A Handbook for Litigants in Person

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Foreword to 'A Handbook for Litigants in Person'

Access to justice is a right not a privilege. That right has in the vast majority of cases traditionally been exercised by members of the public through the services of a lawyer. Over the last ten years there has however been an increase in the number of individuals who have, for various reasons, pursued and defended claims on their own behalf: they have been and are litigants in person (or self-represented litigants). It is anticipated that in the years to come the number of litigants in person will increase and perhaps will do so sharply.

In an environment where more individuals litigate on their own behalf it is incumbent on the judiciary, amongst others, to do what it can to help them navigate the civil justice system as effectively as they can. To that end this handbook, which is specifically aimed at those litigants in person engaged in proceedings on the multi-track, has been prepared by a number of very experienced Circuit Judges under the lead of His Honour Judge Bailey and has very kindly been produced by Linklaters.

It should not be forgotten that litigation is not easy, nor should it be embarked upon lightly. For those who do need to resort to the courts in order to enforce their rights, and do so without the assistance of a lawyer, the guidance provided in this handbook will be of real, practical assistance. It is clear and comprehensive. It is detailed and accessible. It will, I am sure, play an important role in rendering the civil litigation process less daunting and more accessible for those litigants who represent themselves. In that regard it will play an important part in helping to maintain our commitment to access to justice as a right available to all.

Lord Dyson, Master of the Rolls

11 December 2012

Preface

This Handbook has been written by the six judges who comprise the Civil Sub-committee of the Committee of the Council of Circuit Judges; judges who, between them, have over 60 years experience of sitting on the bench.

In publishing this Handbook we do not intend to encourage litigants to represent themselves. Far from it. Civil litigation can be an exacting process and navigating the technicalities of the law and the rules of civil procedure is no easy matter. Many litigants in person approach their advocacy without forensic legal skills or objectivity, two essential qualities for a competent lawyer.

Nevertheless we recognise that there are increasing numbers of litigants in the civil courts who represent themselves. Legal representation can be very expensive, and the availability of civil legal aid has been severely limited in recent years. This represents a real problem for society and litigant alike. Ideally all disputes would be resolved amicably, if necessary with the assistance of a mediator. But inevitably some disputes cannot be settled and it is important that those involved in disputes should be able to have them determined by a judge in a civil court system which commands respect and which is readily accessible to all.

The overwhelming majority of legal disputes which do not involve the criminal law are determined in the county court. The county court judge will either be a circuit judge or a district judge. District judges determine the smaller claims (small claims or fast track claims) while circuit judges determine the larger claims (multi-track claims) and hear appeals from district judges.

As judges sitting across the length and breadth of the country, we are acutely conscious of the difficulties facing the litigant in person. Together with many other judges and lawyers, we agree that there is a real need for a Handbook for Litigants in Person. It is however very difficult to decide on the best format for such a book. Litigants in person vary a great deal in their abilities and attitude toward the court and the litigation process. This book is not a simple guide. For the litigant who wants no more than a short leaflet on the process as a whole, or individual parts of the process, such leaflets will be available at most county courts. This Handbook is designed for the litigant who is involved in a multi-track claim of some substance. It takes the form it does after much discussion and, in some measure, through the insistence of the Editor-in-Chief. Complaints and suggestions for improvement should be sent to him. The following points are important:

(1) The Handbook gives the reader a general overview of the whole process;

(2) Each chapter begins with ‘Headlines’; these are the most important points to note in the material covered by the chapter;

(3) The text gives references where appropriate to the *Civil Procedure Rules*; for a litigant involved in substantial court proceedings there is no substitute for reading the *Rules* themselves;

(4) The Handbook covers the entire court process and gives advice on how best to approach each stage of the litigation process. Advice chapters are written in the second person to give an immediacy to the advice offered. The remainder of the Handbook, which provides information rather than advice, is in the third person.

This Handbook is not comprehensive. It cannot possibly be. But the Handbook covers the most important material on which a litigant in person is likely to need help and guidance and it gives advice on the central areas of preparation and presentation which the authors hope will provide real assistance to a litigant on his own.

Litigants are bound to be apprehensive about a court hearing, but they should not fear appearing in court. The modern judge aims to be as helpful as is consistent with his or her position and the need to maintain the authority of the court. A judge has a duty to ensure a fair trial by giving litigants in person due assistance. Doing so helps to ensure that the litigant in person is treated equally before the law and has equal access to justice. But litigants in person do have to remember that the help and assistance a judge is able to give in the course of a trial or interim hearing can only go so far. The judge cannot give legal advice to a litigant in person. The judge must never put himself in a position where he might be thought by a neutral observer to be favouring one party over his opponent, even where the party concerned is a litigant in person and his opponent a barrister of many years' standing, well able to look after himself and his client. Thus, the judge cannot become the advocate of the litigant in person, for the role of a judge is fundamentally different to that of an advocate. He must ensure a fair trial, and not afford an advantage to the litigant in person.

It is important for all litigants to see the litigation process as a whole. The process will culminate in a trial but the care with which a litigant prepares for that trial is every bit as important as the trial itself. The task of the judge in a civil court is to determine both the facts of the case and the law applicable to those facts. In determining the facts, the Judge may only rely on the evidence presented by the parties. A judge may not involve himself in the obtaining of evidence. It is simply not allowed. It is vital therefore that litigants present the evidence they need to succeed. Cases have been lost which might otherwise have been won because litigants have not thought carefully about the evidence they need, have not obtained that evidence, or have not presented it properly.

If there is a message in this Handbook it is this: If you are to engage in litigation you should take it seriously. You can always avoid litigation by compromise or, if necessary, by surrender. If you find yourself in litigation on the multi-track it will be hard work. But if it is worth doing it is worth doing well. This Handbook is here to help you.

Three further points. First, the English language has yet to develop unisex pronouns. We have used male pronouns where a pronoun is required and in this we ask the indulgence of our female readers. Secondly, we have used the time-honoured expression 'litigant in

person' for it is widely used and understood, and it is the expression used by Parliament in the relevant legislation. Others refer to the 'self-represented litigant'. It is a matter of choice. Thirdly, and most importantly, litigants should appreciate that judges are individuals. Some have their own particular way of doing things. We are confident that most judges sitting in the civil courts will agree with all the advice we have given in this Handbook. But you may appear before a judge who disagrees with individual points we have made. For the litigant, the most important judge is the judge before whom he is actually appearing.

The text incorporates the changes to the Civil Procedure Rules introduced by The Civil Procedure (Amendment) Rules 2013 ('the Jackson Reforms') and is up to date at 1 April 2013.

Finally we wish to thank Linklaters for their kind assistance, both practical and financial, in the publication of the Handbook.

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Chapter 1
Legal help : Do you have to be a litigant in person?

A. Insurance
B. 'No win no fee' solicitors
C. Damages-Based Agreements
C. Accident cases
D. Citizens Advice Bureaux
E. Law Centres
F. Pro Bono Lawyers
G. Legal 'consultants' and professional McKenzie friends
H. Where to find your law

Headlines

(1) Investigate, with a solicitor or advice centre, whether you may be eligible for public funding for your legal case.

(2) Check your insurance policies in case you have legal expenses insurance which will cover your particular case.

(3) Do not delay in seeking help and assistance.

(4) Investigate whether your case is of interest to a 'no win no fee' solicitor or whether you can enter into a Damages-Based Agreement under which a solicitor takes on your case for a share of your damages and without a fee if you lose.

(5) Consider whether you may be able to obtain help and assistance from any of the wide range of agencies which offer free services, such as a local CAB, or Law Centre, or Specialist Advice Centre.

(6) Representation in court may be available from the Free Representation Unit, the Bar Pro Bono Unit, or one of the Law Society Pro Bono schemes.

Introduction

1.1 This book is for you, as someone who has no first hand knowledge of law or legal procedure, when you find yourself involved in a legal dispute. It may relate to your house, your car, your job, some injury you have suffered or something totally outside your usual experience. You may want to start proceedings or you may be on the receiving end of a claim. Whether the amount at stake is trivial or substantial, if you are unfamiliar with the legal process, it will be a worrying experience. So, as soon as you find yourself in this situation, you should see what, if any, legal help you can obtain. You may be able to pay for some legal advice, at least in the initial stages, or you may be eligible for legal aid or other legal assistance, for example, from your trade

union. This Handbook assumes you have explored those possibilities and that they are not open to you. But before deciding you are going to have to represent yourself, you should first see if there are any other possible sources of legal help.

> DO NOT DELAY – THE EARLY STAGES OF SUCH DISPUTES CAN BE CRUCIAL BOTH IN TERMS OF THE ACTION THAT SHOULD BE TAKEN AND THE COSTS THAT CAN BE SAVED.

1.2 This chapter explores briefly what help you may be able to obtain where you do not qualify for publicly funded legal assistance.

A. Insurance

1.3 It is possible that you already have insurance to cover your legal costs in a wide variety of claims. 'Before the Event' insurance is available at generally acceptable premiums, but of course once the events giving rise to the dispute have occurred it is too late to obtain such insurance. However, do check your insurance policies. If you are involved in a road traffic claim your motor policy will often provide legal expenses cover where you want to bring as opposed to defend a claim. (Your insurer will defend any claim brought against you, provided you have kept to the terms of the policy.)

1.4 Most household insurance policies give public liability cover which will meet the cost of defending a wide variety of claims. Some household policies include 'Before the Event' legal expenses cover. Holiday insurance may cover the costs of claiming for a ruined holiday, and other types of specialist insurance may provide cover for legal claims arising in connection with the subject matter of the insurance.

B. 'No win no fee' solicitors

1.5 Now that Conditional Fee Agreements (CFAs) are legal there are many solicitors willing to bring claims, and sometimes defend claims, on a 'no win no fee' basis. This is a sensitive area. It is a difficult subject for the authors of this handbook to comment upon. There are many excellent solicitors who will provide a good service under a CFA. There are also, unfortunately, accounts of solicitors who fall short of a high standard, and who seek to impose too high a success mark-up or who compromise a claim too readily in order to secure a fee. For you as litigant it is very important that:

(a) you read the agreement carefully, and

(b) ask if there are any points which are not clear.

Check in particular that the agreement provides for a complete legal service in respect of the dispute, including legal representation at the hearing. Some agreements provide only for initial advice and preparatory work leaving it to you to find and pay for representation at the hearing. The Law Society, which has a regulatory responsibility for solicitors, publishes guidance on CFAs

including a model agreement and client leaflet, and if you are at all uncertain as to whether you are being treated properly you may raise the matter with the Law Society.

1.6 If you do undertake litigation under a CFA you are likely to have to take out an 'After the Event' insurance policy. This insures you against having to pay the other party's costs if you lose but it may well involve a very substantial premium.

Damages-Based agreements

1.7 From 1 April 2013 it will be possible for a litigant to enter into a 'Damages-Based agreement' ("DBA") with a solicitor. Such agreements have been possible since 2010, but only in employment matters. They have now been extended to all civil claims. Not to put too fine a point on it, a DBA is a contingency fee agreement although based on the 'Ontario model' rather than an American model. Under a DBA the solicitor (and any barrister he instructs) will be rewarded by an agreed share of the litigant's damages up to a limit of 25% in personal injury cases and 50% in all other cases, but only if the litigant wins. No fee is payable to the solicitor or any barrister instructed in the event that the litigant loses his case, but the litigant will usually have to pay court and other expenses. Where the litigant is successful and obtains an order for his costs to be paid by the other side, which is the usual order for a winning litigant, the costs that are recovered from the losing party are deducted from what would be the solicitor's share of the damages, so that a litigant who agrees to pay his solicitor 50% of his damages may end up with rather more than 50% himself after payment is received under a costs order against the losing defendant.

1.8 The requirements for a valid DBA in civil litigation are set out in s58AA of the Courts and Legal Services Act 1990, (which was introduced by s 45 Legal Aid, Sentencing and Punishment of Offenders Act 2012), and the Damages-Based Agreement Regulations 2013. In summary a valid DBA must:

(1) be in writing;

(2) identify the legal proceedings (or parts of legal proceedings) to which the agreement relates;

(3) specify the circumstances in which the litigant has to pay any costs and expenses;

(4) explain the reason for setting the amount of the solicitor's payment at the level agreed.

There is no requirement for the client to have independent legal advice before he enters into a DBA with a solicitor, and there is no requirement for a solicitor operating under a DBA to inform the other side of that fact.

1.9 For the prospective litigant claimant it will be of interest that he can instruct a solicitor without having to pay costs if he loses, albeit at the price of a

significant proportion of his damages if he wins. It is a possibility to consider before embarking on litigation without representation. However no litigant should ever forget that if he loses his litigation he will usually face an order to pay the costs of the other side. Careful thought needs to be given to this possibility and how it will be funded in the eventuality that it becomes a reality. If the litigant has no insurance cover or other means of meeting those costs he should consider an After the Event (ATE) insurance policy. Premiums under such policies are high, and now that the cost of an ATE premium cannot be recovered from the other side by a successful litigant this cost should be a material consideration in any assessment of the merits of proceeding with a DBA.

1.10 It is also the case that the 2013 Regulations leave a number of unanswered questions for solicitors, not least how an hourly rate is to be determined for an inter parties assessment of costs should the other side be ordered to pay the litigant's costs. These are not matters which directly concern the litigant, but they may impact on the litigant's negotiation of a DBA with a solicitor. In personal injury cases, where the solicitor is limited to a 25% success fee, there will have to be a potential award of damages well above £100,000 before most solicitors will agree to a DBA. In other cases it is likely that there will have to be a sizeable award of damages in prospect, at least £75,000 to £100,000, or there to be a straightforward case with only a few issues and limited documentation on disclosure, before a solicitor will agree to act on a DBA at all, let alone at a success fee of less than 50%.

D. Accident cases

1.11 There are 'claims management firms' who will 'manage' your claim for you, particularly where this involves personal injury. Some such firms are reputable, many are not. For the most part such firms are not interested unless you are a prospective claimant and your claim has excellent prospects of success. Such claims will usually be brought by a reputable solicitor or direct access barrister for a success fee of 10% or 20%, which is likely to be a better option than using a claims management firm.

1.12 Claims management firms are most prevalent in road traffic cases. They will aim to make their money by charging the other driver's insurance company for towing away and storing your car, by carrying out your car repairs and by hiring a car to you at a high 'spot-rate'. All this comes at no cost to you as the claimant motorist, with such risks as there are being carried by the claims management firm and their associated solicitors.

E. Citizens Advice Bureaux

1.13 Legal advice may be obtained from a Citizens Advice Bureau in over 3,500 locations in England and Wales. CABs have a long history of helping litigants both before and during litigation. Many of them are able to call on volunteer

solicitors to give more specialist advice. Your local CAB may be found at www.citizensadvice.org.uk

F. Law Centres

1.14 There are 56 Law Centres in England and Wales where solicitors and barristers offer free legal advice (but generally not representation) in most areas of the civil law. In addition there are a number of specialist advice centres throughout the country where volunteers with legal qualifications provide help and advice. These volunteers are unlikely to be able to take you all the way through the litigation process, but they will usually be able to offer you sound advice as to how to tackle your particular case. You should be able to find your local law or advice centres on the web – (try Legal Advice Finder) or call Community Legal Advice on 0845 345 4 345.

G. Pro Bono Lawyers

1.15 Many lawyers undertake work for nothing under 'pro bono' schemes. The Bar Pro Bono unit has over 2,000 barristers on its panel with a wide range of experience, including 250 QCs. The Law Society has pro bono schemes under which solicitors offer their services for nothing, both with its Junior Lawyers division, Law Works, and in liaison with big City Firms who run their own pro bono scheme. An advocate to appear for you in court may be found from the Free Representation Unit.

1.16 These various pro bono scheme provide an enormous amount of free help and advice. In some cases such help is provided all the way through the litigation process. In others advice may be given on the legal background to your case and help given to set you on the right track in the litigation. The authors of this Handbook cannot endorse any individual scheme, even though in their practising days several of the authors were involved in one scheme or another. Whether you will find a helpful lawyer is always a matter of chance. But unless you are determined to manage without help we would suggest that you seek it, especially at the early stages of the case. Lawyers receive a bad press. Not all lawyers deserve it.

H. Legal 'consultants' and professional McKenzie Friends

1.17 There are lay people who offer advice and representation services to litigants in person in return for a fee. Some are reliable, many are not. Remember only a barrister or a solicitor can speak on your behalf in court. Sometimes an individual judge may permit a particular lay representative to address the court in appropriate circumstances, but this is a matter entirely for the judge in his or her discretion.

1.18 *The McKenzie Friend*. The original idea of the McKenzie Friend was that someone known to the litigant (hence 'friend') would provide help and support to the litigant during the hearing. The McKenzie Friend would be able, for example, to assist with documents or remind the litigant quietly of questions to put to witnesses or points to make to the judge in the closing address. It is now possible for a litigant to find a McKenzie Friend on the internet. The authors would not encourage you to use the services of someone you did not know before the litigation started to act in the capacity of friend, but we acknowledge that some advisers can provide useful help and assistance. Remember that there is no regulation of such 'friends'.

I. Where to find the law

1.19 In very general terms there are practitioner texts, student texts, and more simple guides or 'nutshells'. Practitioner texts are likely to be hard going for a litigant with no legal training, but some litigants manage them very well. Student books should be more digestible. They may seem daunting on first reading, but most are clearly written and the principles should fall into place with a little perseverance. Some public libraries carry legal text books, but do check the date of publication. You have to be wary of using a book which is more than a few years old.

Your local CAB or Law Centre may be able to guide you to an appropriate text, or you could seek the advice of an independent law bookseller such as Wildy & Sons [020 7242 5778] or one of the law bookshops to be found in many university towns who may have a second-hand textbook for sale.

Chapter 2
Mediation

A. Litigation a last resort
B. What is mediation?
C. How will the mediation take place?
D. What happens if we do not settle the case at mediation?

Headlines

(1) Do attempt to settle your case if at all possible. You will save yourself a lot of hard work, anxiety and cost.

(2) Try and settle the case directly with your opponent first. If you are unable to do so, consider mediation.

(3) Help is available in finding a mediator from the Civil Mediation Council.

(4) The mediation process is totally flexible. It can be conducted in a number of different ways, and you and your opponent can choose what suits you both best with the assistance of the mediator.

(5) If the mediation fails you continue with (or start) your legal proceedings, often with the benefit of being better informed as to your opponent's position on the issues and how he views the claim as a whole than you were before.

(6) A litigant who refuses to engage constructively in mediation may find himself penalised in costs at the end of the trial.

A. Litigation a last resort

2.1 Issuing proceedings in the civil court should be considered as a last resort when you have exhausted other means of ending your dispute. The courts expect that parties involved in a dispute will make every effort to resolve their dispute before they make a decision to issue civil proceedings.

2.2 Attempts to resolve your dispute before you enter into civil proceedings might entail:

(1) Speaking directly to the person or a representative of a company with whom you have a dispute, in an attempt to settle some, or all, of the issues. Sometimes having these conversations can be difficult, but you should always try to remain calm even if you feel frustrated. Losing your temper will not help to resolve the situation.

(2) If initial direct conversations fail, you should be prepared to put your side of the dispute in writing. This would be particularly helpful when dealing with a company who may have their own customer complaints procedure. You should allow a reasonable amount of time for a response to be given.

(3) If you are unhappy with a service, or work that has been carried out on your behalf by company or a professional individual such as an accountant or tradesperson, it would be reasonable to allow them the opportunity to address your issues and, where possible, carry out such work as might provide a remedy to the dispute.

(4) There may be other organisations that could deal with your complaint more appropriately, such as an Ombudsman, or professional standards body such as the Law Society or one of the accountancy institutes, or a trade association. Having your dispute dealt with in this way may well be quicker and less costly than civil court proceedings.

2.3 If you are unsure as to your next step, you can obtain help and advice by contacting your local Citizens Advice Bureau or alternatively you can visit the Directgov website www.direct.gov.uk, where you can obtain further information in relation to solving disputes.

