or annotate relevant documents (including copies).

Do not create new documents referring to the case (other than communications with your lawyer) without speaking to your lawyers first. The duty to disclose documents continues throughout the proceedings.

Our duty to the court

The duty of giving proper disclosure is not only that of the party to the litigation but also a personal one imposed on the solicitor to the party. This is because a solicitor is an officer of the court and they will be in breach of their duty to the court if they fail to supervise the process effectively. In extreme cases they will also be guilty of professional misconduct.

Some possible steps before trial

The following are examples of steps a party may take before trial.

Further information - Applications

If dissatisfied with any of their opponent's statements of case a party can apply to the court for an order requiring further information to be supplied.

Further disclosure applications

Similarly, if a party suspects that their opponent has not disclosed all relevant documents, they may apply for an order requiring further and better disclosure of existing documents or that a more extensive search for documents be carried out.

Applications for interim injunctions

Interim injunctions are court orders given before the trial of an action. They do not determine the issues in the action, but they require a party to the action to do, or refrain from doing, something in order to preserve a position until trial.

Applications for injunctions can be made at any stage of the proceedings and in urgent cases are made even before the proceedings are commenced. The law and rules governing injunctions are complex and we will discuss these with you if they are relevant to the claim.

Security for costs

An application for security for costs can be a powerful weapon in the hands of the party making the application. The purpose is to protect a party for the costs

it incurs in defending itself by requiring the opponent to pay money into court prospectively, in an amount referable to the level of an adverse costs order it would face if it lost.

An application for security for costs is usually made by a defendant against a claimant, but it can also be made by a claimant against a counter-claiming defendant. It involves the defending party saying to the court that the other party's claim should be "stayed" (i.e. indefinitely postponed) until that other party provides security for the defending party's costs. It may be ordered against a claimant company which is insolvent.

It is also regularly ordered against foreign claimants who are not EU nationals (separate rules apply to litigation involving parties who are nationals of EU member states).

For proceedings issued post Brexit the issue of obtaining security against someone resident in an EU member state is complex. We will advise you if this is relevant and how you should proceed. In certain circumstances a "maintainer" of an action (i.e. a person who funds an action) can be ordered to pay the costs of an action, even if they are not a party themselves.

Part 36 Offers

The Part 36 procedure is open to both defendants and claimants and can protect their position as to costs and put pressure on the opposition to settle early on in the dispute and certainly before trial. It involves making an offer, in prescribed terms, which the person making the offer is willing to pay or receive in settlement of the claim. The offer should be pitched by reference to the merits in the action. The existence of the offer is kept secret from the trial Judge. It is revealed after the case is concluded and once questions of liability and damages have been decided.

There are numerous points to consider when deciding whether to make an offer which we will discuss with you.

If the offer is accepted within 21 days, then that acceptance brings the action to an end without the need for a trial. The claimant is also automatically entitled to their costs of the action to be assessed on the standard basis (see below under "Costs") up to the date of acceptance of the offer. If the offer is not accepted, the case continues.

When judgment is pronounced there are various possible scenarios:

- If a claimant is successful but awarded less than the amount offered by a defendant in its Part 36 offer, the defendant will usually only have to pay the claimant's costs up to 21 days after the defendant's Part 36 offer was made. After that point the burden for costs is shifted by the offer: the defendant will be entitled to its costs from that time and interest on those costs even though it lost the case. This means that a claimant who wins but fails to beat a well-pitched offer will usually end up paying both its own and the defendant's costs from soon after the offer all the way up to and including trial. Those costs may be significant, particularly if the offer was made at an early stage in the process.
- If a claimant is awarded the same or more than that which the claimant stated in its own Part 36 offer that it would be prepared to accept, usually the claimant will be entitled to enhanced damages and costs as follows:
  - an additional award of damages up to 10% where damages are awarded up to £500,000 and 5% of damages awarded up to £1million making an additional award of up to £75,000;
  - interest at up to 10% above base on the judgment sum from 21 days on which the offer was made;
  - its costs on the indemnity basis from 21 days after the offer was made (see below under "Costs" regarding indemnity costs); and
  - interest on those costs at up to 10% above the base rate.
- If a claimant wins and the amount awarded exceeds the amount that a defendant offered, then the defendant's offer is of no effect and is disregarded.