2.4 If you have issued proceedings and your claim has been allocated to the small claims track, you can request that your claim be referred to the Small Claims Mediation Service. You should do this by ticking 'Yes' to mediation on the small claims allocation questionnaire (Form N149). There is no equivalent service for multi-track and fast-track cases. However, in almost all cases the court will encourage mediation in two ways, using both carrot and stick:

(1) the carrot is the saving of costs (and sometimes the court will insist on the parties preparing forecasts of costs so that it is plain quite how much going to trial will cost) and the assistance provided by the Civil Mediation Council in providing a directory of accredited civil mediators and setting reasonable rates of charges, which may be found at: http://www.civilmediation.justice.gov.uk;

(2) the stick is the provision in the order of a direction in the following (or equivalent) terms:

> The parties do give serious consideration to using mediation with a view to reaching an early settlement. The parties will be expected to provide an explanation if mediation has not been attempted. Costs consequences may follow.

The effect of this order is that a party who eventually wins his claim, but who did not effectively engage in mediation when his opponent was prepared to mediate, may lose some or all of the costs he would ordinarily be awarded at the end of a trial.

B. What is mediation?

2.5 Mediation is a process by which opposing parties (and their advisers, if any) are brought together to engage in principled negotiation with the aim of finding a workable agreement between the parties and in this way avoid recourse to the Courts.

2.6 The mediation process is overseen by a mediator, who will ensure that all parties involved in the dispute have a chance to put forward their views and to hear what the other side has to say. The mediator is neutral. He does not take sides, neither will he make any attempt to judge who is right or wrong. The mediator focuses the parties' energy on moving forward rather than dwelling on the rights and wrongs of the past. They are encouraged to engage in problem solving, developing options, and building agreement based on common interests.

2.7 You can find a mediator through the Civil Mediation Council, see above. Or you may prefer to find a mediator privately. There are a number of experienced mediators whose details can be found on the internet. Remember that mediation is a joint process. Both sides to the dispute have to agree the mediator, or the way in which the mediator is to be chosen, and both you and your opponent will have to pay a fee in advance to the mediator for his or her services.

C. How will the mediation take place?

2.8 This will be a matter of agreement between the parties and the mediator. A mediation can take place by telephone, or by e-mail, or in a meeting. Mediation by telephone will only be suitable for cases where the area of disagreement between the parties is limited. Sometimes the parties would rather have the mediator shuttle between them by phone or by e-mail, without the need to speak to each other directly. In other circumstances there can be a mix of joint sessions between the parties and the mediator, and closed sessions where a party can speak to the mediator one to one in confidence. The mediation process is flexible and designed to suit the needs of the parties.

2.9 It may be helpful to bear in mind that, when there is a negotiated settlement, the chances are that both sides have given way to some extent. You may end up feeling a little dissatisfied and wondering whether it might have been better to fight all the way in court. Such feelings are only natural, but the chances that it would have been better to spend months involved in litigation, spending the time necessary to contest your claim properly, and enduring the anxiety that almost inevitably accompanies civil litigation, are so slim that you can safely ignore them.

D. What happens if we do not settle the case at mediation?

2.10 The court will usually order a stay (a halt) to the proceedings of between one and three months to enable mediation to take place. If the dispute is not settled then you and your opponent need to contact the court and the proceedings continue in the ordinary way. You should remember that the mediation process is confidential. You may not tell the judge what you or the other party said during the course of the mediation. If one party does not engage constructively in the mediation that may be matter which may be brought to the attention of the judge at the end of the case when he is considering what costs order to make.

2.11 It may all have been a waste of time and energy. But often it is helpful to have gone through a mediation process even if the mediation did not end with agreement. Both sides should understand the issues more clearly, and be better able to see where the other side is coming from. It may be that during the litigation process, after documents have been disclosed and witness statements exchanged, it will be easier to settle the case in the light of what you know about your opponent's position.

Chapter 3
The County Court

A. History and purpose
B. Civil Disputes
C. Judiciary and Staff
D. Trial by Judge alone
E. County Court proceedings : Small Claims / Fast Track / Multi Track

Headlines

(1) This chapter gives general background information about the county court and the three 'tracks', to one of which all cases are allocated.

(2) There are important considerations as to costs that may be awarded in the allocation of your case to a track. This topic is also covered in chapter 7. If you believe that your case is a relatively simple one and really ought not to take more than one day to try, do not allow your opponent to persuade you that your case is a multi-track case. You should ask the judge to consider the matter and provide him with the information to reach an informed decision.

A. History and purpose

3.1 There have been courts in England called 'county courts' since Saxon times. The modern county court, however, was created by statute in 1846. The aim was to provide a growing population with a local court designed to adjudicate small scale disputes swiftly and less expensively than litigation in the courts in London. There are presently 215 county courts around the country, but not all these courts will try the larger (Multi-Track) cases. These larger cases tend to be tried in regional Trial Centres. The governing statute is now the County Courts Act 1984, with the county court's jurisdiction amended by the High Court and County Courts Jurisdictions Order 1991.

3.2 Over time, the jurisdiction of the county court, always prescribed by statute, has been extended. In some areas of law, such as contract, tort (except defamation claims), sums recoverable under statute, and actions for the recovery of land, the county court's jurisdiction is as extensive as that of the High Court. In other areas, essentially those coming under the equity jurisdiction exercised by the Chancery Division of the High Court, the county court's jurisdiction is severely restricted, the amount of the court's jurisdiction being limited to claims worth no more than £30,000.

3.3 The purpose of the county court remains that of a local court, providing much speedier justice than that available in the High Court, and at a lower cost. There

are now three separate types of proceedings in the county court, and the cost of litigating in the county court is very dependent on the type of proceedings in which the litigant is involved, see Section E below.

B. Civil Disputes

3.4 The county court has jurisdiction in three quite distinct areas of civil, in the sense of non-criminal, dispute. These may be described as civil, family and insolvency claims. Most county courts have a family jurisdiction, deciding disputes arising on the breakdown of marriage, and problems relating to children whether or not accompanied by divorce. A small number of county courts have an insolvency jurisdiction dealing with bankruptcy and the liquidation of companies with a share capital of less than £120,000.

3.5 This Handbook does not cover family or insolvency disputes. It deals only with civil disputes, such as claims relating to contracts, the ownership and possession of land, and torts, including personal injury claims arising out of road traffic accidents, and accidents at work.

C. Judiciary and staff

3.6 Cases at the county court are managed and tried by both Circuit Judges and District Judges. In the main, the bigger (multi-track) trials will be heard by Circuit Judges, some of whom also sit in the High Court exercising the jurisdiction of High Court Judges. District Judges are responsible for hearing the trials of smaller cases (both fast track and small claims) and for managing the multi-track claims before they reach a hearing. But these distinctions are not set in stone. Some District Judges are authorised to hear multi-track cases, and when there is no other work available Circuit Judges may hear fast track cases. In some courts, notably Central London Civil Justice Centre, most pre-trial case management of multi-track cases is by Circuit Judges.

3.7 In most instances, a litigant may appeal a decision made by a District Judge to a Circuit Judge. This is a true appeal. That is, the Circuit Judge does not hear the matter afresh. The litigant who appeals a decision of a District Judge has to show that the District Judge made an error of law or arrived at a decision which is outside the acceptable boundaries of decision-making in that particular area. It is necessary for an appellant to obtain permission to appeal a District Judge decision, either from the District Judge or the Circuit Judge.

3.8 The county court is staffed by employees of Her Majesty's Courts and Tribunal Service. The staff are responsible for a wide range of services required to ensure that the court functions properly. County Court staff are responsible for issuing claims, taking in transfers of cases from other courts, issuing and processing applications, clerking the judges in their work in and out of court, preparing and serving orders, enforcing orders, and a wide range of other functions. A few senior staff undertake quasi-judicial work, in particular conducting examinations of debtors as to their means.

3.9 County Court staff are not lawyers, and it is no part of their duty to give legal advice. Conditions vary from court to court, but in the big cities staff tend to have to work in very difficult conditions. Litigants are entitled to expect a good level of service, but do have to remember that the county court is the poor relation in the court service and is greatly under-resourced. This puts a great deal of pressure on the court staff.

D. Trial by Judge alone

3.10 With certain specific exceptions all trials in the county court are heard and determined by a single judge sitting alone. The judge therefore sits both as judge, managing the proceedings in court and determining points of law, and as jury, deciding questions of fact.

3.11 Under the provisions of the County Courts Act 1984, s 66, an application may be made for a trial to be heard by both judge and jury where there is a 'charge of fraud' against the applicant for a jury or where there is a claim in respect of malicious prosecution or false imprisonment. A 'charge of fraud' involves more than an allegation of fraud. Such a charge only arises in cases of actionable deceit, and even then the court's discretion to order trial with a jury is rarely exercised. In cases of malicious prosecution or false imprisonment, claims which are almost invariably brought only against the police, it is more common for the court to order trial with a jury.

3.12 An application for a claim to be tried with a jury must be made within 28 days of service of the defence [CPR 26.11]. A county court jury comprises eight jurors, and the jury operates by answering specific questions posed in relation to the essential issues of fact in the case. These questions are determined by the judge in consultation with the litigants.

E. County Court proceedings : Small Claims / Fast Track / Multi Track

3.13 All claims in the county court are allocated to a "track" under the provisions of CPR Part 26. There are three tracks. As its name suggests the Small Claims Track is for low-value claims. It is the normal track for any claim which has a value not exceeding £5,000. However, there are two exceptions to this general rule. First, where the claim is for damages for personal injury, not only must the value of the total claim not exceed £5,000, the value of the personal injury element of the claim should not be more than £1,000. Secondly, where there is a claim by a tenant of residential premises against his landlord requiring the landlord to carry out repairs, the cost of the repairs should not be more than £1,000 and the value of any other claim should not exceed a further £1,000.

3.14 The Fast Track is the normal track for any claim of a value greater than that for a Small Claim, but which does not exceed £25,000, and the trial is likely to last for no longer than one day with any expert evidence limited to one expert per party in no more than two expert fields.

3.15 All remaining claims are allocated to the Multi Track. These will be the more substantial claims brought in the county court.

3.16 Small claims track matters will almost invariably be heard by a District Judge who will act rather more as an adjudicator than as a judge. The proceedings will be informal, and the judge's task will include a responsibility to elicit the evidence, and ensure that each party has called the witnesses who can give relevant evidence and has produced the documents which will assist the court to arrive at the correct decision. "He must also hold the ring and ensure that each party has a fair chance to present his own case and to challenge that of his opponent". To do this the judge will have to enter the ring in a way which is rarely appropriate in other cases. This Handbook may give some general assistance to a litigant in a small claims track matter, but it is aimed primarily for the fast track and multi-track litigant who has to engage in far more formal legal procedure where the judge's scope for assisting in the preparation and presentation of the case is severely restricted.

3.17 Fast track claims will usually be heard by a District Judge. Essentially these claims proceed in the same way as a multi-track claims. They are, however, the shorter, lesser value, claims which for those reasons will tend to be simpler to prepare and present. Some litigants will retain lawyers to represent them on fast-track claims but a majority of litigants will represent themselves.

3.18 Multi-Track claims will usually be heard by a Circuit Judge or a Recorder. A Recorder will generally be a lawyer in practice, either a barrister or a solicitor, who has a part-time judicial appointment. A few Recorders are full-time judicial office-holders in other fields, such as an Employment or Leasehold Valuation Tribunal Chairman. There are District Judges who are also Recorders. A Recorder has the same status as a Circuit Judge. All Circuit Judges will have been Recorders for at least two years before being appointed full-time judges.

3.19 There are very important cost implications attached to the different tracks. The general rule in the small claims track [CPR 27.14] is that no costs may be awarded against the losing party except the fixed costs attributable to issuing the claim and court fees paid by the successful party, together with (a) reasonable travelling expenses for the successful party and his witnesses (b) loss of earnings up to £50 per day and (c) a fee for any expert called not exceeding £200 [27PD.7]. However, where the judge considers that a party has behaved unreasonably (eg bringing a wholly speculative claim or failing to comply with court directions) the party concerned may be ordered to pay the other party's legal costs.

3.20 In fast track claims, costs are usually awarded against the losing party in favour of the successful party on a fixed scale. Where the value of the claim is not more than £3,000, the costs will be £485; for claims up to £10,000, £690; for claims up to £15,000, £1,035 and for claims up to £25,000, £1,650. There are additional provisions in the CPR for awarding further costs or no costs at all set out in CPR

Part 46, including a provision for awarding additional costs to a litigant in person who is successful in the litigation, whether as claimant or defendant.

3.21 A successful party in a multi-track claim may expect to be awarded his costs in full. Full might not actually mean that every penny of the successful party's costs have to be paid. There are detailed rules as to costs which may be recoverable in civil litigation, and it is possible to have a further dispute over the costs in front of a specialist Costs Judge. It can be a very expensive matter to face an order to pay the other side's costs in a multi-track claim.

Chapter 4
The Civil Procedure Rules

A. Civil Procedure Rules 1998
B. The Overriding Objective
C. The Court's Case Management Powers
D. Time limits
E. Chancery Guide, Queen's Bench Guide, and TCC Guide

Headlines

(1) All civil trials are governed by the Civil Procedure Rules 1998 ("CPR").

(2) The CPR may be downloaded from a number of sites. It is not necessary or sensible to download the whole rules. There are some 79 of them, many with practice directions. If you are unable to obtain a printed copy of the CPR the sensible thing is to download the rule, or rules, which relates to the stage of the case that you are at. The text is this handbook will refer you, as appropriate, to the relevant part of the rules. References are given in square brackets. [CPR 16.2] is a reference to a rule. [CPR 16PD.3] is a reference to a practice direction which supplements the rule.

(3) The CPR [CPR 1] require all cases to be dealt with 'justly', and CPR 1 gives a broad definition of 'justly' for these purposes. The definition incorporates the concept of proportionality, and the fair allocation of the court's resources. The court must deal fairly between the parties in each case, but must also have regard to the fact that there will be other parties in other cases competing for the court's time and resources.

(4) The court has wide management powers. Time limits should be kept, and sanctions might be imposed on a litigant who fails to meet time limits. But sanctions are rarely imposed for the first breach of a time limit.

A. Civil Procedure Rules 1998

4.1 The Civil Procedure Rules 1998 ("CPR"), which came into effect on 26 April 1999, provide a single body of procedural rules for all civil courts, namely the county court, the High Court, and the Court of Appeal, civil division. The CPR have the force of statute being made, and regularly amended, by statutory instrument under the power given by the Civil Procedure Act 1997. Significant amendments came into effect on 1 April 2013 as part of the 'Jackson Reforms', see Chapter 14.

4.2 The CPR were designed to effect a considerable change to the procedural rules previously in force, namely the Rules of the Supreme Court and the County Court Rules. In particular, the CPR imposes on the court (ie the judge) the duty actively to manage cases so as to further the overriding objective. Among the

more important aims of the CPR are (1) to ensure that litigation is conducted with the parties' 'cards on the table', and (2) to introduce the concept of proportionality in the handling of a case. The court always aims to ascertain the true facts in any case to which to apply the correct legal provisions so as to arrive at the just result. But it has always been acknowledged that the court cannot always be confident that it has correctly ascertained the facts. The standard of proof in civil cases, ie proof on a balance of probabilities, shows the realism with which the task of 'finding the facts' is approached. Additionally the CPR requires the court to approach its task with proportionality in mind. If the cost of pursuing any aspect of a civil dispute is out of proportion to the benefit that may be derived from that pursuit, the court may decide that it is better not to incur the cost than pursue a particular point, even where to do so may well allow the court to arrive at a more reliable answer.

4.3 The CPR are divided into 'Parts', each with a number of rules relating to a particular topic and most Parts also have one or more Practice Directions which supplement the rules and assist in understanding how the rules are to be implemented. There are 79 Parts to the CPR, but a number of these parts deal with specific courts or specialist proceedings which will not concern the overwhelming majority of litigants. The CPR also contain a number of forms to be used at various stages of a civil claim.

4.4 The CPR are published, with editorial notes, by a number of legal publishers. The litigant in person may hear the Judge or lawyers referring to 'the White Book' (published by Sweet & Maxwell) or 'the Green Book' (published by LexisNexis) and there are other editions as well. Jordans publish the rules with editorial notes (in a Brown cover). All these books are very expensive. The CPR themselves can, however, be freely downloaded from the internet, for instance at www.justice.gov.uk/civil/procrules. The various forms which may be used to comply with the directions given by the court exercising its case management powers may also be freely downloaded.

4.5 It is important that a litigant obtains a copy of the rules which are relevant to each stage of the case in which he is involved. The rules are fairly straightforward to read and understand, and so can be followed by a litigant without legal assistance. If a litigant does have trouble in understanding any rule he can always ask the judge at the next Case Management Conference for help, or, if the matter is urgent and relates specifically to an Order made by the court, a litigant may write to the court manager and ask that he put any particular question before the judge for assistance in complying with the Order in question.

B. The Overriding Objective

4.6 CPR Part 1.1 provides that "These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly and at proportionate cost". 'Dealing with a case justly' has always been the aim of the English civil court, but from 1 April 2013 this 'overriding objective' is given a new definition. By virtue of CPR Part 1.2 "Dealing with a case justly and at proportionate costs includes, so far as is practicable –

(a) ensuring that the parties are on an equal footing;

(b) saving expense;

(c) dealing with the case in ways which are proportionate –
  (i) to the amount of money involved;
  (ii) to the importance of the case;
  (iii) to the complexity of the issues; and
  (iv) to the financial position of each party;

(d) ensuring that it is dealt with expeditiously and fairly; and

(e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases.

(f) enforcing compliance with rules, practice directions and orders."

4.7 It follows that the court must be concerned not simply with finding the true facts and correctly applying the relevant law. It has to be concerned with matters of expense, proportionality, and the need to take account of the demands imposed by other cases. From the perspective of the litigant in person 'ensuring that the parties are on an equal footing' does not extend to depriving the other side of its advocate, but the court does have to take into account the fact, when it arises, that one side has legal representation and the other does not. From 1 April 2013 'enforcing compliance with rules, practice directions and orders' is given a new emphasis.

C. The Court's Case Management Powers

4.8 These powers are very wide. They are set out in CPR Part 3 which is too extensive to discuss here. Essentially the court is given the necessary power to take an active part in the management of any case and, as appropriate, to tailor the directions it makes to the particular needs of the case.

4.9 The court manages a case by making Orders which are, in effect, giving directions to the parties as to what they have to do and by when. Sometimes these Orders are made in the course of an interim hearing (interim because it is not a trial or final hearing) with both parties present. An interim hearing may be ordered because one or other party has a particular application to make, but most Orders for directions are made at Case Management Conferences when the court calls all parties to attend a hearing to consider how the case is progressing and what further directions need to be made.

4.10 Sometimes the court makes an order on paper (often described as 'boxwork') without the parties being present. Such Orders may be made at the instance of the court or as a result of an application by one or other parties. Where a court makes an order without hearing the parties, the Order must contain a statement of the right of any party affected by the Order to apply to have it set aside, varied or stayed, [CPR 3.3(5)]. Usually the Order gives the parties seven days in which to make such an application. A litigant in person who wishes to challenge an Order should write to the court without delay. Judges are usually careful to ensure that boxwork orders made without a hearing are not unduly controversial,

but no litigant should feel in the least intimidated about applying to vary or set aside an order made without a hearing. No judge should ever object to hearing a litigant make representations about the appropriate form of an Order, or, indeed, whether an Order should be made at all.

4.11 It is important to bear in mind that directions made in the course of preparing for trial may have serious ramifications at trial. Litigation is hard work, and should be seen as such. Where the court orders a Case Management Conference the time may not be convenient, and it is always open to any party to ask the court for a different hearing time. But the court cannot always accommodate such requests. A party to litigation should always do his utmost to attend interim hearings, and do so having reviewed his papers so that he can answer any question about his case put to him by the judge.

D. Time Limits and sanctions

4.12 All Orders for directions should come with time limits, and a good order will specify both the date and the time of day by which any direction is to be complied with.

4.13 Courts do take time limits seriously, and there are a range of sanctions available to the court to punish a litigant who does not comply with a time limit. He may, for example, be precluded from arguing a particular issue, or calling particular witness evidence, or part of his claim for damages may be struck out. The most serious sanction of all is to strike out a claim in its entirety where a claimant acts in breach of a court order, or to strike out a defence and so allow a claimant to have a judgment without a trial where a defendant is in breach of a court order.