Clearly a party faced with a Part 36 offer should consider very seriously whether or not to accept it. Any party who feels that the outcome on quantum is uncertain should always consider making a Part 36 offer at an early stage of an action so as to concentrate the other party's mind.

Additionally, it is important to constantly review Part 36 offers as the case progresses as evidence may come to light that may change a party's view of the offer made. Sometimes it may be appropriate to make fresh offers or withdraw past offers as your assessment of the case improves.

Alternatives to "Part 36" offers

There are situations where a defendant may wish to protect itself as to costs in circumstances where the rules relating to Part 36 offers are not appropriate. A common example is a case where a perpetual injunction is sought ordering the defendant not to do certain specified acts. In addition, a defendant may consider that the Part 36 requirement to pay the claimant's costs up to the date of acceptance of the offer to be a prohibitive feature.

Claimants and defendants in these circumstances can make a formal offer by way of a letter which is described as "without prejudice save as to costs". Again, the court does not see the letter until it comes to decide the question of costs. The court is obliged to take these offers into account at the conclusion of a case when deciding costs. The key difference is that they do not carry with them the enhancements described above which follow a successfully pitched Part 36 offer. The benefits enjoyed are at the discretion of the judge and so you may or may not get the same benefits from a costs recovery perspective.

Witness statements

The court will ordinarily order the parties to exchange witness statements for all witnesses of fact who are to attend trial. The function of the witness statement is to set out in writing the evidence of the maker of the statement which is relied on by the party calling that witness. The court may order that witness statements be limited by length or subjects it will cover. The statements must not contain any inadmissible or irrelevant material and must contain the truth on the issues covered and will require the maker to sign a statement of truth. It is improper to serve a witness statement that is known to be false or which the maker does not in all respects actually believe to be true. Witness statements provided by non-English speakers must be prepared in their own language and accompanied by an English translation unless the witness is sufficiently fluent in English.

In April 2021 changes were made to the preparation of witness statements in the Business and Property Courts. The purpose is to set out in writing the evidence in chief that a witness of fact would give at trial. The trial witness statement will inform the parties and the court of the evidence a party intends to rely on at trial. It will promote the overriding objective by helping the court to deal with cases justly, efficiently and at proportionate cost, saving time at trial and promoting settlement in advance of trial. Additionally, and importantly, the rules are designed to provide transparency so the judge will understand what the witness actually recalls of the relevant factual matters, and to what extent their recollection is the result of that recollection being refreshed by a more recent reference to documents (and both will go to the weight the judge will attribute to the evidence of the witness).

Usually a witness statement will simply be read by the judge as part of their preparation for the trial process. Ultimately, however, the court has discretion and may require all evidence to be given live in court, particularly in cases where the facts are very contentious and may be determinative of the issues.

Great care must be taken in the preparation of witness statements to ensure that they cover all the salient points which the party calling that witness needs that witness to prove for their case: the judge may refuse permission to ask supplementary questions taking into account any limitations imposed by the court.

A witness who is called to give evidence at trial will usually be cross- examined on their witness statement so its content needs to be both accurate and complete.

Expert evidence

Sometimes it is necessary to call expert evidence in order to prove a claim or disprove another party's claim. Generally speaking, expert evidence is opinion evidence, i.e. the expert expresses an opinion based on certain assumed facts. Where the facts are in dispute the expert may be asked to give alternative opinions based on different sets of hypothetical facts.

It is the overriding duty of an expert to help the court on the matters within their expertise, rather than to act as an advocate for the party who instructs them. Accordingly, the court rules specifically provide that this duty overrides any obligation to the party instructing the expert or paying the expert. Expert evidence presented to the court should be, and should be seen to be, an independent product.

No party may call an expert without the court's permission. At the case management conference or in response to an application to the court by a party the court will decide whether or not an expert is appropriate. The court will restrict expert evidence and will only allow expert evidence that is reasonably required to resolve the proceedings. The substance of the expert's evidence will be given to the other side well before trial. This ensures that by the time of the trial each party is fully aware of the nature and extent of the expert evidence to be given by the other side.

In certain circumstances the court may not allow the parties to call their own experts and will instead appoint a single expert as the court expert paid for jointly by the parties. Where the parties cannot agree who should be the court's expert, the court may select one.

At the end of the expert's report there must be a statement by the expert, confirming that they understand the extent and nature of their duty to the court and that they have complied with that duty. The expert's report must also disclose the substance of all instructions, both written and oral, on the basis of which the report was written. The court may go further and order that the instructions themselves should be disclosed, but only if there are reasonable grounds to consider that the statement given in the expert's reports concerning the substance of their instructions are inaccurate or incomplete.

The court will also encourage, by order if necessary, without prejudice discussions between experts with a view to promoting an agreement and narrowing of the issues for trial.

The court has the power to order that the expert evidence be given concurrently, with both experts sitting in court in tandem. This is known as "hot tubbing". This may cause the judge's role to be increasingly "inquisitorial" (akin to their contemporaries in civil jurisdictions) since they may ask increasingly direct questions of each expert whilst trying to form their own view based on what is said.

Case management hearings

These are hearings designed to set a framework and timetable for the preparation of the case for trial and is when the court sets the trial date. A case management conference deals with the case as a whole, but other applications for specific directions may be necessary as the case progresses.

Ideally a full timetable will be set out at the first case management hearing. The first case management conference will also deal with disclosure (see above

under "Disclosure of documents") and costs budgets (see below under "Costs") that have been prepared by the parties. This is a substantial hearing in the early stages of the case during which the court and the parties examine the issues set out in the statements of case, review the future conduct of the case thoroughly, and decide how best to manage the case as a whole. The court will expect the parties to provide information on existing and projected costs to ensure the case is set up to run proportionately in terms of expense to the value of the claim. It is strongly advisable that you attend this hearing and the court has the power to order you attend. In some cases it will also be advisable to have experts present to explain the scope of their likely evidence.

In a number of limited actions which are procedurally straightforward and where directions can be agreed between the parties it may be possible to avoid the need for a case management conference.

Failure to comply with the rules, practice directions or court orders

Judges take a tough line with parties who fail to comply with a rule, practice direction or court order. Non-compliance with time limits or other orders may result in draconian sanctions which can include significant costs penalties, the striking out of a statement of case or a defaulting party being ordered to make a payment into court as a condition for the case proceeding.

A party in default can ask the court to lift the sanction for the default and the court has a limited discretion whether or not to do so. In deciding whether to do so the court will consider all the circumstances of the case, to enable the court to deal justly with the application which includes the need for litigation to be conducted efficiently and at proportionate cost as well as enforcing compliance with rules, practice directions and orders. It is thought that the court will be less likely to grant relief from sanctions with the imposition of these requirements.

Early termination of an action

Settlement possible at any time

At any time during the action the parties can settle and withdraw an action on such terms as they agree between themselves. However, if the court has not been informed of this and any court fixture is wasted, the parties or their representatives can be subject to censure by the court.

Pre-trial determination - other ways

In the absence of a settlement agreement between the parties an action may be brought to an end before a full trial in the following ways:

- summary judgment;
- by withdrawal of the defence resulting in judgment for the claimant;
- by discontinuance or withdrawal by the claimant, generally on payment of the defendant's costs;
- by dismissal of an action upon an application to strike out made by another party; or
- by the court striking out a claim on its own initiative.

The trial

This is the crux of the action, assuming it has got this far. Each party presents their case to the judge. The judge considers the evidence which is tested by cross-examination of the witnesses of fact and the experts. It is crucial that all material facts are investigated and raised because, save for a few exceptions, the findings of fact that are made at the trial are final. Appendix 1 sets out the order of proceedings at trial.

Once judgment has been given (which will usually be two or three months after the trial itself) a party may apply for a stay of execution of the judgment, preventing enforcement of any award of damages. The judge may agree to a stay or alternatively may refuse it.

Note that even if a request to appeal the judgment is allowed, there is no automatic stay. So, if the judge has refused a stay of execution, the party concerned may wish to make an application for a stay urgently to the appeal court. There are numerous considerations involved in the question of whether the trial judge or the appeal court will grant a stay pending the appeal hearing. If appropriate we will discuss these matters with you.

Appeals

The appeal system applies to all appeals, from an appeal of a case management decision to an order made at trial.

Interim appeals

An appeal from a judge's decision on an interim matter (e.g. the grant or refusal of an application such as an injunction) can be made to the Court of Appeal on a point of law or on an exercise of discretion at any time before trial. However, appeals on exercise of discretion are rarely successful.

The decisions of High Court Masters (less senior Judges who decide most interim matters) are appealable to a High Court Judge. Notice of appeal must be lodged within 21 days after the date of the decision of the lower court so a decision as to whether to appeal must be made at the earliest opportunity. The lower court may specify a period that is shorter or longer than the standard 21 days.