4.14 However, to the dismay of some litigants in person who find that the other side does not comply strictly with any particular time provided for in a direction, it has been the convention not to impose a sanction for the first breach of a court order. The more usual approach is for the court to make a second order requiring a direction to be carried out but this time spelling out the sanction that will apply if this second Order is not complied with. These Orders are often called "unless" orders, because they are given in terms that unless the party complies with the order a particular sanction will apply. From 1 April 2013 the judges have been told to be stricter with litigants than has been the case in the past. It is far too soon to see what impact this will have on the enforcement of orders. Judges will often be in a difficult position. Rigorous enforcement of orders may actually lead to increased costs, which is the direct opposite of the stated aim of the April 2013 changes to the rules.

4.15 Even where a sanction is applied it is open to a party to apply for relief from sanctions [CPR Part 3.9] (see 9.18). Such an application must be supported by evidence, usually in the form of a witness statement, which should explain why the party failed to comply with the Order and why, if it be the case, that the application for relief from sanctions was not made promptly. Whether the court will then grant relief, or do so on terms, depends on a consideration of all relevant circumstances and in particular those spelt out in CPR Part 3.9(1).

4.16 Time for complying with directions is almost always given in days. Not every day counts as a day for these purposes. The rule for computing time is at CPR Part 2.8. A day means a 'clear day'. That means that the day on which a period of days begins is not counted neither, if the end of the period is defined by reference to an event, does the day on which that event occurs. Where a time period is five days or less week-ends and bank holidays do not count.

4.17 The court's case management powers enable it to extend or shorten any time period, even where an application for extension is made after the time has expired.

E. Chancery, Queen's Bench, Mercantile and TCC Guides

4.18 In the High Court, the Chancery and Queen's Bench Divisions and the specialist courts (including the Commercial Court, and Technology and Construction Court ('TCC')) publish guides as to how particular aspects of litigation in those courts should be conducted. Neither the Chancery Division nor the Queen's Bench Division Guides have direct application in the county court. The litigant in person may, however, encounter references to these Guides, which in many respects give very useful guidance which could helpfully be followed in the county court, and they are mentioned for this purpose. The Guides can be freely downloaded from the www.justice.gov.uk website.

4.19 A litigant in person may find that his case is in a Mercantile List or a Technology and Construction List in the county court. In such a case the rules specifically relating to these courts, Mercantile Court CPR 59, TCC CPR 60 will apply to that case. The TCC has its own Guide and this will apply to county court cases in a TCC List.

Chapter 5
County Court Fees

A. Court Fees
B. Fee exemption

Headlines

(1) Fees are payable both a start of a claim and at various stages throughout the claim.

(2) Litigants in receipt of Income Support, Pension Guarantee Credit, Jobseeker's Allowance, and Working Tax Credit are exempt from fees provided they are not also in receipt of Child Tax Credit.

(3) Litigants on low incomes and litigants who can show that payment of a court fee would involve undue hardship may also be eligible for remission or exemption from fees depending on a means test.

(4) A litigant who is subject to a Civil Restraint Order requires the permission of a High Court Judge to apply for fee remission.

A. Court Fees

5.1 Court fees are payable on issue, ie at the start, of a claim, and that includes the start of a counterclaim or a third party claim. With money claims, the level of the issue fee will depend upon the sum claimed. Accordingly the sensible course for a claimant is to ensure that his claim is limited to the top of the band in which it falls. If a claim is issued on line (Money Claim Online or MCOL) the fees are a little lower than where the claim is used at court. Non-money claims attract a fixed fee, with possession claims on line (PCOL), which can be used only for possession claim arising on rent arrears, attracting a lower fee than other cases.

5.2 Fees are also payable:

(i) when a case is allocated to one of the three 'tracks';

(ii) when an application is issued for an order during the interim stage of the claim, ie before the trial hearing;

(iii) when the pre-trial checklist is filed;

(iv) for the hearing; and

(v) for any assessment of costs after the hearing.

After judgment, further fees will be payable for any appeal against the judgment or for using any of the different methods of enforcement of a judgment.

5.3 Parliament has made civil litigation an expensive business. The levels of fees are set out in secondary legislation, County Court Fees Orders, and are regularly increased. HM Courts & Tribunals Service publish a leaflet, EX50, which will give the fees currently in force. Details of the fees payable can always be found at www.justice.gov.uk/guidance/courts-and-tribunals/courts/fees .

5.4 During the interim stage of the claim, no fee is chargeable for a Case Management Conference or Pre-Trial Review. A fee for a specific application may be avoided if the litigant waits to make his application at a Case Management Conference, but he must remember to give good advance notice to the other side and to the court that he will be asking for specific directions from the court at the Conference so that the other side is not caught unawares and the court allows sufficient hearing time.

5.5 A refund of a hearing fee is available where the case is settled and the court is notified of the settlement. The amount of the refund depends on when the court is notified of the settlement. More than 28 days before the hearing 100% of the fee is refunded; between 28 and 15 days, 75% of the fee; and between 14 and seven days, 50% of the fee. If the court is notified fewer than seven days before the hearing there is no refund.

B. Fee Exemption

5.6 For less well-off litigants there is the possibility of fee remission. There are three concessions. Under concession 1 there is a full remission of court fees if the litigant is in receipt of any one of four means-tested benefits, income support, income-based jobseeker's allowance, state pension guarantee credit or working tax credit where the litigant is not in receipt of child tax credit. Under concession 2 there is a full remission of court fees if the litigants annual gross income is under certain limits, the figure depending upon the number of children living with the litigant. Under concession 3 there is a partial remission of fees based on a means test. The details of these concessions may be found in the HMCS leaflet EX160A. More information on fee remission is available online at www.hmctsformfinder.justice.gov.uk

5.7 A 'vexatious litigant', that is a litigant subject to a Civil Restraint Order, may not apply for fee remission without the permission of a High Court Judge.

5.8 A litigant applying for fee exemption has to complete form EX160. This is processed by a court officer. If the litigant does not agree with the officer's decision he may appeal in writing to the Court Manager. A final appeal lies from the Court Manager to the Area Director.

Chapter 6
The Basic Structure of Litigation

A. A cause of action
B. Issues of law
C. Issues of fact

Headlines

(1) To bring a claim, the Claimant must have a 'cause of action' recognised in law.

(2) If a Defendant wishes to challenge the Claimant's claim, he must raise either issues of fact or issues of law or both. Most cases involve only issues of fact.

(3) It is essential for you as a litigant to identify the issues of fact in your case so that you can concentrate on what is really important in your case.

(4) The court will sometimes direct parties to prepare a list of issues. You should welcome such a direction, because you will then see what your opponent considers to be the issues, and, possibly, the judge may make helpful observations about what appear to be or appear not to be issues in the case.

A. A cause of action

6.1 To bring proceedings in a civil court, the claimant must have a claim against the defendant that is recognised as being enforceable in law. To be successful in the proceedings the claimant must have a good 'cause of action' against the defendant. The cause of action is the entire set of facts that gives rise to an enforceable claim.

6.2 There are two elements here. First there must be a claim that is recognised as being enforceable in law. English law recognises a wide variety of claims, but not everything which causes injury, loss or annoyance to another will constitute a valid claim. The claimant must satisfy the court that his claim is one which is proper to bring within the recognised principles of the law.

6.3 The second element is the factual basis of the claim. To take two examples. Where a person breaks an agreement he has with another he may have to pay compensation (damages) to that other person (the innocent party). Or where a person who is under a duty to act with due care fails to do so with the result that another person suffers harm, a claim may be made by the victim of the harm. It is for the claimant to establish all the essential facts that go to make up that valid claim.

B. Issues of law

6.4 'Issue' in this context means a matter on which the parties disagree. An 'issue of law' is where the parties to proceedings have a dispute as to any aspect of the law or

its application in relation to their proceedings. Many cases proceed without giving rise to issues of law. Where, for instance, the claimant is a pedestrian who claims that he was crossing the road at a light-controlled junction when he was hit by a car driven by the defendant through a red light, it is most unlikely that an issue of law will arise. The legal claim will be in the tort of negligence, for the law recognises a duty on all drivers to exercise reasonable care to avoid causing damage to anyone else who is using the road at the same time. If a driver goes through a red light and injures a pedestrian who is crossing the road, there is little scope for arguing the legal basis of the claim. The driver may defend the claim on a factual issue, eg the light was, in fact, green so that he was crossing the junction perfectly reasonably when the pedestrian ran out in front of him, but there will be no legal issue.

6.5 But the above is a simple example and the law behind any particular claim may not be so straightforward. Before a claimant starts a claim, he needs to satisfy himself that he has a claim recognised in law. A defendant is entitled to challenge that claim either on the basis that it is not a proper claim in law or that it does not apply to the facts of the claim being brought. A defendant challenging the legal basis of the claimant's claim in either of these ways raises a 'legal issue' as to the validity of the claimant's claim.

6.6 This can be a daunting prospect for some litigants in person. The law can be technical and can sound even more technical than it is. Lawyers, in common with most other professionals, use shorthand phrases that may take some understanding. But for the most part the 'law', in the sense of what makes up a valid claim, is not difficult to understand. It is convenient to divide the law into specific areas giving rise to valid claims, the most common being contract, tort, land law, and trusts. Anyone wishing to research whether he has a valid claim will find that most text books will cover defined areas of the law, for the law is too vast an area to be conveniently covered in one volume. Once the correct area of law has been identified, it should be possible to identify the part of that area of the law which covers the facts of any individual case.

6.7 Each valid legal claim may be divided into its 'elements'. Probably the most common claim brought in the courts is in the tort of negligence. This claim may be divided into three elements, namely:- (1) a duty owed to the claimant by the defendant; (2) a breach of that duty by the defendant; and (3) damage recoverable in law caused to the claimant by that breach. The claimant must establish each of the three elements. The defendant may challenge any or all the elements. He may challenge the duty alleged by the claimant and assert that the law does not recognise that a person in the defendant's position owes a duty to a person in the claimant's position. This will, essentially, be an issue of law but the facts on which the issue is decided may be important, so there may be an issue of mixed law and fact. Whether or not a defendant has acted in breach of a duty he owes to the claimant will usually be an issue of fact. But with the third element, that of damage, the law has restrictions on the scope of damage that may be claimed in any particular circumstances. So issues of law may arise in connection with damages.

6.8 It is not possible in this Handbook to cover the law. That has to be found in text-books. Please see the comments made in paragraph 1.19.

C. Issues of fact

6.9 An issue of fact, that is a dispute or disagreement as to the actual facts arising in a claim, is an easy concept to understand. Issues of fact are the very stuff of court-room dramas. They are the building blocks of any case. What is very important for the litigant, however, is to have clearly in mind those factual issues which are relevant to the determination of the case, and those that are not. A litigant who spends time and effort disputing facts which are not relevant to the decisions which the judge has to make can annoy everyone by wasting time. But, more importantly for him, the litigant who makes a great song and dance about facts which are not relevant to the determination of the case may end up by masking those facts which are helpful to his case.

6.10 Which facts are relevant and which are not will depend on the circumstances of the individual case. The colour of the clothes worn by a claimant pedestrian in a road traffic accident case may have no bearing at all on the defendant's driving. But if the accident happened at night time and the claimant was wearing very dark clothing, the colour of the claimant's clothes may become extremely important. Where the driver was planning to go after he had crossed the junction where the accident happened is often quite irrelevant to an assessment of his driving. But it may become highly pertinent if the driver was lost and paying more attention to his general surroundings and less attention to the road ahead than he should have been. Or he may have been late for an appointment. The litigant has to use his good sense as to what is and what is not relevant in his particular case. Furthermore the litigant should always be ready to accept that, as a case proceeds, an issue of fact which seemed very important to him before the trial may turn out to be of little importance, and vice versa.

6.11 It is *always* important to identify the essential issues of fact before the trial begins. That is the purpose of pleadings (statements of case), see chapter 8. When the pleading stage of the claim is completed, it should be possible to work through the pleadings and identify all essential issues of fact. A good litigator will identify all the essential issues of fact shown on the pleadings so that he can: (1) ensure that he discloses all documents that bear on those issues; (2) consider what witness or documentary evidence he may produce at trial to support his side of the various issues; and (3) deal with each issue thoroughly in his witness statements.

6.12 Judges regularly direct litigants to prepare and file a list of issues. See this as a helpful direction. It will make you think about the issues you are raising. It will also enable you to learn what your opponent considers to be the issues in the case. Because it is helpful to the parties and judge alike, a judge at a Case Management Conference or other interim hearing may consider the list of issues with the parties and possibly make observations which may help you add to or refine your list of issues. If the case management judge in your case does not direct a list of issues, and you would prefer that he did, do not hesitate to ask for such a direction.

Chapter 7
Starting and responding to proceedings

A. Before starting proceedings
B. How to start proceedings
C. Where to start proceedings
D. How to respond if you are sued
E. The allocation of the case to a track
F. Service of documents
G. Children and other protected parties
H. Limitation periods

Headlines

(1) Before embarking on proceedings it is essential that a prospective claimant not only notifies the prospective defendant of his claim, but also provides sufficient information about that claim to enable the defendant to make an informed decision as to how best to proceed. A defendant who believes that he has an answer to the claim should also exchange information with the claimant, so that both sides can properly assess where they stand in relation to the proposed claim.

(2) Where it is apparent that there is a real claim which is disputed on a proper basis both parties should explore the possibility that a compromise may be achieved through mediation or some other form of alternative dispute resolution.

(3) Before you start proceedings for a money sum do consider whether the defendant will be able to pay. You will never know for certain, but beware the risk of throwing good money after bad.

(4) Proceedings may be started under Part 7 (Form N1), or, where there is no substantial dispute of fact, under Part 8 (Form N208). If in doubt the claimant should start under Part 7. The forms may be obtained from any County Court office or by downloading the form at www.hmctsformfinder.justice.gov.uk. The forms are accompanied by guidance notes. These notes need to be read carefully.

(5) The relevant form needs to be completed on paper unless the claim is simply for a money sum against no more than two people, when it may be completed on line at www.moneyclaim.gov.uk.

(6) An issue fee will be payable depending upon the value of the claim.

(7) All county court claims are now issued at a central national court centre in Salford. Once a defence is received, the parties are sent an 'directions

questionnaire' to complete and return to a local court. This is usually the court covering the area in which the defendant resides.

(8) A defendant who is served with a claim form has 14 days to decide whether he will admit or defend the claim in whole or in part and return that part of the form which states his intention.

(9) Once a case has been sent to a local county court, a judge will allocate the claim to one of three 'tracks': the small claims track, the fast track, or the multi-track. This allocation is based on the replies to the Directions questionnaires that are sent to all parties. The litigant should complete his questionnaire carefully. Allocation has very considerable implications for the case, and if a litigant is concerned that the case has not been correctly allocated he should apply to the court for a re-allocation.

(10) The court will usually serve the proceedings on the defendant. Once a person is a party to proceedings he must provide an address for service. All documents served during the proceedings must be served at this address, whether personally, or by first class post, or the DX mail and courier service, or (only where the litigant agrees) by fax or e-mail.

A. Before starting proceedings

7.1 Explore alternatives to proceedings. Litigation can be very expensive. It should be used only as a last resort when other possible avenues to resolve the dispute have been tried and failed. The Court encourages this approach by means of 'pre-action protocols'. Every prospective litigant should go through a pre-action stage in which he attempts to reach a compromise with the 'other party' even where the dispute may have been brewing for some time and the respective parties have apparently adopted entrenched positions. For many (sensible) people it is one thing to say "see you in court", but quite another to go through the whole litigation process with the time, expense, and perhaps above all, stress, involved.

7.2 Before starting proceedings the prospective claimant should send a letter to the prospective defendant giving full details of the claim and specifying a reasonable period in which to respond. This principle is reinforced by specific pre-action protocols for different types of claim. There are ten protocols in total. These protocols form part of the CPR. They cover areas such as personal injury, low value road traffic accidents, professional negligence, building disputes, and housing disrepair claims. The time to allow a potential defendant to respond varies from 15 working days for low value road traffic accidents up to three months for personal injury claims. The protocols are high-minded, very lengthy, over complicated and, essentially, counter-productive. But they are part of the Rules and should be read and followed by lawyers, although most judges will not expect close observance by litigants in person.

7.3 The basic principles behind pre-action protocols are, however, sound and should be followed by every claimant. Failure to follow these principles may have serious costs consequences. These principles are that before proceedings are started the parties should:

(1) exchange sufficient information about the matter to allow them to understand each other's position and make informed decisions about settlement and how to proceed; and

(2) make appropriate attempts to resolve the matter without starting proceedings, and in particular consider the use of an appropriate form of alternative dispute resolution ('ADR') (see Chapter 2) in order to reach resolution.

7.4 Prospective litigants should tailor what they do to comply with these principles to the circumstances of their particular case. There is no single approach to be adopted in every situation. But at the very least the Judge will expect to see that before starting his proceedings the claimant has explained to the defendant in clear terms what his claim is and why he is bringing it. This is usually done in a 'letter of claim' which contains:

(a) a clear summary of the facts;

(b) all allegations of fault (whether breach of contract, breach of duty, or other 'fault');

(c) a statement of the sum claimed or the injury and losses suffered by the claimant with an indication of the figure for the compensation which will be claimed; and

(d) (in cases where it is clear that there are important documents) an offer to provide copies of documents.

The prospective defendant should be given a proper time to respond. This should usually be in the region of four weeks. If there is no response it is sensible to send a chasing letter before finally starting proceedings. When the defendant does respond substantively, the Claimant must consider that response. The Judge will expect the Claimant to write a further letter explaining why he does not accept the response, if that is the case. The important thing is that the parties engage on the dispute; they should not simply trade insults.

7.5 Having exchanged information the parties should then consider ADR. No proceedings should be started while the possibility of settlement is still actively being explored.

7.6 If settlement talks fail, or the prospective defendant refuses to engage in such talks, you will be left with no alternative but starting proceedings. This will be time consuming and very possibly nerve-wracking. Before you start do consider whether you will be able to enforce any judgment against the defendant. It would be a disaster if after all the hard work you obtain a judgment and then find that the defendant has no means to pay. Do what you can to satisfy yourself that the defendant is worth suing.

B. How to start proceedings

7.7 *The procedure*: Proceedings are started by the issuing of a Claim Form. Most proceedings will involve significant factual disputes. They are known as "Part 7 proceedings" and the relevant form for Part 7 proceedings is Form N1.

There are some proceedings in which there is no real factual dispute, but a decision is needed from the Court. These are known as "Part 8 proceedings". Although less common than Part 7 proceedings a wide variety of cases may be started as a claim in Part 8 proceedings (a 'Part 8 claim'). Examples are cases relating to probate, the administration of trusts, applications under particular statutory provisions and some landlord and tenant claims. The relevant form for Part 8 proceedings is Form N208. Part 8 proceedings are specialist in nature and rarely suitable for used by a litigant in person who is not an experienced lawyer. This Handbook assumes that as a litigant in person you will either be bringing or defending a Part 7 claim.

7.8 You may obtain Form N1 from any County Court office or by downloading the form at www.hmctsformfinder.justice.gov.uk. The forms are accompanied by guidance notes. Read these notes carefully. They explain how the forms should be filled in. The forms also provide information for the defendant, explaining the process and what he needs to do to admit or defend the claim.

7.9 Chapter 8 of this Handbook provides guidance as to what you should include in the Form N1 and the need in addition for Particulars of Claim.

The Claim Form sets out in short form the nature of your claim and should state clearly what the claim is for, that is what sum is claimed or what other remedy is sought. In some cases however, eg claims for compensation for personal injuries, it may not be possible to specify the exact amount of the claim. Instead, what should be stated is the maximum amount the claim is limited to, eg £50,000. The figure should be a realistic estimate of the upper limit of the claim. It will also, incidentally, determine the size of the issue fee the claimant will have to pay so it is unwise for a claimant to claim more than he can reasonably hope to be awarded.

7.10 *Completing the form*: The form needs to be completed on paper unless the claim is simply for a money sum against no more than two people, when it may be completed on line.

7.11 To start a claim on paper, you should complete the form and make enough photocopies of it and the guidance notes for the court and each defendant. Make an extra copy to keep for yourself. Have a sensible filing system which you feel comfortable with and file your claim form. Help in completing the form can be obtained from Citizens' Advice Bureau. Court staff will do what they can to assist but they are not there to give you advice.

7.12 When completed you should submit the form to the court, with enough copies for each defendant, either by attending at the court office or by post, together with the court fee, where applicable. The fee can be paid in cash, by cheque payable to 'HM Courts & Tribunal Service', or by debit card.