Permission to appeal

Generally speaking, permission of the court is required for appeals to proceed. This will only be granted where the appeal appears to have a real prospect of success or where there is some other compelling reason why the appeal should be heard.

Grounds for allowing appeals

Once permission is granted, the appeal court will allow an appeal where the decision of the lower court was wrong or unjust because of a serious procedural or other irregularity in the proceedings in the lower court. Save for limited exceptions, appeals are limited to a review of the decision reached by the lower court: they

do not include a re-hearing or review of the evidence.

Second appeals

A second appeal is only allowed in special circumstances. No second appeal may be made to the Court of Appeal from a County or High Court unless the Court of Appeal considers that:

- the appeal would have a real prospect of success and it would raise an important point of principle or practice; or
- there is some other compelling reason for the Court of Appeal to hear it.

This is a very high test.

From the Court of Appeal an appeal lies to the Supreme Court but only with the permission of the Court of Appeal or the Supreme Court.

Execution and enforcement

Some methods of enforcement

Methods of execution and enforcement of judgments are varied and it is not appropriate in this general note to go into them. The following is a list of the categories of execution:

- enforcement by taking control of goods by Writ or Warrant of Control (sending a court officer to seize goods);
- a Charging Order on land or securities followed by an Order for Sale;
- a Charging Order over the judgment debtor's interest in partnership property followed by an Order for Sale;
- appointment of a Receiver by way of equitable execution;
- Third Party Debt Orders (such as funds held by a bank);
- attachment of earnings (proportion of earnings is deducted by employer); and
- enforcement by way of bankruptcy or liquidation proceedings.

The above methods are relevant for enforcing judgments in England and Wales. Post Brexit, enforcement of judgments in EU countries has changed and you will be advised of the options available. There is no doubt this has become more complex and expensive due to the UK's departure from the EU.

Contempt of court

In addition, if a party has been found guilty of contempt of court, there are other measures available against that party which strictly speaking are not methods of execution but methods of punishing that party for contempt of court. Examples are Writs of Sequestration (the court confiscating the assets of the party in contempt) and committal to prison.

Costs

General principles

Costs are always in the discretion of the court save in certain circumstances when they follow automatically e.g. a claimant discontinuing an action.

While the general rule is that the loser pays the winner's costs, this is not always the case. Sometimes a judge may make a contrary order, or may make different orders relating to different issues or stages in the case.

In particular the courts must have regard to all the circumstances of the case - including the conduct of the parties - when deciding what order to make on costs. The conduct of the parties can include the following:

- conduct before as well as during the proceedings and the extent to which the parties may have followed any relevant pre-action protocol;
- whether it was reasonable for a party to raise, pursue or fight a particular allegation or issue;
- the way in which a party has pursued or defended their case or particular allegation or issue;
- whether a winning party has exaggerated their claim; and
- Settlement offers including Part 36 offers.

Costs budgets

In April 2013 the courts introduced costs budgets. These rules were updated in 2016 and 2020 and are applicable to all multi-track cases in all courts except where the amount of money claimed is £10 million or more or where the claim is a non-monetary claim which is either not quantified or not fully quantified but the claim is valued at £10 million or more. Even in these cases the courts have a discretion to order costs budgets. There are other limited exceptions.

Parties are required to prepare a detailed costs budget to be agreed with their opponent or subject to a case management order of the court. Following discussions between the parties, if the parties are unable to agree their budgets then a budget discussion report detailing whether the budget is agreed, and those areas not agreed will have to be prepared for the court.

The process requires the lawyers to prepare a budget based on discrete phases of the claim (e.g. disclosure, witnesses) and to provide a budget for solicitors' and barristers' time for each of these phases as well as detailed disbursements. This is a major change in that parties are being expected to project manage cases prospectively, rather than looking back at how costs have been spent after the event. Contingencies will also have to be budgeted for and the court's approval will be required for changes. The court will be keen to ensure that budgets are prepared which are proportionate to the claim and adhered to by both parties.