7.13 A claim on line is started at www.moneyclaim.gov.uk. The court fee is calculated automatically and can be paid by credit or debit card. The online guidance explains the process but there is also a help desk that can be contacted in case of problems. The number is listed on the website.

7.14 After the proceedings have been started the court will inform the Claimant that the claim has been issued by sending a 'Notice of Issue'. The court will also send each defendant a copy of the claim together with the notes of guidance. Defendants have the option of admitting the claim in whole or in part or defending it.

C. Where to start proceedings

7.15 *County Court or High Court?*: The general rule is that the county court has the same jurisdiction as the High Court. The primary exception is in the equity jurisdiction where there is a county court limit of £30,000, above which all claims must start in the High Court although once started in the High Court a claim may be transferred to a county court regardless of the county court limit. Equity proceedings include cases involving trusts, estates, dissolution of partnerships and applications for specific performance.

Proceedings may only be started in the High Court (either in London at the Royal Courts of Justice or in a District Registry, which is the High Court outside London and is usually together with the county court) if the claim is:

(a) expected to be for more than £25,000;

(b) for personal injuries and the value of the claim is £50,000 or more; or

(c) required to be started only in the High Court.

The figures were set for (a) and (b) above some time ago, and a litigant who starts a claim in the High Court for less than £250,000 without some special feature, eg public importance, complexity of facts, or a difficult point of law, can expect the High Court to transfer the case away to the county court. In the Technology and Construction Court the judges expect claims worth less than £500,000 to be started in the county court.

7.16 *Which county court?*: All claims are now issued at a central national court centre in Salford. Once a Defence is received, the parties are sent a 'directions questionnaire' to complete and return to a local Court. This is usually the Court covering the area in which the Defendant resides, but if the parties both specify a preferred court in the directions questionnaire it will be to this preferred court. This court will deal with the management of the case to trial, unless an application is made to transfer the case by either or both parties to another court for the convenience of the parties. At the county court appropriate cases may be assigned to special lists within the court. The three specialist lists are the Chancery List, the Mercantile List, and the Technology and Construction List.

7.17 Cases may be transferred between the county court and the High Court to ensure that they are heard at the level which is most appropriate to the issues in the case, and between county courts either for the convenience of the parties or for court administrative purposes, for example where a case needs to be placed in a specialist list which is not available at the court to which the case has been sent.

D. How to respond if you are sued

7.18 On receipt of the claim form a defendant must decide how to respond. The time allowed for this is 14 days, unless the claim form states that particulars of claim are to follow. In that event the time allowed is 14 days from the service of the particulars of claim.

7.19 The options are as follows:

(a) a defendant who wants to defend the claim (in whole or part) should file a defence with the court or, if unable to do this within the time limit of 14 days, an acknowledgment of service;

(b) a defendant who admits the claim (in whole or part) should file an admission; or

(c) a defendant who files an acknowledgment of service and wants to defend must file a defence within 28 days of the service of the particulars of claim.

7.20 It is not possible in a basic guide such as this to cover all the procedural rules. What follows is intended to provide a general overview. The details are to be found in the relevant sections of the Civil Procedure Rules (CPR):

CPR Pt 9	Responding to Particulars of Claim
CPR Pt 10	Acknowledgment of Service
CPR Pt 14	Admissions
CPR Pt 15	Defence

7.21 If a defendant files an admission, the claimant has the right to enter judgment unless the defendant is a child or protected party (see below). Once an admission has been made it can only be withdrawn or altered with the permission of the court. Where the claim is for an unspecified amount of money, judgment will be entered for an amount to be decided later by the court. However a defendant who admits liability to pay a claim for an unspecified amount may offer a sum in satisfaction of the claim [CPR 14.7]. A defendant may make a request for time to pay [CPR 14.9]. 'Time to pay' may be an extended period in which to pay the whole sum due, eg while the defendant makes arrangement to sell his house or other asset, or may involve payment by instalments. The rate of payment may be determined by a court officer [CPR 14.11] or by a Judge [CPR 14.12].

E. The Allocation of the Case to a track

7.22 Where a claim is defended the court will decide at an early stage in the proceedings where to allocate the case for trial. Cases are allocated to one of three "tracks" for case management and trial:

(1) The small claims track;
(2) The fast track; and
(3) The multi-track

7.23 In broad terms, the small claims track is the normal track for any claim which has a value of not more than £10,000, the fast track for claims with a value of not more than £25,000 where the trial is likely to last for no more than one day, and the multi-track for all other claims.

Personal injury claims are not allocated to the small claims track unless the value of the claim is for personal injuries is not more than £1,000 as well as the value of the claim overall being no more than £10,000. Claims by a tenant of residential premises against a landlord for an order for repairs to be carried out are not allocated to the small claims track unless the value of the repairs is no more than £1,000, and the value of any other claim for damages does not exceed that figure.

7.24 The small claims track is intended for cases which can be dealt with without the need for substantial pre-trial preparation, and with greater informality. The procedure for the preparation of the case and the conduct of the hearing is set out in CPR Pt 27 and is designed to make it possible for a litigant to conduct his own case without legal representation. Small track cases are heard by District Judges. Only very limited orders for costs may be made in small track cases, essentially limited to fixed costs and expenses [CPR 27.14].

7.25 The fast track is intended for cases which can be heard in a day and which do not involve a large number of documents or consideration of complex expert evidence. Part 28 sets out the procedure for preparation of the case and the conduct of the hearing. Fast track cases are heard mainly by District Judges but may also be heard by Circuit Judges. The costs that may be awarded in fast track cases depend upon the value of the claim, but in all cases are severely limited [CPR 46.2].

7.26 The case management and the hearing of a case allocated to the multi-track will normally be at a Civil Trial Centre. The multi-track is reserved for the more substantial and complex cases, which may require greater judicial case management. For this purpose the court may fix a case management conference to review the preparation of the case and to give directions for its progress to trial. CPR Pt 29 sets out the procedure to be followed from allocation to trial in multi-track cases. Multi-track cases are normally heard by Circuit Judges. The most serious and complex cases may be heard by a High Court Judge. In appropriate circumstances, the case can also be released for hearing by a District Judge.

7.27 *The Directions questionnaire*: Allocation of defended cases to the appropriate track is a crucial preliminary case management issue. Once a defence has been filed indicating that the claim is defended the court will serve a form of Directions questionnaire on each of the parties. The questionnaire will state on it the date by which it is to be answered and returned to the court. It is important that the form is completed carefully.

Once the time provided for returning the questionnaire has expired (unless extended by agreement) the court will proceed to allocate the case to track. Before making the decision, if necessary, the court may order a party to provide more information about his case.

7.28 *The allocation*: In deciding which track to allocate to a claim, the court will have regard to a wide range of matters including –

(1) The financial value of the claim;
(2) The nature of the claim;
(3) Whether the case is likely to raise complex issues of fact, law or evidence;
(4) The number of parties involved;
(5) Any counterclaim, its value, and the complexity of the issues it raises;
(6) The amount of oral evidence likely to be heard at trial;
(7) The importance of the claim to the parties;
(8) The circumstances of the parties.

If something happens after the case has been allocated to track which alters the nature of the case, the court can be asked to review the allocation and re-allocate it if appropriate.

F. Service of documents

7.29 CPR Pt 6 and the two practice directions to Pt 6 contain a great many rules as to how claim forms and other documents may be served. These rules are of considerable importance. This is because the consequence of a party to litigation not taking any particular step may be severe. The court needs to be satisfied that a party who is in apparent breach of one of his obligations under CPR, (eg in not responding to a claim form, or not serving details of his claim after receiving a request,) has in fact been served with the appropriate document to trigger that obligation. There are also special rules for serving companies and partnerships.

7.30 In most cases a litigant in person may rely on the court to serve a claim form. What the litigant must do is ensure that he gives a correct address for the defendant. A litigant who serves a claim form himself should ordinarily serve it personally on the defendant, or entrust it to the first class post, document exchange, or an alternative service provider which provides for delivery on the next business day [CPR 6.3].

7.31 Once a person has become a party to proceedings he must give an address at which he may be served with documents relating to those proceedings [CPR

6.23]. He may then be served personally or by post at that address or, if the party agrees, he may be served by fax to a specified number or by e-mail or other electronic communication to a specified e-mail address or electronic identification.

7.32 Litigants may encounter defendants who are anxious to avoid service. In such cases it may be necessary to apply to the court for an order permitting service by an 'alternative method' or at an 'alternative place' as specified in the order. The application may be made without notice to the defendant (naturally) and must be supported by evidence sufficient to satisfy the court that the defendant is seeking to evade service and that the alternative method or place proposed is likely to bring the proceedings to his notice [CPR 6.15].

G. The position of children and other protected parties

7.33 Children and young persons under the age of 18 cannot bring or defend proceeding on their own, unless allowed to do so by the court. Someone has to act on their behalf. That person is known as a 'Litigation Friend'.

The same applies to adults who because of mental illness or disability are unable to manage their own affairs. They are known as 'Protected Parties' and a litigation friend must be appointed to act for them.

7.34 No step can be taken in proceedings against a child or protected party except for the issuing and serving of a claim form until a litigation friend has been appointed, except with the permission of the court. If it appears during the course of proceedings that a party lacks capacity to conduct the proceedings, no further step can be taken in the proceedings without the permission of the court until the protected party has a litigation friend.

7.35 The litigation friend must be someone who can fairly and competently conduct the proceedings on behalf of the child or protected party and has no adverse or conflicting interest. In the case of a child the litigation friend will often be a parent. In the case of a protected party it will often be a close relative or friend.

7.36 CPR Pt 21 deals with how a litigation friend can be appointed. This may be without a court order [CPR 21.5], or by an order of the court [CPR 21.6].

7.37 Where a claim is settled by or on behalf of a child or protected party, the terms of the settlement must be approved by the court before they can take effect [21.10]. The court will normally give directions as to the control of any money recovered in the proceedings by or on behalf of the child or protected party. The general rule is that the money is retained in a fund, suitably invested, until the child attains his majority or the protected party recovers his health, but a guardian or other interested person may apply to the court for part of the fund to be used for specific purposes for the benefit of the child or protected party [CPR 21.11 and 21PD.13].

H. Limitation Periods

7.38 The law provides time limits for bringing proceedings. There are general rules in the Limitation Act 1980, but there are many other statutes which provide for limitation periods. A litigant should be aware that most of these rules are procedural rather than substantive. That means that as a matter of procedure a claim must or may be refused because it is out of time, as opposed to the cause of action ceasing to exist after a period of time, which is a substantive limitation period. There is this important difference. If a defendant does not expressly rely on a procedural limitation period in his defence the claimant may still bring his claim even though it is out of time. With a substantive limitation period the cause of action no longer exists once the period has expired. A defendant litigant in person should be careful to plead a procedural limitation period in his defence, and, as stated above, the majority of limitation periods in English law are procedural.

7.39 The law relating to limitation can be intricate, and only the very basic rules may be given here:

(1) 6 years is the 'standard' limitation period for claims in contract, tort, or for sums recoverable under a statute. The period begins when the cause of action accrues. In contract this will usually be when the contract is broken. In tort this will usually be when the claimant suffers damage. In a statutory claim this will usually be when the money becomes due.

(2) 12 years is the limitation period for actions on a 'speciality' eg a deed or document under seal such as, often, a lease. The period begins when the obligation under the document is broken. 12 years is also the time limit for claims to recover money due under a mortgage or to recover the proceeds of a sale of land.

(3) 3 years is the limitation period for claims in respect of personal injury or under the Fatal Accidents Act 1976. The time runs from the date on which the cause of action accrues (the ordinary rule in tort) or, if later, from the claimant's 'date of knowledge' ie the date on which the claimant knew that his injury was significant, the identity of the defendant or person through whom the defendant is said to be liable, and that the injury was attributable in whole or in part to the act or omission which is stated constitutes the liability of the defendant.

Even where the limitation period has expired for a personal injury or Fatal Accidents Act claim, the court has a discretion to allow the action to proceed.

(4) In tort a cause of action can accrue to a claimant without being aware of it. Examples are where a claimant suffers loss because a document is carelessly drafted, or calculations negligently carried out, or there is physical damage to part of a building he cannot easily see. In such cases the standard limitation period is 6 years. However a claimant may, outside the 6 year period, bring proceedings if he does so within 3 years

of the ‘starting date’ which is the date on which the claimant first had both the knowledge required to bring the claim and the right to bring the claim.

(5) 12 years is the time limit for actions to recover land, but rent due on the land is subject to a 6 year limitation period.

(6) 6 years is the time limit for enforcing a court judgment.

7.40 There are also special rules in the Limitation Act 1980 which: (a) extend the limitation period where the claimant is under a disability, ie is a minor or a protected party, (b) provide that where a defendant acknowledges his liability to pay a debt the cause of action accrues on the date of that acknowledgment, and (c) postpone the start of the limitation period where the action is based on the fraud of the defendant, or any fact relevant to the claimant’s right of action has been deliberately concealed by the defendant or the action is for relief from the consequences of a mistake until the date on which the claimant discovers the fraud, concealment or mistake or could with reasonable diligence have discovered it.

7.41 Litigants should also be aware that where a claim arises out of international carriage, whether by sea, air, road or rail, there are special rules providing rather shorter limitation periods than the standard periods under the Limitation Act 1980. The relevant statutes are incorporating rules agreed by international convention, and these rules also affect the liability of the carrier. It is particularly important that the litigant brings his claim within the convention time limits because the standard approach of these conventions is provide that after a time limit has expired the claimant’s right to compensation is extinguished, not just that his remedy is barred, a substantive limitation period. There is then nothing open to a court to do to assist the prospective litigant.

7.42 Limitation can be a minefield for the unwary. The only safe course, once you know that you have sustained injury or suffered loss, is for you to get on with your claim. Do not sit on your rights. You should be conscious that there is no obligation on a solicitor or party who knows the law to inform you that a limitation period may soon expire. It is not at all edifying, but the authors are aware of cases where a solicitor has kept up an apparently encouraging exchange of correspondence with a prospective litigant, (but without making any formal admission), until a limitation period has expired, and then told him that his claim was now extinguished.

Chapter 8
Statements of Case ("Pleadings")

A. What are pleadings and why are they important?
B. The Statement of Truth
C. How to go about preparing your pleading (1) as Claimant pleading a Claim Form and Particulars of Claim
D. How to go about preparing your pleading (2) as Defendant pleading a Defence (and Counterclaim)
E. How to go about preparing your pleading (3) as Claimant pleading a Reply (and Defence to Counterclaim)
F. Preparing a chronology

Headlines

(1) Statements of Case, or 'pleadings' are formal court documents which set out each party's case. They are important documents. They inform all other parties and the judge what the pleading party will be arguing at trial.

(2) No party is allowed to depart from his pleadings, ie argue a case that is inconsistent with the case set out in his pleading.

(3) Pleadings must be taken very seriously. Any pleading you serve must be verified with a Statement of Truth. If the facts set out in the pleading are wrong you may be guilty of contempt of court and it is likely to affect the judge's view of the your reliability and truthfulness.

(4) Before drafting a pleading you should prepare carefully. A list of things to do as either a Claimant or a Defendant are set out in paragraphs 8.9 and 8.18 below

(5) All pleadings must start with the title of the case and end both with a signed and dated Statement of Truth and your address for service of any subsequent pleading.

General

8.1 Statements of Case under CPR are what used to be called 'pleadings'. The old name has stuck. It is widely known and understood.

8.2 The Statements of Case / Pleadings in frequent use are:

(1) Claim Form and Particulars of Claim (the latter where the particulars of details of the case are not set out in the Claim Form) – served by the Claimant

(2) Defence (and Counterclaim) – served by the Defendant, the counterclaim being added only where the Defendant wishes to make his own claim against the Claimant (*a defendant making a counterclaim should make sure that he has a valid cause of action - chapter 6*)

(3) Reply (and Defence to Counterclaim) – served by the Claimant

(4) (Reply to Defence to Counterclaim) – served by the Defendant

Traditionally there were other pleadings, rejoinders, surrejoinders, rebutters, surrebutters and so on, but they are now passing into antiquity.

8.3 If possible, as a litigant in person, you should obtain advice from a Citizen's Advice Bureau or someone who has experience in court work and show them the documents you have prepared for their comment.

A. What are pleadings and why are they important?

8.4 Pleadings are the formal court documents in which each party to the proceedings sets out his case. They are essential:

(1) so that both parties (or all parties where there are more than two) know the essential details of the case his opponent is going to argue at trial, and

(2) to enable the Judge to know what issues are to be argued and on which decisions will be required in the judgment at the conclusion of the trial.

It is very important that you as a litigant set out your case properly in your pleadings. No litigant may argue a different case at trial than the one he has pleaded; a party may not "depart from his pleadings". So it is essential you plead your case properly. If you find that you need to advance a different case to that you have pleaded you will have to ask for and obtain the court's permission to amend your pleadings. Whether you will allowed to do so will depend on all the relevant circumstances and in particular whether your opponent is or will be significantly prejudiced by your amendment. The earlier you apply to amend the more likely you are to be given permission to amend.

B. The Statement of Truth

8.5 Pleadings must be taken seriously. You should never plead anything which you do not believe to be true. (The days when statements could be made in pleadings purely for tactical purposes are gone.) The CPR achieves this by requiring all pleadings (described in CPR 22.1 as 'statements of case') to be verified by a statement of truth. That means that every pleading must be personally verified by the party serving the pleading by the following statement:

"I believe the facts stated in this (*name of pleading)* **are true."**

This is the 'statement of truth'. It is the almost invariable practice to have the statement of truth at the end of the document being verified. However the CPR do permit the statement of truth to be contained in a separate document provided that document contains the title of the proceedings and claim number and the document being verified is properly identified [CPR 22PD.2 2.3].

8.6 It is permitted for a solicitor or litigation friend to sign the statement of truth [CPR 22.1(6)] but this should only be done where there is a good reason for the litigant to be unable to sign it.

8.7 A pleading which is served without a signed statement of truth is a valid pleading, but it may be struck out by the court [CPR 22.2].

8.8 It is very important that you make sure that the facts contained in your pleadings are accurate. Facts in a pleading verified by a statement of truth are evidence in the case. If a party deliberately lies in a pleading or other document he can be prosecuted for the crime of perjury. If you make a significant mistake you will have to apply to amend the pleading. This may affect the reliability of your evidence in the eyes of the Judge who tries the case.

C. How to go about preparing your pleading (1) as Claimant pleading a Claim Form and Particulars of Claim

8.9 <u>Before you start drafting your pleadings</u>

(1) Decide what cause or causes of action you are going to rely on in your claim against the defendant. Where the defendant is a company make sure you have its name correctly.

(2) Note down the elements of your cause of action, and make sure that you are in a position to prove the facts necessary to make good each element.

(3) List the matters in dispute between you and your opponent. *(This will help you to identify "the issues" in the case, see chapter 6, and the areas you need to concentrate on when preparing your case and deciding which witnesses to call. You may not be able to prepare a final list of issues but if*

the pre-action stage has been conducted properly, see chapter 7, you should have a pretty clear idea of what the issues will be.)

(4) List what you say your opponent did wrongly or failed to do. Do this having regard to what you have to prove to make good your cause of action *(This list will help you to identify the particulars of negligence or breach of contract in the case, and should help you assess how strong your case is.)*

(5) List what you hope to recover as a result of the case (eg the cost of goods; the amount of compensation for damage to goods; the amount of damages for personal injury; recovery of land or goods).

(6) Prepare detailed notes of the facts both that make up the background to your case and which will prove the elements of your cause of action. As part of this exercise you should prepare a chronology setting out all the relevant events (including all important documents) as you consider them to be and any matter which your opponent has raised in pre-action correspondence. See 8.34 below.

(7) From these notes prepare an account of the relevant events in date order out of which your claim arises. Make sure that you cover all the matters in dispute between you and your opponent. This account will form the first draft of your witness statement which you will have to serve in due course.