Compliance with budgets will be essential for recovery of costs from an opponent - if costs exceed the budget previously given for a particular phase, it will be necessary either to get agreement to the increase from your opponent or a variation order from the court before they are incurred. Parties are required to revise their budgets upwards or downwards during the proceedings if there are significant developments which warrant such revisions. Failure to do so may result

in a failure to recover some of the costs. The costs rules provide that if the amount a party is seeking to recover at the end of the proceedings in respect of costs is on a standard basis (see below), the court will have regard to the budget and will only depart from the budget if there is a good reason to do so.

The bases of costs

When deciding the amount payable by a party towards its opponent's costs, unless a sum is fixed in the court's order, the court will be required to determine or "assess" how much is payable. The assessment process is undertaken by reference to either the "standard" basis or the "indemnity" basis. The former is less generous to the receiving party than the latter.

On both bases, the court will not allow costs which have been unreasonably incurred or which are unreasonable in amount.

On the indemnity basis, doubt as to reasonableness is resolved in favour of the receiving party. There is no proportionality test.

On a standard basis, doubt as to reasonableness is resolved in favour of the paying party and the court will also only order costs which are proportionate. When considering whether the costs are proportionate the court will have regard to:

- the amount of the costs compared to the value of the claim;
- the value of any non-monetary relief in issue;
- the complexity of the case;
- any additional work generated by the conduct of the paying party; and
- any wider factors involved in the proceedings, such as reputation or public importance.

Wasted costs

If a court thinks that one of the parties, or their legal representative, has behaved unreasonably or improperly before or during the proceedings it may:

- disallow all or part of that party's costs; or
- order the party at fault or its legal representative to pay costs which they may have caused any other party to incur.

If as a result of the lack of preparation or instructions it becomes necessary to adjourn a particular hearing or case management conference, there is a risk that the court will make a wasted costs order against the party considered to be in default.

Interim costs orders - "Pay as you go"

One of the principles of the CPR is that parties to the litigation should be aware of the costs of the litigation as the case progresses and, where appropriate, should pay or should receive costs according to the perceived reasonableness of the steps taken during the course of the litigation.

At the end of most interim applications which involve the parties appearing before the court, a judge will consider assessing on a summary basis the costs of that application. If the judge chooses to make that assessment, and determines on the amount of the costs (instead of ordering the assessment to be made separately by a Costs Judge) the costs as assessed must be paid within 14 days.

On interim applications costs may be awarded in various ways. Such orders may mean that the party who wins at the trial may still have to pay some of the losing party's costs during the process. For example, a claimant who wins at trial but has previously issued an unsuccessful interim application will usually win the costs of the action but will have had to pay to the defendant the costs of the unsuccessful application.

Unless there is a different order made, all costs orders are payable within 14 days.

Detailed assessment of costs applies to almost all costs orders

All costs which a party to litigation is ordered to pay (except in those cases where the costs are assessed or fixed by the court then and there) are subject to the process known as detailed assessment of costs. This is an assessment of legal costs by reference to technical rules, limits and ceilings. In the absence of agreement by the paying party to the itemised bill of costs submitted by the receiving party, the bill of costs and all the papers of the receiving party's solicitors have to be lodged with a special officer of the court known as the Costs Judge. Due to the implementation of costs budgets the role of detailed assessment of costs is likely to be diminished particularly for future costs identified in the budget, as parties will already be working to a set budget. Incurred costs included in the budget will be capable of scrutiny.

The process

For cases where costs are £75,000 or less, a provisional assessment of costs will be undertaken which basically means it will be undertaken on paper. The Costs Judge goes through the work records, time sheets and various working documents of the receiving party's solicitors and assesses the amount of costs that the paying party has to pay. The paying party's solicitors are entitled to be heard during this process. The extent to which the paying party's solicitors are allowed access to the receiving party's solicitors' papers is a matter for the discretion of the Costs Judge (privilege is still respected).

Costs recovery - unlikely to be full

Because of technical limits and ceilings that are applied in the assessment of costs during this process, and due to the possible application of the proportionality principle in cases in which standard costs are awarded, it is rare that a successful party to the litigation will recover all their costs from the losing party, even assuming the losing party is in a position to pay them. There are many variables which could apply:

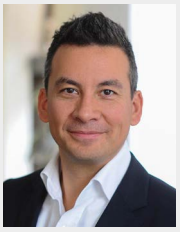
- the court may not approve the full budget a party considers it necessary to spend;

- it is often necessary to incur expenditure in excess of the budget figure in the interests of the case; and
- if the matter proceeds to a detailed assessment, not all costs will be allowed on an inter partes basis, even when assessment is on the indemnity basis.