(8) Collect together all the documents you have relating to the claim, put them in date order and prepare a list of them. Make sure that your account of events includes reference to any important document and is not inconsistent with any such document, unless you are convinced that there is something wrong with the document. *(Collecting your documents together may show you that you do not have all the relevant documents because, for example, letters from a sequence of correspondence are missing, or you do not have an invoice or receipt or all the pages of an invoice or receipt. Where you are missing really important documents you could try writing to your opponent and asking for a copy (see Chapter 7.3 -7.5). If he will not provide a copy or the documents are not so important that you can properly ask for a copy in the pre-action stage you can note the missing documents and make sure you obtain a copy in disclosure, see Chapter 10.)*

(9) If your case will be dependent on evidence given by one or more other witnesses, make sure that you have spoken with them and prepared at least a first draft of a statement which they are confident about and will stand by. *(It is worth remembering that the closer you get to trial the more reluctant some people will be to go to court and give evidence. The sensible litigant obtains signed statements with Statements of Truth from his witnesses early on in the case.)*

(10) Do not rush into starting your case and preparing your pleadings. If you start without proper preparation you may find that things go seriously wrong once the case gets under way. You may feel strongly about the iniquity of your opponent, and it may be that you (or more dangerously a member of your family or close friend) cannot wait to get going against the defendant. Pause. Prepare carefully first. Make sure that you really do have a case worth pursuing.

8.10 Drafting your pleading

(1) Draft the Claim Form by setting out in short form the nature of your claim on Practice Form N1. You must use Form N1 for a Part 7 claim (Form N208 for a Part 8 claim) [CPR 7APD.3.1], and this form will help you with the title of the proceedings. Every pleading *must* start with the title of the proceedings. The examples in Appendix X show you how to set out the title.

(2) Draft the Particulars of Claim by setting out, in summary form, the important facts and features of your case making sure that you include all the facts necessary to prove each element which goes to make up your cause of action. *If you do not plead all facts necessary to prove your cause of action your claim may be struck out 'for disclosing no cause of action'.*

(3) Make sure that the pleading accurately sets out your case, taking into account all the material you have collected under (2) – (9) above.

8.11 It is permissible to include your Particulars of Claim in your Claim Form, but although the CPR 16PD.3 state that the particulars of claim should, if practicable, be set out in the Claim Form the advice must always be only to use the Claim Form to contain your Particulars of Claim if suing for a specific sum of money and you can set out your claim in a few sentences. For example, a claim to recover a debt may simply read *"The Claimant's claim is for money due for plumbing services as set out in the attached Invoices 123 and 124 dated 3 June and 28 June 2012 totalling £43,450".* In all other cases state in the Claim Form that the Particulars of Claim will follow, and prepare a separate document.

8.12 In drafting your Particulars of Claim make sure you start with the title of the case and that you give your address for service [CPR 16PD.3.8]. CPR PD16 paragraphs 4 to 9 specify matters which must be included in (a) personal injury claims, (b) fatal accidents act claims, (c) hire purchase claims, (d) claims relating to land, and (e) claims for money expressed in a foreign currency. Make sure you cover the points raised. Two further points:

(1) if the claim is to recover goods you must include a statement of the value of the goods in question;

(2) there are special rules relating to contract claims. These are

(a) if you are relying on a written contract you must identify that contract in your pleading and attach a copy of the contract to your pleading;

(b) if you are relying on an oral contract your Particulars of Claim must set out the contractual words used and state: (i) by whom, (ii) to whom, (iii) when, and (iv) where these words were spoken. *You do not have to give the words verbatim or as in speech; the gist is sufficient.*

(c) if you are relying on a contract which has been entered into by conduct your Particulars of Claim must specify the conduct relied on and state (i) by whom, (ii) when, and (iii) where the acts constituting the conduct were done.

8.13 Always use short numbered paragraphs. The document should be typed. You will presumably wish to claim interest on any sum awarded and if so you must say so specifically in the Particulars of Claim. CPR 16.4 contains mandatory rules about pleading interest and certain types of damage (exemplary, aggravated or provisional – which, incidentally, are very rare in practice) and these need to be followed.

8.14 Provided you set out your case on all the facts necessary to prove your claim your pleading will pass muster. Make sure that the facts are set out in chronological order and that you do no more than summarise them. The full details of the relevant facts will be set out later in your witness statements. The old adage 'Facts not law; Facts not evidence' remains as true today as ever. It means that you do not have to set out the legal basis of your claim in your pleading, simply the facts that go to make up your claim. Further, you do not set out the evidence, ie the details, just the basic facts that go to make up your claim.

8.15 Do not expect to get it right first time. Pleadings do need to be worked on. Many people (even barristers) can occasionally get 'writer's block'. A blank sheet of paper can be frightening. The answer is usually to get writing, even if you think (or are sure) that you may later have to rework your text. If your Particulars of Claim becomes lengthy and a little discursive, go through what you have written and ask: 'does this bit really have to go in either to prove an element of my cause of action or to get across the essential nature of my claim?'. If it does not, cross it out.

8.16 Even if there are mistakes of a technical nature in your pleading as served you should not worry about it. There is a myth, widely held, that lawyers are all too keen to take technical points and judges are prepared to determine disputes without having a trial on the merits. That may have been the case centuries ago but not today. Professional lawyers regularly make mistakes in their pleadings. Mistakes may have to be corrected (where there is a mandatory rule to comply with) but few judges will be difficult about it. When a Judge says that it is

important that the pleading is correct he means that it is important that the facts in a pleading are correct. This is not a technical matter, it is an issue of credibility. If a litigant changes his account of the relevant facts he may find that he is not believed.

8.17 It is very difficult to give general advice. Below is a suggested general format which you will need to adapt to the particular facts of your claim.

(1) State the relationship between the Claimant and the Defendant . For example *("The Defendant is a builder who agreed to carry out work to the Claimant's home at 25 Broad Road, Newtown.")*

(2) Set out in chronological order the dates and details of all the major events so as to show the course of events and in what circumstances the Defendant caused the damage or loss. This may take several short numbered paragraphs. So if the claim is for failure to stick to the terms of an agreement then it should state the terms of the original agreement and any changes or alterations to the work to be done under the agreement or any later changes or variations to that original agreement as they occurred. It may also include details of important conversations between the Claimant and the Defendant (particularly any which altered the agreement). It should also set out the details of any important written documents (such as when it was written, by whom, to whom and in what terms).

(3) Set out in short numbered sentences what the Defendant did wrongly or failed to do. This may involve setting out the different ways in which the Defendant was negligent (careless) in a claim in tort or what it was that he failed to do which he should have done in a claim in contract. This may well involve setting out a list of individual instances of breach of duty of care or breach of contract such as bad workmanship in different parts of the work or a list of damage caused by the work he did.

(4) Set out in detail what losses you have suffered or are likely to suffer in the future. In a claim for damage to personal property (ie property other than land or buildings) this may be the cost of repair or replacement. In a claim for poor workmanship to a house, state what it has already cost and or is likely to cost in the future to put right the poor work. Refer to and give details of any invoices for sums paid or professional estimates for what it has or will cost. If you do not have a professional estimate you will have to give your own, but remember in this instance that while your own estimate may be sufficient for pleading purposes it will rarely be sufficient for the purposes of obtaining an award of damages.

(5) At the conclusion of the Particulars of Claim have a paragraph setting out what it is that you are claiming. For example

"The Claimant therefore claims:-

(1) Damages to be assessed (limited to £100,000), or
The sum of £50,000, or
A declaration (of a legal right) (eg) that the Claimant is entitled to use the right of way marked in blue on the attached plan.
(2) Interest pursuant to statute
(3) Costs"

(6) Finally you must include the statement of truth, signed and dated and the address at which you will accept service of documents from the defendant.

D. How to go about preparing your pleading (2) as Defendant pleading a Defence (and Counterclaim)

8.18 First carry out preparation as suggested at 8.9 above:

(i) Work out the cause or causes of action which form the basis of the claim against you, and note down the elements of the Claimant's cause of action, (see Appendix Y). Show that the facts are such that the Claimant's case must fail on at least one element of that cause of action. *You may find that you have to admit part of the claim.*

(ii) List all the matters in dispute between you and your opponent (*see 8.9(3) above).*

(iii) Prepare detailed notes of the facts both that make up the background to your case and which will disprove one or more elements of your opponent's cause of action.

(iv) From these notes prepare an account of the relevant events out of which your opponent's claim arises. Make sure that you cover all the matters in dispute between you and your opponent. This account will form the first draft of your witness statement which you will have to serve in due course.

(v) Check that you have copies of any documents referred to in the Particulars of Claim and ask for copies of any document you do not have. Collect together all the documents you have relating to the claim, put them in date order and prepare a list of them. Make sure that your account of events includes reference to any important document and is not inconsistent with any such document, unless you are convinced that there is something wrong with the document.

(vi) If your defence will be dependent on evidence given by one or more other witnesses, make sure that you have spoken with them and prepared at least a first draft of a statement which they are confident about and will stand by.

(vii) If you wish to make a counterclaim against the claimant check through the points made in 8.9 above to make sure you have not missed anything.

8.19 Remember there is a strict time limit to comply with to avoid judgment being entered against the Defendant by default. Do not delay your work, however irritated you may be that you are being compelled to do the work at all. But also remember that you can ask for more time. In the first instance ask your opponent to agree to allow you more time. Do this by writing a letter asking to be given until a specified date to serve your defence, in the expectation that you will get a letter back which can be shown to the court later if necessary. If your opponent will not agree to give you more time you should apply to the court, very promptly, to ask for more time. An application to the court must be made using the appropriate form (N244 - see paragraph 13.13). If all you are asking for is 14 or 21 additional days it will usually be sufficient that you state simply that you need the time. If you want a longer period you should explain in your application why you need the time. If the Claimant has started proceedings without complying with a pre-action protocol or sending a proper letter of claim (see chapter 7) spell this out clearly for this will almost certainly justify an extension of several weeks for your defence.

8.20 If you want to make a counterclaim against the Claimant you may do so in the same pleading as the defence. There is a convenience angle here, see below. But it is not essential that a counterclaim is served with the defence and you should not delay your defence and risk having judgment entered against you in default because you are not ready to plead your counterclaim.

8.21 Pleading the defence

You should plead your defence by reference to the numbered paragraphs of the Particulars of Claim. If you have a litigant in person as an opponent who has set out a screed of text without numbered paragraphs this will be very irritating (for the Judge as well as yourself). It is suggested that you make a copy of the Particulars of Claim, divide it up into convenient paragraphs to which you plead, and serve a copy of your annotations with your defence.

8.22 Go carefully through each numbered paragraph of the Particulars of Claim and plead to it, either by admitting it in full, or denying it in full, or giving a qualified admission. Be sensible. Do not deny things which you know are correct, especially where they are merely descriptive. So taking the example in 8.17(1) above, if you are a builder simply plead: Paragraph 1 of the Particulars of Claim is admitted.

8.23 Where there is a paragraph in the Particulars of Claim which gives an account of events and you agree with part of what is said but not all of it, you may adopt a formula such as "Save that [the Defendant attended the site on the day in question

to inspect the building but did not gain access to the roof space] paragraph 2 of the Particulars of Claim is admitted.

8.24 *An important rule.* It is a rule of pleading that every fact set out in the Particulars of Claim which is not denied in the Defence is deemed (ie taken) to be admitted. It is therefore important that you deny any assertion of fact which you do not accept to be true. This may be done fact by fact, but that can become tedious. You can deny several facts in any particular paragraph by denying the whole paragraph or by using a formula such as "Although the Defendant (or, if you prefer, "I") did visit the premises on 3 May 2012 and saw and spoke to the Claimant's wife all the other facts in paragraph 2 of the Particulars of Claim are denied". Many pleaders play safe by adding to the end of the defence a formula such as:

> "Except as is expressly admitted above all facts and matters alleged in the Particulars of Claim are denied".

8.25 It is essential that the Defence denies the paragraph or paragraphs of the Particulars of Claim which plead that the Defendant has acted in breach of contract or has been negligent or whatever arises on the Claimant's cause of action. Failure to do so may result in the Claimant applying for judgment. In some cases the Defence relied on by the Defendant involves proving certain facts. Those facts must be pleaded.

8.26 *Pleading a counterclaim.* A counterclaim is a separate claim in its own right. You can plead it in the same document as a defence, using the title 'Defence and Counterclaim'. Plead the Defence first. Then, underneath the sub-heading 'Counterclaim' plead the counterclaim. All the facts and matters necessary to make good the cause of action in the counterclaim must be pleaded, and a counterclaim which does not plead all necessary facts may be struck out for disclosing no cause of action. However if you have pleaded important facts in your defence, eg a contract on which you wish to bring your counterclaim, you may begin your counterclaim by pleading: 'The Defendant repeats his defence' and you do not have to set these facts out again. End the counterclaim by setting out the claim that is being made, for example, "And the Defendant Counterclaims Damages, and Interest and Costs" and then verify the pleading with a Statement of Truth.

8.27 *Defence by way of set-off.* Set-off can be a highly difficult technical subject, but the easiest and most common form of set-off can be usefully mentioned here. Where each party to a contract has separate claims against the other arising out of that contract these separate claims can be set off against each other. So for example where a householder contracts with a builder to carry out work for a specific price and the builder does the work the householder will (usually) be liable to pay the price for the works. But if the builder does not do all the work competently and the householder has to engage another builder to rectify the works the householder will have a cross-claim for the cost of the rectification works. If the builder sues for the balance of the price the householder may

counterclaim the cost of the rectification work and use that counterclaim as a defence either to reduce the sum due to the builder or to extinguish it altogether. It is necessary however to plead the defence by way of set off in the defence. A formula such as 'the Defendant sets off his counterclaim' will be sufficient.

E. How to go about preparing your pleading (3) as Claimant pleading a Reply (and Defence to Counterclaim)

8.28 It is rarely necessary to plead a Reply. The old rule still applies, namely that a Reply is only necessary if the Claimant wishes to 'confess and avoid'. This is an old-fashioned way of saying that if the Claimant accepts that the Defence raises a defence which is, or might be, correct but which the Claimant asserts he has an answer to if it is correct, the Claimant should plead the facts which answer the Defence in a Reply. This makes it clear that the Claimant will rely on these additional facts in order to defeat the defence.

8.29 Some litigants use a Reply to put forward additional facts or arguments which may counter matters raised in the Defence even though there is no admission of anything asserted in the Defence. Such a pleading will be purely tactical, but so long as it is concise and to the point the court will not object to it.

8.30 There is no need for you as a Claimant to deny assertions of fact made in a defence. However if you are also pleading a Defence to Counterclaim with your Reply the normal rule applies as to facts being deemed to be true if not expressly denied, so make sure you deny any fact pleaded in the Counterclaim with which you do not agree.

8.31 If you are a Claimant and your opponent makes a counterclaim, you must make sure that you plead a defence, and in doing so you must make sure that you deny every fact pleaded in the counterclaim with which you do not agree. There will almost certainly be time limits to take into account. If you cannot plead your Defence to Counterclaim within the time limit, ask your opponent for more time, and if he refuses make an application to the court.

8.32 The same advice applies to a Defendant drafting a Reply to Defence to Counterclaim as to a Claimant drafting a Reply.

8.33 As with any other pleading (Statement of Case) a Reply (and) a Defence to Counterclaim, and a Reply to Defence to Counterclaim must be verified by a Statement of Truth. All pleadings should be dated and give the service address of the party serving them.

F. Preparing a chronology

8.34 If you are to prepare your case properly and present your arguments to best advantage at trial you should never take anything for granted. Thorough preparation can be tedious and can seem unnecessary, particularly as you will have lived through the relevant events yourself. But if the case is worth fighting at all, it is worth doing well, and part of doing it well is to check your case as best you can through the eyes of someone who comes to it afresh, as the judge will in due course.

8.35 This is rarely straightforward, but one very good way to ensure that you look at your case as objectively as possible is to prepare a detailed chronology. By that is meant set out all the events that form part of the dispute in chronological order so that you can see (or remind yourself) how they unfurled at the time. It is often the position that a good chronology will put events in perspective and will greatly assist you both to see where there are gaps in your evidence and to present your case to best advantage.

8.36 There is no one way to prepare a helpful chronology. But unless an alternative approach comments itself it is suggested that you use three columns: (1) date, (2) event, (3) reference, ie where you obtain the information for the first two columns. This may be from a document (whether a letter, a diary entry, or other document such as invoice or delivery note), or from the recollection of yourself or a witness, something that will form part of a witness statement in due course.

8.37 As the case progresses you will almost certainly need to add to your chronology. You should revisit your chronology after disclosure when you have your opponent's documents to hand, as you prepare your witness statements, and when you have received your opponent's witness statements.

Attendance notes

8.38 Another, unrelated, practical tip in conducting litigation is to keep attendance notes. When you go to court for any hearing do keep a careful note of what is being said. You will see any barrister or solicitor opponent keeping a note, for it may be useful later on to have an aide memoire as to what happened at the hearing. Similarly with telephone calls. As you speak on the phone to a member of the court staff, or your opponent, keep a note of the main elements of the conversation. You never know when it might be important for you to have a contemporary record of what was said. You can be sure that the solicitor at the other end of the phone will be jotting down notes as you speak.

Chapter 9
Default judgment and Sanctions for non-compliance

A. Default Judgment
B. Setting aside a Default Judgment
C. Sanctions and relief from sanctions

Headlines

(1) Litigants who do not comply with the time limits set by the Rules or in directions given by Court Order are likely to find that judgment is ordered against them or a sanction is imposed which may harm their case at trial.

(2) If a Defendant fails to respond to service of the Claim Form or Particulars of Claim, the Claimant may obtain judgment against him 'in default' ie without having to have a trial.

(3) All Court Orders and directions which set a date and time within which the party must carry out a particular step in the action should be complied with. Failure to comply will usually necessitate an application to the Court which will almost certainly result in the party being ordered to pay costs.

(4) Although the Court will often give a litigant more time to take any particular step in the action where there is reason to do so, there is no guarantee that the Court will extend a time limit. The Court is unlikely to extend time twice without imposing a sanction.

(5) There are a wide range of sanctions available to the Court to impose on a litigant who fails to comply with a Court Order, or with any provision of the CPR or a practice direction.

(6) A litigant may apply to set aside a default judgment or to obtain relief from a sanction. However any such application must be made promptly. If there is any delay in making the application a good reason must be given for the delay.

(7) An application to set aside a default judgment or for relief from sanction must be supported by a witness statement verified by a statement of truth. The witness statement should explain why the litigant has failed to comply with the relevant Rule, Order or Practice Direction and give reasons why the judgment should be set aside or relief given from the sanction. Where the litigant is applying to set aside a default judgment the witness statement should also set out the nature of the litigant's defence and show that he has a defence worth arguing over at trial.

(8) If you realise in advance that you are unlikely to be able to meet a time limit, you should apply to the Court as soon as possible and request an extension of time. Do not wait until the time limit passes.

A. Default Judgment

9.1 A 'Default Judgment' is a judgment without a trial or consideration of merits where a defendant has either (a) failed to file an acknowledgment of service or (b) has failed to file a defence [CPR 12.1]. Where the claim is for a specific sum of money the Claimant will usually be able to enter judgment for the sum claimed (and interest). If the claim is for an unspecified amount (eg "damages"), the judgment is final as to the Defendant's liability to pay but the amount to be paid will be determined by the Court at a later hearing (at which the Defendant may present evidence).

9.2 A judgment may be entered in default:

(1) if the Defendant fails to file an acknowledgement of service within the time limit (14 days after service; CPR Pt.10.3) or
(2) if, having filed an acknowledgement of service, the Defendant fails to file a Defence within the time limit (28 days from service of the Particulars of Claim, CPR Pt 15.4)

9.3 A Default Judgment may be obtained where the claim is for:

(1) a specified sum of money;
(2) an amount of money to be decided by the court;
(3) delivery of goods where the claim form gives the Defendant the alternative of paying their value;
(4) any combination of the above remedies; or
(5) where the claim is for one or more of the above remedies together with other remedies and the Claimant abandons his claims for other remedies in his request for judgment.

9.4 A Default Judgment may not be obtained in certain cases, such as:

(1) a claim for delivery of goods under an agreement regulated by the Consumer Credit Act 1974;
(2) a claim commenced under the Part 8 procedure (see chapter 7);
(3) mortgage and possession of property claims;
(4) if the Defendant has paid the whole claim or has filed an admission of liability to pay in full but has asked for time to pay;
(5) if the Defendant has applied to have the Claimant's Particulars of Claim struck out under CPR 3.4 or for summary judgment under CPR 29.

9.5 The Claimant must apply for a default judgment. The court will not order judgment without an application. A Claimant may obtain a default judgment by filing a request in Form N205 or N227.

B. Setting aside a Default Judgment (CPR Part 13)

9.6 The Court **must** set aside a default judgment if it can be shown that the necessary conditions in CPR 12 were not complied with when the judgment was obtained.

9.7 In all other cases the Court **may** set aside or vary the default judgment. However, the Court will only do so where:-

(1) the application is made promptly (ie as soon as reasonably possible after the Defendant becomes aware of the default judgment) **and**,

(2) **Either**
(a) the Defendant has a real prospect of successfully defending all (or part of) the claim, or

(b) there is some other good reason why the judgment should be set aside or varied, or the defendant should be allowed to defend the claim. [CPR 13.3]

9.8 If you need to apply to set aside a default judgment your application must be supported by a detailed witness statement, signed with a statement of truth.

This witness statement should contain full details of :-

(1) when and how you became aware of the proceedings,

(2) what actions you took to prepare your defence after you became aware of the claim,

(3) why you failed to respond to the claim in time,

(4) when and how you first became aware of the default judgment,

(5) what you then did and, if there is any delay in making your application, you must give detailed reasons for that delay, and

(6) full details of the nature of your defence to the claim (this should include as much information as possible to enable the Court to judge whether your defence has reasonable prospects of succeeding in full or, at least, in part). It would be sensible for you to prepare a draft Defence (ie the pleading which you would file if your application were successful), and attach it to your witness statement.

9.9 If the Court sets aside a default judgment, it may do so "on terms", such as the payment of costs, or the payment into Court of a sum of money pending the final hearing. The Court will usually give directions as to the future conduct of the proceedings.

C. Sanctions and relief from sanctions

9.10 Quite apart from default judgments the court may impose sanctions against any party for non-compliance with Court Orders.

9.11 The Court enforces its control of the proceedings by ordering that particular directions shall be carried out by a specified date and time. The Courts place particular importance on such time limits as they impose a strict timetable which progresses the case to the eventual trial. As a result the parties cannot alter or amend the timetable to suit themselves. They must obtain the approval of the Court for any amendment.

9.12 It is important that you take directions given in a Court Order seriously. If you are unlikely to be able to meet a time limit you should apply to the Court (in advance of the date) for an extension of time setting out full reasons in a separate statement.

9.13 If you fail to meet a time limit your opponent may apply to the Court for an order requiring you to comply, and if you fail to do so, imposing a sanction for non-compliance, see below. This applies equally to your opponent, against whom you may apply for an order with a sanction (an 'unless order').

9.14 Your or your opponent's application may be made for an order without a hearing or, in more serious cases, with a hearing. In either case the party in default will almost certainly be ordered to pay the costs of the application, even if he has complied with the direction by the time of the hearing of the application, although in such a case there will be no sanction except in extreme cases. Where the party in default has not complied with the direction by the time of the hearing of the application, the Court is likely to order that unless he complies with the direction by a certain date he will suffer a sanction. These Orders are often referred to as 'unless' orders, eg "unless the Defendant serves his witness statements by [date] he be precluded from adducing evidence on any issue relating to liability".

9.15 The sanction may be quite disastrous for the party in default. Examples of sanctions which may be imposed on a defaulting party are:-

(a) being precluded from calling evidence on a particular matter at trial;

(b) being precluded from calling a particular witness;

(c) being prevented from arguing a specific issue;

(d) having part of his claim or defence struck out;

(e) being ordered to pay a sum of money into Court to be held until the final outcome of the case;

(f) having the whole of a claim or the whole of a defence struck out so that the defaulting party loses the action; or

(g) having to pay any costs his opponent has incurred as a result of his breach of the order.

9.16 A party against whom an Order is made imposing a sanction, whether the sanction is imposed directly or by way of an "unless" order may apply to the Court for relief from the sanction.

The relief may simply be to extend the time in which to comply with the order or to request that the order should be removed entirely because it is impossible to comply with it or because it was an unreasonable sanction to impose in the particular circumstances of the case. Alternatively the party might apply to the court for an order that the particular sanction should no longer be imposed because he has complied with the direction, albeit outside the time limit (on the grounds that the sanction imposes a disproportionate penalty on him).

9.17 Any application for relief against sanctions should be made as soon as possible. It must be accompanied by a detailed witness statement [CPR3.9(2)] verified by a statement of truth [CPR 22]. The witness statement should set out precisely (and in chronological order) what steps the party took to comply with the order and why he failed, what difficulties and problems he encountered and the reason for any delay in making the application for relief. In effect, the party has to satisfy the court that he has tried to comply with the order but has been frustrated by circumstances and matters beyond his control and should therefore not be penalised by the sanction. Any documents which support the party's witness statement (such as a medical note) should be copied, referred to in the statement, and be exhibited to the statement.

9.18 CPR 3.9 ("Relief from sanctions") requires the court hearing any application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order to consider "all the circumstances of the case, so as to enable it to deal justly with the application, including the need –

(a) for litigation to be conducted efficiently and at proportionate cost; and
(b) to enforce compliance with rules, practice directions and orders."

This provision places some emphasis on the need to comply with the substance and the time limits in any directions which are given in the course of the court management of the case.

9.19 Before the 1 April 2013 the rule governing relief from sanctions required the court to have regard in particular to the following nine matters:

(1) the interests of the administration of justice;
(2) whether the application for relief has been made promptly;
(3) whether the failure to comply was intentional;
(4) whether there is a good explanation for the failure;
(5) the extent to which the party in default has complied with other rules, practice directions, court orders and any relevant protocol;
(6) whether the failure to comply was caused by the party or his legal representatives;
(7) whether the trial date or the likely trial date can still be met if relief is granted;
(8) the effect which the failure to comply had on each party; and
(9) the effect which the granting of relief would have on each party.

Although these matters no longer form part of the rule, some if not all are likely to be relevant in any application for relief against sanctions. They provide a useful checklist of matters which you may wish to address should you have to apply for relief from sanctions, or if you are opposing your opponents application for relief.

9.20 All the matters in the above list are self-explanatory, except possibly '(a) the interests of the administration of justice'. The primary interest in the administration of justice is that each party should be able to present all the evidence he reasonably wishes to adduce in order to support his claim or his defence. To that extent the court will be reluctant to leave a party subject to a sanction in a position where he cannot present his case as he would wish. But the interests of the administration of justice also require litigants to comply with court orders, and not to take up the time of the court which could be better spent on more deserving cases.

Chapter 10
Disclosure and Inspection of Documents

A. Disclosure of documents
B. Procedure for standard disclosure
C. Take your duty to disclose seriously
D. Inspection of documents
E. Directions for disclosure

Headlines

(1) Every litigant is under a duty to disclose documents relating to the case. This is an important duty and it continues right through to the end of the litigation.

(2) A 'document' is widely defined. It includes anything on which information is recorded, whether in paper, electronic, audio or visual form.

(3) The Rules divide disclosure into 'standard' and 'specific'. There is a complex definition of standard disclosure. This definition is only important where there are a great many documents. In all other cases litigants should follow the simple rule that all documents relevant to the issues in the cases must be disclosed, including documents which the litigant fears may harm his case.

(4) In order to give disclosure a litigant must use Form N265. A form may be obtained from a law stationer or online.

(5) Take your obligation to give disclosure seriously. Make sure you find all your documents and resist any temptation to keep documents back.

(6) Each document to be disclosed must be identified with a concise description, eg 'letter from C to D 12.04.11' or 'Receipt from X Ltd to C dated 17.09.10'.

(7) Every list of documents must include a disclosure statement, duly completed, see Form N265.

(8) A litigant is entitled to inspect (ie view physically) any document disclosed by his opponent, and to ask for a copy. However in most cases there is no need to inspect the actual document and litigants will usually simply ask for copies of individual documents disclosed by their opponents. All copies must be paid for at a reasonable charge, say 25p per sheet.

(9) It is open to a litigant to apply for an order for specific disclosure where he considers that his opponent has not disclosed one or more documents which should have been disclosed or has not conducted a proper search for documents. A litigant may also apply for an Order for Third Party Disclosure requiring a person who is not a party to the proceedings but who holds relevant documents gives disclosure of those documents,

A. Disclosure of documents

10.1 This chapter covers the disclosure and inspection of documents. This is an essential part of the litigation process designed to ensure that all relevant documents are before the court at the trial of the action, and, before that, all parties to the litigation are able to assess the strengths and weaknesses of their case in the light of all the documentation, and are able to take account of the documentation when preparing their case for trial. The detailed rules about disclosure are in CPR Part 31.

10.2 Every litigant owes a duty to give disclosure, and this duty must be taken seriously. It is a duty that continues right through to the conclusion of the proceedings [CPR 31.11]. Accordingly if a relevant document comes to light after a litigant has served his list of documents (see below), even during the course of the trial, that document must be disclosed.

10.3 Strictly, disclosure of a document means no more than stating that the document exists or has existed. [CPR 31.2]. Once a party has disclosed a document all other parties have a right to inspect that document except where it no longer exists or is privileged from inspection. [CPR 31.3] However lawyers often refer compendiously to 'disclosure' as meaning both stating the existence of a document and allowing the other parties to inspect the original and or provide copies of the document.

10.4 A 'document' means anything in which information of any description is recorded [CPR 31.4]. This includes: (i) paper documents (letters, invoices, bills, business books, medical records, employment records etc); (ii) electronic 'documents' where information is stored in electronic form (all forms of databases, e-mails, voicemails, mobile phones, memory sticks etc); and (iii) audio or visual recordings (audio, video and CCTV recordings, photographs, mobile phone photos or videos etc). Any material which contains information, which is capable of being retrieved, will be a 'document' for the purposes of litigation.

10.5 Litigants in person should proceed on the general principle that all parties to the litigation are required to disclose all documents which are or are likely to be relevant to the issues in the case.

10.6 However, there are cases where the extent of the documentation is such that disclosure does drive up litigation costs. In all multi-track claims, other than claims for personal injury, the parties are now required to file and serve a discovery report, verified by a statement of truth, not less than 14 days before the first Case Management Conference [CPR 31.5(3)]. This report should:-

(a) describe briefly what documents exist or may exist that are or may be relevant to the matters in issue in the case;
(b) describe where and with whom those documents are or may be located;
(c) in the case of electronic documents state how they are stored;

(d) estimate the broad range of costs that could be involved in giving standard disclosure in the case, including the costs of searching for and disclosing any electronically stored documents;
(e) states whether the party wishes to agree the scope of disclosure with his opponent or have the court make the disclosure order it considers appropriate.

Additionally, not less than seven days before the first Case Management Conference (and on any other occasion the court may direct) the parties must "at a meeting or by telephone, discuss and seek to agree a proposal in relation to disclosure that meets the overriding objective" [CPR 31.5(5)].

10.7 With the disclosure reports duly filed, and after the parties have discussed the possibility of agreeing a disclosure proposal, the court is then to decide what disclosure should be given [CPR 31.5(7)]. The court may dispense with disclosure, order disclosure only of documents on which the party relies, make an issue based disclosure order, order standard disclosure or make any other order the court considers appropriate.

10.8 In the large majority of county court multi-track cases the introduction of the disclosure report and a disclosure discussion, let alone the time taken at a Case Management Conference considering precisely what order for disclosure should be made, would appear to represent a sledgehammer to crack a nut, and that assuming the nut exists at all. There will be relatively few cases where the costs incurred in providing standard disclosure warrant the expense of preparing disclosure reports, holding a meeting or telephone conversation to consider a disclosure proposal, and holding a Case Management Conference or spending longer at such a conference. These are requirements that will place a considerable additional strain on a litigant in person, and will, in the large majority of cases, serve to drive up costs. But the rules are there and have to be complied with. Unless you are a litigant in a case involving a large number of documents (a thousand or more) the best advice is to prepare for standard disclosure, tell the court that this is what you are doing, and agree with your opponent to give standard disclosure (see 10.7).

10.9 The CPR divides disclosure into (1) "Standard Disclosure" and (2) "Specific Disclosure", and in the first instance, despite the changes in the rules referred to above, the Court will usually make an order for 'Standard Disclosure' [CPR 31.6]. Such an order requires each party to disclose:

(1) the documents on which he relies; and

(2) the documents which –
  (a) adversely affect his own case;
  (b) adversely affect another party's case; or
  (c) support another party's case; and

(3) the documents which he is required to disclose by any relevant practice direction.

This is all potentially complicated, and is set out in the text because the expression 'Standard Disclosure' may well be used by the Judge giving directions, although it is not necessary for the Judge to use this expression; an order to give disclosure is an order to give standard disclosure unless the court directs otherwise [CPR 31.5]. However, the best advice for a litigant in person is at paragraph 10.4; ie disclose all documents that have any relevance to the issues in the case. This was the Rule before 1998. By way of short explanation, the Rules relating to disclosure changed in 1998 to take account of the fact that, in a tiny percentage of all claims issued in the courts, disclosure was a very extensive and expensive operation involving thousands of documents and vast solicitors' bills. If a litigant in person's case involves sufficient numbers of documents to engage the change in the Rules he really will have to seek legal advice.

10.10 "Specific Disclosure" is where the court orders the litigant to disclose particular documents or documents within a particular class, or carry out a particular search for documents which are then to be disclosed [CPR 31.12]. The documents, or class of documents, to be disclosed or search to be undertaken will be spelled out in the order. If it is not clear to the litigant what is required of him he should ask for guidance. Ignoring the order is likely to land the litigant in hot water.

B. Procedure for [standard] disclosure

10.11 There is a procedure for disclosure set out in the Rules [CPR 31.10]. It requires the use of a form, Form N265. This form helpfully guides the litigant through the procedure, which is that:

(1) the litigant must make a list of documents in Form N265, and serve this list on every other party;

(2) the list should set out the documents in 'a convenient order' and must identify each document as concisely as possible;

(3) the list must indicate those documents which the litigant claims are privileged from inspection;

(4) the list must indicate those documents which are no longer in the litigant's control and what has happened to those documents; and

(5) the list must include a disclosure statement.

10.12 Before considering these five points it may be noted that the Rules do allow for the parties to agree in writing not to disclose documents without making a list and without making a disclosure statement [CPR 31.10(8)]. Where the case involves only a few documents, and the litigant can be confident that the opposing party does not have any documents which would help his case or harm his opponent's case, it is sensible to take advantage of this Rule. Each party can agree in writing simply to provide copies of their documents to the

other party, or, indeed, in the simplest of cases, dispense with disclosure altogether. This can save time and expense. But before agreeing not to go through the disclosure process the litigant should be absolutely sure that his opposite number is not avoiding his responsibilities to disclose documents which will harm his case or help the other litigant's case. In any case where there are relevant documents, particularly documents contemporary to events which are in dispute, disclosure is an extremely important tool in helping the Judge get to truth of the matter.

10.13 Some brief comments on the five matters in paragraph 10.11:

(1) Form N265 must be used. The Rule is mandatory. When giving standard disclosure a party is required to make a reasonable search for relevant documents. What is reasonable will depend on the facts in the case and circumstances. Factors relevant in deciding what is reasonable, will include the number of documents, the nature of the proceedings, how easy or expensive it is to retrieve a particular document, and the significance of documents which may be located during the search.

(2) What order is 'convenient' will depend on the nature of the case. It is usually obvious, but if it is not, the safest course is to list every document in chronological order. A 'concise description' means just that. For example 'letter from C to D 12.04.11' or 'invoice from D 27.03.09'. A litigant in person with a solicitor opponent may find that the solicitor takes short cuts here, eg "correspondence between the parties .. various". This practice is widespread. It is convenient to the solicitor who does not have to do his work properly, and in many cases (it has to be accepted) does not much matter. The solicitor will state, correctly, that it saves costs. But it does not comply with the Rules, and there will be occasions when it is important for the court to be able to ascertain what documents a particular litigant has disclosed.

(3) Documents which are 'privileged' need not be disclosed. Privilege is a complicated subject, but essentially all communications with legal advisers for the purpose of obtaining advice or in connection with litigation are privileged. Privilege can be 'waived'. This means that if a privileged document is relied on (rather than simply referred to) in a statement of case or witness statement, or in the course of evidence or argument in open court, the court may require that document (and very possibly other documents connected to that document) to be disclosed.

(4) Sometime a litigant cannot put his hands on a document, either because he cannot find it or he has passed it on to someone else. Where the 'someone else' is a person from whom the litigant can get it back, (eg a professional adviser, or partner) the document is under the litigant's 'control' and he must recover and disclose the document. Where the litigant cannot retrieve or find a document he must nevertheless include it in his list and state that he no longer has it under his control. It is very important that litigants do list such documents. Missing documents which have not been referred to in the list of documents can readily give

rise to suspicion of misbehaviour, and, indeed such suspicions may be well founded. However where the litigant has genuinely mislaid a document and is being accused by his opponent of misbehaviour it will look much better for the litigant that he has listed the document as missing in his list of documents than if he says for the first time that he no longer has it while giving evidence in the witness box.

(5) The disclosure statement is a statement by the litigant making the list of documents which: (a) sets out the extent of the search he has undertaken to locate documents, (b) certifies that he understands his duty to disclose documents, and (c) certifies that to the best of his knowledge he has carried out that duty. Form N265 guides the litigant through this process.

10.14 *Copies.* A litigant need not disclose more than one copy of a document. [CPR 31.9]. However if any copy of a document has been marked up (whether by adding writing or obliterating text) that copy should be treated as a separate document and disclosed separately, eg 'letter from C to D 12.04.11 with manuscript additions'.

C. Take your duty to disclose seriously

10.15 Do make sure that you take your duty to disclose seriously. Two points here. First, do think hard where relevant documents may be and look for them properly. Do not forget your personal diary, if you have one, or your engagements diary at work. Producing documents late in the day can often look suspicious however innocent the initial failure to disclose them. Secondly, resist any temptation you may have to keep back or hide documents. The chances are high that at some point during the trial the fact, or even suspicion, that you have failed to disclose documents you should have disclosed will arise. Few documents exist in a vacuum. When the whole case comes together at trial, if not before, the fact that there are gaps in the documentation is likely to become apparent. The effect on the judge's view of your reliability for failing to disclose the document when you should have done may be very serious indeed. It might even cost you the case.

10.16 Neither should you ever ignore your continuing duty to make disclosure of documents which come into your possession after you have made your list. A piece of forgetfulness on your part may be turned by your opponent into a serious criticism with a suggestion of impropriety which may harm your case.

10.17 The court may at any point in the proceedings give directions for disclosure or additional disclosure [CPR 31.5(8)]. You may find yourself having to revisit your disclosure statement (see 10.13(5) above) and search for more documents. Alternatively, if you think that your opponent is not being entirely frank with his disclosure, you can always ask the court for a further order requiring your opponent to make good his defaults.

D. Inspection of documents

10.18 After a litigant has served his list of documents his opponent or opponents have a right to inspect all documents on the list for which privilege is not claimed. 'Inspect' means just that, looking at the document in question. A litigant who wishes to inspect his opponent's documents must give written notice to the opponent of his wish, and the opponent must allow inspection not more than 7 days after the date on which he receives the notice. It is for the litigants to decide where inspection takes place. The standard practice is for the inspecting party to travel to the disclosing party's premises or solicitor's office for inspection.

10.19 After inspecting a document the litigant may request a copy and the disclosing party must supply a copy within 7 days of the request provided the inspecting party either pays or undertakes to pay the disclosing party's reasonable copying charges. [25p a copy is a fairly standard charge.]

10.20 A litigant will only usually need formally to inspect a document where there are doubts about the authenticity of the document or there is the possibility of some marking (or the absence of some marking) on it which may be relevant to the case. Where no such considerations arise the sensible course is for the litigant not to insist on his right of inspection, but simply to ask the disclosing party to provide copies of any document which he himself does not already have.

10.21 *Documents referred to in statement of case.* If a document is referred to in a party's statement of case, all other parties are entitled to inspect that document even before the party serves his list of documents. [CPR 31.14]. The same applies to documents referred to in witness statements, but as witness statements almost invariably follow lists of documents any such document should already have been disclosed.

E. Directions for disclosure

10.22 Disclosure is almost invariably the next step in a claim after the parties have served their statements of case, and litigants should expect the court to give a direction for disclosure within about 28 days of the service of the defence or, where there is one, a reply.

10.23 If a litigant takes the view that his opponent has fully complied with the duty to make disclosure he may issue an application for a direction that the opponent give specific disclosure of particular documents, or particular classes of documents, or undertakes a further, specified, search to be carried out for documents. Any such application must be supported with a witness statement explaining how it is that the litigant has formed the view that his opponent's disclosure is defective. An application for specific disclosure can sometimes be resisted on the grounds that the disclosure would be disproportionate.