Delay and interest

Because of delays in the assessment process, it may be many months after the successful conclusion of a trial that the winning party receives its costs from the losing party. However, interest on costs is payable by the paying party on the amount that is eventually assessed at the rate applicable to judgment debts, from the date of judgment.

For more information please contact:



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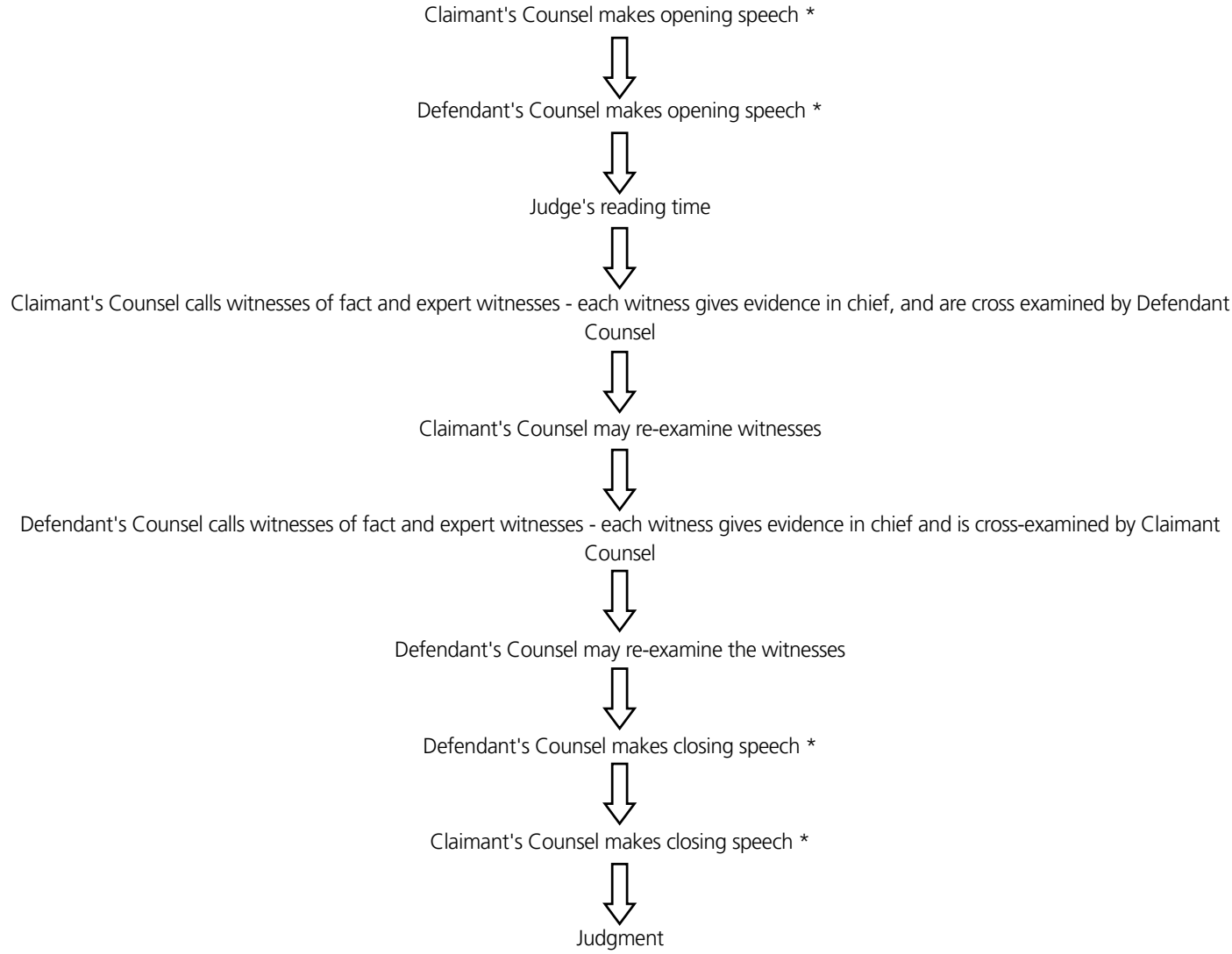
Appendix one



Note: The above steps may be varied by the court either by their exclusion or the order in which they take place.

* In complex cases often written submissions may be submitted to the judge at this stage

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