10.24 Similarly, a litigant may issue an application to challenge any claim for privilege his opponent may have made in respect of any specific documents and the court may direct the opponent to disclose the document or documents in question.

Pre-action disclosure

10.25 In some circumstances parties can apply for disclosure before proceedings start [CPR 31.16]. The court may make an order for pre-action disclosure if the parties concerned are likely to be involved in subsequent proceedings and the disclosure is desirable to dispose fairly of such proceedings or to assist the dispute to be resolved without proceedings and to save costs.

Third Party disclosure

10.26 The court may also make an order for disclosure against a person who is not involved in the litigation [CPR 31.17]. Such an order may be made where that person holds documents which may support the case advanced by the litigant making the application or adversely affect one of the other parties, and the court is satisfied that the disclosure sought is necessary to deal with the case fairly.

10.23 Applications for specific disclosure, pre-action disclosure, and third-party disclosure are made following the rules set out in CPR Pt 23. In brief, the application must be supported by a witness statement (verified by a statement of truth) which explains clearly what order the applicant is seeking and the basis on which the order is sought. The application notice must be served in the party against whom the order is sought (respondent) as soon as practicable after it is issued and filed at court, and in any event at least three days before the application is heard by a judge.

10.24 In practice a good proportion of applications are dealt with by a judge without a hearing because the case made out in the application is sufficiently strong for the judge to conclude that an order ought to be made. *However*, any Order made without a hearing may be challenged by the respondent to the application provided he issues his application to challenge within seven days of the order being served on him [CPR 23.10]. This is a short time limit. A litigant who receives an Order made against him without a hearing must not hang about but get straight on to the court where the Order was made to issue an application to set the Order aside or have it varied.

And finally…

10.25 Once you have inspected your opponent's documents make sure you add any new fact you have learnt from these documents or new document you did not previously know about to your chronology.

Chapter 11
Witness Statements

A. Form of witness statement
B. Content of witness statement
C. Statement of truth
D. Exchange of witness statements
E. Restrictions on witness statements
F. Reluctant or absent witnesses

Headlines

(1) Evidence at the trial will be given orally by witnesses, but only those witnesses whose evidence is set out in a witness statement which has been shown to the opposing party will normally be allowed to give evidence.

(2) Every witness statement must comply with the formal requirements of CPR 32PD.17-20.

(3) The witness statement should 'tell the story', that is cover all the facts that the witness is able to speak to in chronological order. It should be set out with numbered paragraphs in a legible (typed) form.

(4) If you have prepared a chronology and are amending it (as you are strongly advised to do) it will be helpful to have this to hand as you prepare your witness statements.

(5) It is important that you make sure that your witness statements deal with all the factual issues in the case. You should have made a list of issues which will help with this exercise

(6) It is vital that the statement contains the truth and only the truth. The maker of the witness statement must 'verify' it with a 'Statement of Truth' in the form : "I believe that the facts stated in this witness statement are true." If the maker of the witness statement makes a false statement he is guilty of a contempt of court and may be punished accordingly.

(7) Witness statements are statements of fact. They should never include statements of opinion.

(8) The Court will almost invariably order that witness statements are exchanged by the parties by a particular date. This prevents a party from seeking an advantage by delaying his statements until he has his opponent's statements.

(9) Where you are unable to provide a formal witness statement for one of your witnesses for a good reason (eg reluctance to give evidence, illness or absence abroad) you should provide a 'witness summary' setting out the evidence that you expect the witness to give if brought to court.

(10) Evidence can usually be given by video link where a witness cannot reasonably be expected to travel to court. If you wish to use a video link you must give the court good notice (at least four weeks) and you should explain why a video link is necessary.

Background

11.1 The essence of a civil trial in English law is oral testimony (evidence) given by witnesses in public before a Judge who acts both as 'judge' (determining the law) and 'jury' (determining the facts) [CPR 32.2].

11.2 It is a primary aim of the CPR that parties come to court knowing the case they face from their opponent(s). The days, not so long ago, when a party could keep his cards close to his chest are gone. Consistent with this aim each party is required to set out his factual evidence in written statements from each of the witnesses he intends to call to give evidence, and these statements are exchanged with the other party before trial [CPR 32.4].

11.3 Unless there is an exceptionally good reason for the absence of a witness statement, the Trial Judge, who always has a discretion on such matters, will not give permission for the relevant witness to be called to give evidence at trial.

11.4 The rules governing witness statements are set out in CPR Pt 32.

A. Form of Witness Statement

11.5 A witness statement must comply with the requirements of Practice Direction 32 [CPR 32.8]. CPR 32PD.17-25 specify these requirements and provide that the court may refuse to admit a witness statement in evidence or refuse to allow the costs of any witness statement which fails to comply with these requirements.

11.6 All the requirements of CPR 32PD.17-20 should be complied with, the most important being that each witness statement should:

(1) be headed with the title of the proceedings
(2) state the full name and address of the witness;
(3) give the witness's occupation, or if he has none, his description;
(4) be typed if at all possible on one side only of A4 paper;
(5) be divided into numbered paragraphs; and
(6) end with a signed and dated Statement of Truth.

C. Content of Witness Statement

11.7 As a litigant in person preparing a witness statement for yourself of any of your witnesses you should take care to observe 4 'golden rules':

(1) the witness statement should 'tell the story' in chronological order;

(2) the factual issues in the case should all be dealt with;

(3) the witness statement is a statement of fact, not opinion; and

(4) the witness statement must be true.

11.8 *(1) the witness statement should 'tell the story' in chronological order*.

You should not forget that you (almost certainly) will have personal knowledge of the events covered by the witness statement. The Judge will not. It is important both that you cover all the necessary background and that you do so in chronological order. Your aim should be to get your side of the story across to the Judge. To do so draft the statement in clear language. A statement which does not cover the material in chronological sequence is likely to confuse. If, as advised, you have prepared a chronology this will help you when preparing your witness statements. But discretion is required. Setting out the necessary background is very helpful, but including a wealth of material that is not essential is likely to detract from the important parts of the statement. Nevertheless it is necessary to include everything that might be important because the Judge may not allow you to give evidence of additional matters which could have been, but were not, included in your witness statement or the witness statements of your witnesses. Use your discretion. If in doubt include the material in the statement.

11.9 *(2) the factual issues in the case should all be dealt with.*

By the time witness statements are prepared and exchanged (i) the pleadings (statements of case) will be completed and (ii) discovery and inspection will have taken place. You will be able to work out what issues of fact (see chapter 6) exist between you and your opponent. Review those issues in the light of any new documents thrown up by disclosure. The sensible litigant prepares a list of these issues, and makes sure that all the issues are covered in his witness evidence. Not every witness will be able to deal with every issue, but every witness who can deal with an issue should cover it in his statement. If any issue is not covered by a witness statement you should do all you can to find a witness who can deal with the issue in question.

11.10 *(3) the witness statement is a statement of fact, not opinion*

A witness statement must be confined to statements of fact, without any expression of opinion. Only expert witnesses are permitted to give opinion evidence. Occasionally an opinion is included in a witness statement. Once this is identified the Judge will have no difficulty in putting a line through it both metaphorically and practically so you do not have to worry if the odd opinion slips into one of your witness statements. However, unguarded opinions from yourself or your witnesses can sometimes affect your case

adversely. It is better to stick to the rules and make sure that there are no statements of opinion in any of the witness statements you rely on.

11.11 *(4) the witness statement must be true.*

In all but the exceptional case each witness's statement will "stand as his evidence in chief". By this is meant that, provided the witness (on oath or affirmation) confirms the truth of his statement when he is called to give evidence at trial, the statement will form part of the evidence in the case. It is critical therefore that you make sure that the maker of each statement, and yourself as the litigant on whose behalf the maker is being called to give evidence, checks the statement carefully (cross-referring to the documents and other witness statements as necessary) before signing it as true. Too often (indeed far too often) witnesses who have had statements prepared for them by solicitors tell the Judge that matters in the statement are not correct; they say (all too believably) that they simply signed what the solicitor had drafted for them without reading it through carefully and critically. This reflects badly not only on the witness, but on the whole case presented by the party calling the witness. Accordingly, it is most important that, as far as possible, you make sure that each witness statement is in the witness's own words, and that it is checked very carefully before it is verified by the witness as true.

11.12 Preparing a good witness statement is hard work and time consuming. You should never leave it to the last minute. Unless the maker of the statement has an exceptional natural fluency, you will probably find that a statement has to go through several drafts before it reaches a state where it covers all the necessary material in a clear manner, and the witness is confident that it is all accurate. In this regard a word processer is very useful. Never forget that at trial you will be questioned on your witness statement and your witnesses on theirs. Get it right. Do not leave hostages to fortune.

11.13 Where it is sensible to do so, you should divide the statement into separate sections each with its own heading or sub-heading. For example in a building claim, if there are problems with the roof, and with the windows, and with the doors, the evidence relating to the roof could be put under the heading "Roof", and the evidence about the windows and doors under separate headings "Windows" and "Doors". Each section will probably be best dealt with in chronological sequence. The fact that the chronologies of the individual sections will overlap will not matter; the Judge is likely to consider the evidence under each section separately.

11.14 It is essential that every witness statement is divided into numbered paragraphs. These paragraphs should not be too long, and it is very unwise to include evidence on two distinct matters in the same paragraph.

11.15 A witness statement may refer to one or more documents; it is often important that it does. By the date of exchange of witness statements all relevant documents should have been disclosed, but if a document not previously disclosed is referred to in a witness statement the opposing party may require disclosure of it. It is a common practice amongst solicitors to attach to the witness statement copies of all documents referred to in that witness statement.

This is not necessary where it is clear what document is being referred to, and if a proper list of documents has been served by the party it is perfectly sensible to save the copying and refer, for example, to 'the invoice no.35 of the Claimant's list of documents'.

D. Statement of Truth

11.16 A witness statement must be verified by a Statement of Truth [CPR 22.1; 32PD.20]. This is usually put at the end of the statement. It should be in the following form:

> "I believe that the facts stated in this witness statement are true."

11.17 Where the witness cannot easily understand or read English it is important that the witness statement is read over to him, with explanations as may be necessary. The fact that this happened should be recorded on the witness statement in addition to the Statement of Truth:

> "This statement has been read over to me and [the passages at paragraphs x, y, z] explained by [name]"

11.18 Where the witness does not speak English, and will be giving evidence through an interpreter, the witness statement should be prepared in the witness's own language, and signed with a Statement of Truth in that language. The witness statement should then be translated, and the translator must prepare a witness statement verifying the translation and exhibiting both the original foreign language statement and the translation.

11.19 A person who makes a false statement which has been verified by a Statement of Truth commits a contempt of court and may be punished by fine or, in serious cases, by imprisonment [CPR 32.14].

D. Exchange of witness statements

11.20 The Court will give a direction for exchange of witness statements by a certain time (usually 4pm) on a particular date. The usual course is for both (or all) parties to agree to put their statements in the post on the same day.

11.21 If you find yourself in difficulty meeting the time for exchange and need a few extra days (say up to a week or ten days) it is not uncommon for parties to agree informally to extend time. But if you require more time than this you should issue an application requesting the court to extend time, explaining why you are unable to comply with the court's direction. Strictly speaking the parties cannot extend the time for compliance with a court order by consent, and you may find some judges taking a rather stricter line with informal extensions than others.

11.22 Where you are ready to exchange but your opponent is not, it is open to you to serve your statements unilaterally. In common with many litigants however

you may well be understandably reluctant to do so for fear that your opponent may tailor his statements to take account of your statements. 'Exchange' means just that. You do not have to serve your statements unilaterally, but you should make it clear in correspondence that you are ready to exchange. If after, say, a couple of weeks you find that your opponent is still not ready or prepared to exchange statements you should (a) file your statements at court, and (b) issue an application for an 'unless order' – see chapter 9 – requiring the opponent to exchange by a particular date or face a sanction, eg being prevented from calling his witnesses.

11.23 *Evidence in reply:* There will be occasions where you wish to serve further witness statements either because new matters have arisen (eg you are a claimant in a personal injury action and you suffer a relapse) or because after seeing your opponent's statements or further documents produced by him, you realise there are matters you need to deal with in evidence beyond those covered in the witness statements you have already served. You will need the court's permission to serve further witness statements. The court will usually give permission for further statements, especially to a litigant in person, provided you do not delay your application. The main reason for a court refusing permission will be that the application is made so close to the trial date that the hearing would have to be adjourned to enable the further statements to be served and considered by the other side, and that it would be wrong to delay the trial. Another reason for refusing permission would be that the court takes the view that a party has been seeking a tactical advantage in not covering certain areas of evidence in the witness statements exchanged under the original direction. If you consider that your opponent has been acting in this way you may oppose an application for permission to serve further witness statements by bringing your concerns to the attention of the court.

E. Restrictions on witness statements

11.24 The court has the power to give directions [CPR 32.2(3)] to –

(a) identify or limit the issues to which factual evidence may be directed;
(b) identify the witnesses who may be called or whose evidence may be read; or
(c) limit the length or format of witness statements.

11.25 This is a useful power. There is a tendency among some solicitors (and some litigants in person) to serve witness statements which are inordinately long and which deal at length with matters of background which are not in dispute. Such statements are frequently very expensive to produce in terms of a solicitor's chargeable time. A witness statement does need to tell the story, and set the scene, but care should be taken not to allow the statement to become over lengthy. In the case of 'supporting cast' witnesses it is usually unnecessary for them to repeat material which the main witnesses cover. The supporting witnesses should put in statements which are confined to the point in issue with which they are dealing. Should you form the view that your opponent's witness statements are too long because they deal with irrelevant

material, or that he is proposing to call witnesses on matters not in dispute, or that the statements are not clear, you may bring this to the attention of the court at the next Case Management Conference, or make a specific application to ask the court to restrict either the length of individual statements or the calling of individual witnesses.

11.26 In practice however, you are only likely to learn that your opponent's witness statements are too long or contain irrelevant material or offend good practice in other ways after they have been served. The cost of asking the court to consider making an order restricting the witness statements in any particular way may well be disproportionate to the point in issue. Remember that it is always possible to ask the trial judge to make orders in relation to witnesses, and to make an order disallowing the cost of an unnecessary statement or part of the cost of an overlong statement.

F. Reluctant or Absent Witnesses

11.27 You may find that you cannot serve a witness statement verified by a Statement of Truth for a person you wish to call to give evidence, either because the person is reluctant to give evidence or because he is simply unavailable at the time because, for example, he is working abroad or is unwell.

11.28 In such cases, if you want to rely on the witness's evidence, you must produce a witness summary, setting out the nature of the evidence that you expect the witness to give. You should serve this summary along with your witness statements. As a litigant you can compel a person to come to court to give evidence in a civil trial, see chapter 15, but the Judge will expect a witness summary to be served in respect of any witness who is brought to court to give evidence.

11.29 If a witness cannot come to court, perhaps because he is unfit, or is abroad, and cannot be expected to travel to court, you may ask the Court to admit the witness's statement as evidence in the case 'under the Civil Evidence Act' without the witness coming to court. It is for the Trial Judge to decide whether he will admit the witness statement as evidence, and provided there is a genuine reason for the witness not coming to court the Judge will usually do so. However the absence of the witness from the trial, and the fact that the opposing party will not be able to test that evidence by cross-examination, may well affect the weight Judge will gives to the evidence.

11.30 In some circumstances, if a witness cannot attend, his evidence can be given by a video link or (very exceptionally) over the telephone. The court will need to be given good notice to be able to set up the necessary facilities, and in some courts this may not be possible. You should explain why you need a video link, and where the witness is abroad you should remind the court of any time differences which may affect the giving of evidence. Any additional expense is likely to have to be met by the litigant requesting video facilities.

Chapter 12
Expert evidence

A. Expert evidence
B. Permission required to adduce expert evidence
C. The expert witness
D. Single joint expert
E. Questions to the expert(s)
F. Meetings of experts
G. Power of court to direct party with expertise to provide information

Headlines

(1) Expert evidence is opinion evidence and should be given by someone with a high degree of skill, knowledge and experience in the relevant field.

(2) Expert evidence may be given over a wide range of subjects. Common examples of experts who give evidence before the courts are doctors (usually consultants) in injury cases, surveyors and engineers in construction cases, valuers in property cases, and accident reconstruction experts in difficult road traffic cases.

(3) Permission must always be obtained from the court before expert evidence is admissible. The court will react unfavourably to 'expert shopping' and where one party has consulted more than one expert the court will usually require that party to disclose all expert opinions obtained, even though the party concerned may wish to rely (and may only be permitted to rely) on one expert only.

(4) An expert witness will always be required to produce a written report and will only be permitted to give oral evidence where this is absolutely necessary – usually this will be where experts on opposing sides are in significant disagreement.

(5) Wherever possible the parties should agree to instruct a single expert jointly to express an opinion on the issues in the proceedings requiring expertise. In small value claims the court will almost always insist that there is a 'Single Joint Expert' instructed by both parties jointly.

(6) Although an expert witness will be instructed and paid by one party, or by both parties where he is a Single Joint Expert, the expert owes a duty to the court which overrides any duty he may owe to the party or parties instructing him.

(7) There are detailed provisions in the Rules governing the content of an expert report, and the report must end with a statement that the expert understands and has complied with his duty to the court. Most professionals offering to act as experts will be aware of these provisions; a litigant in person should not instruct

an expert who is not familiar with the relevant rules unless there is no alternative.

(8) Where opposing parties each instruct an expert the respective experts will be ordered to hold without prejudice discussions with a view to reaching agreement on as many matters as possible and to define the areas in which there is no agreement, setting out their competing views.

(9) A litigant may put written questions to an expert to be answered in writing. The answers will form part of the expert's evidence.

(10) Where one litigant has access to in-house expertise not available to his opponent, the court may require that litigant to provide expert information for the use of his opponent in the proceedings.

A. Expert evidence

12.1 A witness who gives evidence as an "expert" may express an opinion on any matter relating to the proceedings. Opinion evidence is not admissible from any other witness.

12.2 The rules about expert evidence are in CPR Pt 35. There is no definition of 'expert' and, in theory at least, anyone may be called as an expert in anything. However, the court is only likely to give weight to the opinion evidence of a person with a high degree of skill and knowledge in a particular subject within his area of expertise. Accordingly when choosing an expert witness a litigant should ensure that he selects a witness who has the appropriate qualifications and, perhaps more importantly, relevant experience.

12.3 Expert witnesses tend to be rather expensive. Many professionals charge more for their services as a forensic expert than they do in the ordinary course of their work. The Rules restrict expert evidence to "that which is reasonably required to resolve the proceedings" [CPR 35.1].

12.4 Expert evidence is given by way of written report, which must be disclosed to all other parties, and unless the court gives permission oral expert evidence may not be called in addition to the written report [CPR 35.5]. Once one party has disclosed an expert report any party may rely on that report, or any part of it, at trial [CPR 35.11].

B. Permission required to adduce expert evidence

12.5 No expert evidence may be adduced without the court's permission [CPR 35.4(1)]. A litigant who requires expert evidence (whether by a written report without oral evidence or by calling the expert to give oral evidence at trial) must make an application to the court, and in doing so he must identify the field in which expert evidence is required and, where practicable, the name of the proposed expert. In some cases, for example medical evidence in injury

cases or surveying or engineering evidence in construction cases, the need for expert evidence may be obvious. But the litigant applying for permission to call expert evidence must explain in the evidence supporting his application (which will ordinarily be in a witness statement) why it is that he needs expert evidence.

12.6 The requirement of the Rules that the name of the proposed expert should be named where it is practicable to do so is to prevent, as far as this is possible, 'expert shopping'. There have been cases where litigants with the resources to do so have gone from expert to expert to find one who will support the litigant's case. This has potentially serious implications. If a litigant discovers that several experts give contrary opinions, the fact that he eventually finds an expert who will support him suggests that this expert might not properly reflect the opinion generally held by experts in that field. Where a litigant has obtained a report from expert A and he wishes to change to expert B the court may refuse him permission, or, if permission is granted, it will usually be on terms that the opinion of expert A is disclosed to the litigant's opponent as well as the opinion of expert B.

12.7 A party who applies for permission to adduce expert evidence must provide an estimate of the costs of the proposed expert evidence and identify the field in which expert evidence is required and the issues which the expert evidence will address [CPR Part 35.4(2)]. 'Where practicable' the name of the proposed expert should be given. The aim of this rule, in force from 1 April 2013, is to ensure that parties think carefully about the need for and the expense of obtaining expert evidence. Where the court gives permission for expert evidence it may specify the issues which the expert evidence should address.

12.8 The advice to the litigant in person, as for any litigant, is to adduce expert evidence only when it is essential to do so, and then restrict the evidence given by the expert to that which is necessary to have. When making an application for permission for expert evidence the litigant needs to have clearly in mind what issue or issues the expert will address. If the litigant applies unnecessarily the judge should inform him why it is not necessary or why only particular issues need to be covered, but to enable the judge to reach a sensible decision it is important that the litigant is able to identify the issues in the case and specify the issue on which expert evidence is required.

C. The expert witness

12.9 Although the expert may be instructed, paid for, and called by one litigant he owes an overriding duty to the court to be independent, objective and unbiased in the evidence he gives, both in his written report and when giving oral evidence. An expert must make it clear when any matter raised with him is outside his expertise.

12.10 There is a detailed practice direction covering the form and content of an expert's report [PD35], and this practice direction also contains a detailed protocol for the instruction of experts [CPR 35.16-38]. There is too much

detail to undertake a summary here; a litigant who requires expert evidence must read through Rule 35 and Practice Direction 35 carefully, for otherwise he may go to a great deal of trouble and expense to no good purpose.

12.11 An expert's report must end with a statement that the expert understands and has complied with his duty to the court [CPR 35.10(2)]. Most professionals who are available to give expert evidence will belong to professional bodies who run courses to educate prospective experts in the requirements of CPR35. A litigant should be very wary indeed of instructing an expert witness who is not fully familiar with the obligations of an expert witness. Such an expert is likely to be found out at trial, and the Judge may feel unable to place any weight on his evidence.

D. Single joint expert

12.12 Where at all possible the parties should agree to appoint a single expert jointly rather than each party call his own expert. This will usually save a great deal of cost. Indeed, the court has power to direct that expert evidence must be given by a Single Joint Expert [CPR 35.7] and where the claim is one of low value most courts will insist that this course is followed.

12.13 A Single Joint Expert should be jointly instructed. That will require agreement between the litigants as to what matters the expert should deal with and what material the expert should be given on which to form his opinion. Plainly the expert must be allowed to carry out any necessary examination or inspection, and to do so in circumstances where neither party seeks to influence him.

12.14 All instructions to the expert must be given in writing. This enables the court to put the expert evidence in its proper context. The parties should try to agree the terms upon which the expert is to be instructed and the aspects of the dispute the expert will be asked to provide an opinion about. If there are particular matters that one party wishes the expert to provide an opinion on, this should be pointed out in the letter of instruction; e.g. if building works are argued by one party to have increased the value of a property, then the expert should be asked whether this is so, and to provide an opinion as to the value of the property, with and without the relevant improvements.

12.15 There will be times that the parties cannot agree either on the choice of expert or the matters he should cover. In such cases the parties may have to bring the dispute before the court for the Judge to give directions. Before troubling the court however litigants should remember that most professional bodies offer an 'expert selection' service, and that unless it is clear that one party is asking the expert to cover matters which are outside the scope of the proceedings the safer course is to allow the expert to cover all the matters either party wishes him to cover, and leave arguments as to relevance to the trial.

12.16 In small claims and fast track trials the usual rule is that only one expert, jointly instructed by both parties will be permitted to give evidence. The

evidence will be given by written report and on the most exceptional of cases will the expert be called to give evidence at trial.

E. Questions to the expert(s)

12.17 Every party has the right to put questions to an expert instructed by another party or a Single Joint Expert [CPR 35.6]. Questions must be in writing and should be for the purpose of 'clarification' of the report. The questions must be proportionate and must be put within 28 days of the service of the expert's report. Questions may be put later than 28 days after service of the report with the court's permission.

12.18 The Rules do not make clear what is meant by 'clarification'. Any question which requires the expert to undertake new investigations or tests is likely to be held to go beyond that permitted by the Rule. However, a primary purpose of putting questions to an expert is to ensure that all relevant matters are covered in the written report, and so save the expert being called to give evidence or, in some cases, obviate the need for the opposing party to adduce expert evidence of his own. If a litigant feels strongly that an expert has failed to cover a significant aspect of the matter before him, or has failed to take account of important material available in the case, he should ask the questions necessary to ensure that the aspect is covered or the material considered, if necessary seeking the guidance of the court.

12.19 A litigant who asks questions will usually have to bear the cost of the answers (in the first instance, ultimately the cost may have to be borne by the losing party in the litigation) but (a) the cost of answering questions is likely to be appreciably less than the cost to the litigant of instructing his own expert, and (b) well directed questions may expose weaknesses in the opponent's case and assist the parties to reach a settlement.

12.20 If the expert does not answer a written question put to him, the court may order that his evidence may be relied on and or that the party adducing the expert report may not recover the fees and expenses of that expert from any other party.

F. Meetings of experts

12.21 Where the court gives permission for both sides to adduce expert evidence it will almost always direct that the experts (or experts of 'like disciplines' where more than one expert is being called by each party) meet to hold without prejudice discussions [CPR 35.12]. The aim is see whether, in discussion, the experts are able to reach common ground or at least define and limit the areas of disagreement. The court's direction will require the experts to prepare and serve a joint statement setting out the issues on which they are in agreement and those issues which are not agreed with a summary of the reasons for any disagreement.

12.22 It is the practice in Technology and Construction ('TCC') cases for the court to direct that the experts meet first before preparing their reports in order to prepare a joint statement. Individual reports are then confined to those areas on which the experts are in dispute. This has two great advantages. First an expert who has not committed himself in writing is more likely to be receptive to argument and discussion and will not feel obliged to stick with his written opinion. Secondly the cost of preparing a report solely on the disputed issues should be less than a comprehensive report covering matters which are not disputed by the other side. There is no reason why a litigant should not ask the court to make a TCC type expert direction in non-technology or construction cases.

G. Power of court to direct party with expertise to provide information

12.23 The Rules recognise that some litigants have access to expertise not available to others. For example, a hospital authority will have access to medical expertise, or a substantial building company may have engineers and quantity surveyors on its staff. Many technical companies or firms will have in-house experts. In such cases the litigant with in-house expertise will have an advantage over its opponent without access to such expertise.

12.24 Where one party has access to information which is not reasonably available to its opponent, the court may order that the party concerned to 'prepare a document recording the information' and serve it on the opponent [CPR 35.9]. It is not obvious why the Rules refer to 'a document' rather than 'a report'; perhaps this is to distinguish between evidential material provided by in-house experts and material in an expert report. The document which is served however should be in the nature of an expert report. Plainly (although the Rule does not state this expressly) the information to be recorded in the document must relate specially to expert issues arising in the proceedings. This power cannot be used to require a litigant to provide information about itself or its procedures which have no relevance to issues in the proceedings requiring expertise to resolve.

Chapter 13
Case Management and other Interim Hearings

A. Court responsible for managing the case to trial
B. Directions
C. Case Management Conferences
D. Pre Trial Review
E. Applications
F. Particular applications
G. Interim remedies
H. Costs on interim hearings

Headlines

(1) The court will 'manage' the case through to trial by giving directions in court orders which must be complied with by the litigants. In most cases the court will make directions on its own initiative, that is without being requested to do so by the parties. Directions may cover any step in the proceedings, including such matters as service of pleadings or amended pleadings, giving disclosure, providing further information, serving witness statements, instructing experts, preparing bundles of documents for trial, serving written ('skeleton') arguments, case summaries, and lists of issues.

(2) A litigant who receives a court order made without a hearing has seven days to apply to the court to vary or set aside the order. The court order should contain a statement of the right to apply, but whether it is expressly referred to in the order or not, any litigant may make such an application. The seven day limit runs from the date on which the order is served on the litigant and must be taken seriously.

(3) The court will usually direct at least one Case Management Conference at which the judge will consider the state of the case and give such directions as are considered appropriate. A litigant may raise any particular matter at a Case Management Conference, but where he is asking for a particular direction to be made he should notify the court and his opponent well in advance. Any matter which may take time to argue may be ordered to be dealt with by specific application (for which a fee will be payable) and not at the Case Management Conference.

(4) Applications for specific orders must be made by application notice in Form N244, and must (1) state what order the applicant is seeking, (2) explain briefly why the order is sought, and (3) be verified by a statement of truth. Where detailed evidence is required one or more witness statements (verified by a statement of truth) should be prepared and served, preferably with the

application notice, but in any event in good time before the hearing of the application.

(5) Parties should act sensibly and agree directions when it is proper to do so. Opposing a reasonable request for a direction by an opponent will usually result in an adverse order for costs.

(6) There are various applications which a litigant in person may make or find are being made by his opponent. The most common are dealt with in the 'Particular Applications' section of this chapter.

(7) There will be occasions where the court will grant a remedy before the hearing, see the 'Interim Remedy' section of this chapter.

(8) The general rule is that costs of disputed interim hearings will be awarded against the losing party and assessed at the hearing. The paying party will have to pay any costs awarded within a short time (14-28 days) after the hearing. Costs of Case Management Conferences will almost invariably be awarded as 'costs in the case'. That means that the eventual loser of the proceedings will almost certainly have to pay the costs of the eventual winner.

A. Court responsible for managing the case to trial

13.1 This chapter deals with the management of the case by the court from issue of proceedings to trial.

13.2 All claims are now issued at a central national court centre in Salford. Once a Defence is received, the parties are sent an 'allocation questionnaire' to complete and return to a local Court. This is usually the Court covering the area in which the Defendant resides. This court will deal with the management of the case to trial, unless an application is made to transfer the case by either or both parties to another court for the convenience of the parties.

13.3 The Court, and not the parties, has overall control of the management of cases and it does so by giving directions (in orders) and making orders on specific matters. Any hearing which takes place before the trial will be 'an interim hearing' and applications made at such hearings are 'interim applications'. The rules governing such hearings are in CPR Part 23. Preliminary case management is governed by CPR Part 26. In most courts case management directions and interim applications are dealt with by District Judges. In major trial centres, such as the Central London Civil Justice Centre, once a case has been allocated to the multi-track much of the case management is in the hands of Circuit Judges, with District Judges doing some specialist work and dealing with fast-track and small claims.

13.4 Once a Defence is received by the court the parties are sent an Allocation Questionnaire on the basis of which the court will allocate the case to a 'track', see chapter 7.

B. Directions

13.5 Once a case has been allocated to a 'track' (see chapter 7) the court will give directions. In the first instance the judge will usually give directions covering:

(a) a stay of the proceedings to allow the parties to try and settle the case by mediation (Alternative Dispute resolution)

(b) preparation (usually by the Claimant) of a case summary which very briefly sets out the matters in dispute between the parties and is usually to be agreed by the other party

(c) disclosure and inspection of documents

(d) preparing and service of witness statements

(e) ordering a Case Management Conference to consider the state of the proceedings after disclosure and service of witness statements to consider whether the statements of case (pleadings) and witness statements are complete for the purposes of trial, whether further evidential directions are necessary, and whether the case is ready for trial.

These directions will often be given in boxwork, ie by the judge in the absence of either party. The Order should state that any party has the right to apply to the court to vary or set aside any direction made by the judge without hearing the parties, but whether it does or not each party has the right to make such an application. If, after receiving an order for directions, you consider that you cannot realistically meet one or more direction you should apply to the court to vary the direction(s) in question. If you are asking for a short additional period in which to comply with the direction you will often be given the time in a further boxwork order. Should however you wish to make a radical change in the directions regime the court will arrange for an oral hearing of your application.

13.6 There are other orders the court may give either on the application of a party or on its own initiative after reviewing the file. For example:

(f) giving permission to amend a statement of case (usually only after an application by a party) or for the Claimant to serve a Reply

(g) ordering that a particular issue (for example an allegation that the claim is time barred) should be heard as a preliminary issue before the main trial

(h) where a party has served a written request for further information of a pleading or document or witness statement, an order that the information is provided by a certain date

(i) permission for instructing and calling expert evidence at the trial

CPR Part 29.1(2) expressly provides that when drafting case management directions both the parties and the court should "take as their starting point any relevant model directions and standard directions which can be found online at www.justice.gov.uk/courts/procedure-rules/civil and adapt them as appropriate to the circumstances of the case". You can therefore see what the starting point was before the judge adapted the direction to your case, and if you prefer the starting point direction you may draw this to the attention of the judge when you make your application to vary or set aside the directions given.

13.7 It is not open for the parties to vary the time given by the court to comply with its directions, although it must be said that solicitors frequently purport to do so and may expect a litigant in person to agree extensions of time for their convenience. This may also be convenient for the litigant in person, and the attitude may well be that there is little a Judge can do faced with an agreement between the parties. There is much in that, and most Judges appreciate that they are there for the benefit of the parties, not the other way about. But Judges should and will react adversely if informal, unauthorised, extensions of time impact on the running of the court's list and therefore on other litigants' cases.

13.8 Monitoring compliance with directions

The court is given express power in the rules to contact the parties from time to time in order to monitor compliance with directions. The parties must respond promptly to any such enquiries from the court [CPR 3.1(8)]. This is a useful power for the court to have, but unfortunately few courts will have the resources to monitor compliance with directions in any but a very few cases.

C. Case Management Conferences

13.9 Most cases will have at least one Case Management Conference ('CMC'), and some will have two or more. Different court centres and different judges may have differing approaches to CMCs. As indicated above, the purpose of a CMC is to enable a judge to consider the current state of the case and to make any directions that he considers are needed to progress the case to trial, or, alternatively, to encourage mediation or other forms of out of court resolution. Many judges will direct one or more additional CMCs when they appreciate that there is a litigant in person who may need more assistance than represented litigants to prepare for trial.

13.10 At the first and sometimes on subsequent CMCs the court will consider issues of costs management, and may make a costs management order, see Chapter 14.

13.11 The CPR now places an obligation on all parties to "endeavour to agree appropriate directions for the management of the proceedings and submit agreed directions, or their respective proposals to the court at least seven days before any CMC. Where the court approves agreed directions, or issues its own directions, the parties will be so notified by the court and the CMC will be vacated".

13.12 This is not an obligation easily discharged by a litigant in person with little if any previous experience of court proceedings. Where there is a represented litigant his lawyers may take the lead, but it is understandable that a litigant in person will be wary of accepting directions proposed by his opponent. Judges will be conscious of this difficulty and few if any will be critical of a litigant in person who prefers to leave the questions of directions to the court. Unfortunately there is always the issue of costs. If the represented litigant makes sensible proposals which the litigant in person prefers not to accept there will be a hearing which might otherwise be avoided. This opens up a risk that the represented party will ask for an order for costs against the litigant in person. Unless it is a very clear-cut case most judges will not order costs against a litigant in person in these circumstances, but the risk cannot be ruled out altogether.

13.13 Make sure you turn up to your CMC and that you do so having reviewed your case. This will involve an hour or two in preparation for the conference. You are expected to be able to answer any questions the judge will have about your case and the state of your preparation. Some judges order a Case Summary to be prepared and filed. This is a brief statement of your case, hopefully on one side of A4; you do not need to give a detailed account. A good case summary will be non contentious and will set out the nature of the dispute and the issues that arise on the pleadings. Try and agree a case summary with your opponent and file it in court before the hearing so that the judge can read it and be up to speed with the case when the hearing begins. Do not be afraid to ask the judge to make an order for a list of issues or the preparation and agreement of a chronology if you consider that it would be useful to compare your list of issues or chronology with that of your represented opponent. You may also ask that the judge orders that only issues on the list of issues approved by the court, as amended from time to time, will be considered at the hearing. Such an order has the great advantage that you cannot be caught unawares at trial by an issue which you have overlooked but which your represented opponent has prepared for thoroughly.

D. Pre-Trial Review

13.14 In many cases the court will order a Pre-Trial Review which should be only a few weeks before the trial date. At this review the court will consider the state of the preparation of the case, and deal with any outstanding procedural matters. It is very important that you check carefully how well prepared you are for trial, and whether your opponent has done all he should to ensure that the trial goes smoothly. This will be your last chance to obtain directions from the court on any aspect of evidence or trial preparation. The Pre-Trial Review

is usually a very helpful exercise, and if it is not suggested by the court or your opponent do not be shy of asking for one yourself.

13.15 Do not be afraid to raise any matters which are troubling you about the case or the impending trial. Far better to discuss such matters with a judge before trial when there is still time to put things right than find yourself at a disadvantage at trial because you have not done something you should have done or misunderstood what is expected of you. Most judges will be helpful. You may end up telling the judge something he ought not to know. If so, he will be able to arrange for another judge to conduct the trial. Far better this, than allowing such matters to come out only at trial, with the risk of embarrassing the trial judge and possibly causing costs to be wasted.

13.16 Some judges are keen to have a time-table set for the trial, allowing specific amounts of time for opening argument, each witness, and closing submissions. As a litigant in person you may have very little idea how long the trial process will take, and you will have to be guided by the judge.

E. Applications

13.17 Although it may be possible to obtain an order for a particular direction at a Case Management Conference, (provided good notice is given to the other party and the court that an application for the direction will be made), a litigant will usually have to make a specific application if he requires a particular direction from the Court to order his opponent to do or provide something (for example answer a Request for Further information, provide disclosure of particular documents) or, if he wishes to obtain permission to do something (for example adduce expert evidence or amend a statement of case).

13.18 An application must be made to the court in which the case is proceeding (rather obvious perhaps but it needs to be stated) [CPR 23.2]. It should be made on Form N244 (in the High Court PF244). The application notice must:

(1) state what order the applicant is seeking;

(2) explain briefly why the applicant is seeking the order;

(3) be verified by a statement of truth [CPR 22].

(1) It is advisable, but not essential, to attach a draft of the order being applied for to the application notice. A litigant in person asking for a particular order may reasonably ask the judge to be responsible for its final drafting, but it is important that the litigant knows and explains what it is that he wants and why he wants it.

(2) a brief explanation of why the order is being sought must be set out in Form N244. There will be occasions where it is necessary to explain in some detail either the background to the request for an order and or the reasons why it is suggested the order should be made. In that event the applicant should

prepare a separate witness statement containing this material, verified with a statement of truth, and served with the application notice.

(3) most versions of Form N244 contain a statement of truth for signing. You must not forget to sign a statement of truth.

13.19 The Rules refer to the 'applicant' and a 'respondent' to an application which, strictly, is how the parties should be referred to for the purposes of the application whoever is the Claimant and the Defendant in the proceedings. However it is much easier to keep the same title and refer to the 'claimant' and the 'defendant' and Form N244 very sensibly proceeds on this basis.

13.20 Form N244 will ask whether you want to have the application dealt with (a) at a hearing, (b) without a hearing or (c) at a telephone hearing. A litigant should only ask for an order without a hearing where the matter is straight-forward, or where he needs the court's permission to take a step in the action and his opponent is prepared to agree to the order being made [CPR 23.8]. Most applications involving litigants in person will be dealt with at a hearing at court. Where a litigant finds that the court has made an order without a hearing, and he wishes to challenge that order, he has seven days from the date on which the order is served on him to apply to set aside or vary the order [CPR 23.10].

13.21 A copy of the application notice must be served by the applicant on all respondents [CPR 23.4]. This should be done as soon as practicable after it is issued and filed at court, and any witness statement or draft order filed at court must also be served on all respondents [CPR 23.7]. 'As soon as practicable' means just that, and an applicant who delays in serving copies of his notice may be penalised in costs. In any case, unless there are special circumstances, the copy notice must be served at least 3 clear days before any date set for the hearing of the application.

13.22 The application will be given a hearing date and time. The parties should attempt to agree the directions and inform the Court of any agreement as soon as possible so as to avoid wasting hearing time. If agreement is not reached the parties should attend the hearing.

F. Particular applications

Requests for Further Information [CPR 18]

13.23 A party can request the other party to provide further information to clarify any matter in dispute in the proceedings or to provide additional information on such a matter. This is done by a 'Request for Further Information' (RFI) which may take any form. Usually an RFI arises out of something the opposing party has stated in his pleading or witness statement, or where a document has been disclosed and it is not clear from the terms of the document where it came from or what it is about. However an RFI can be about anything arising in the proceedings.

13.24 An RFI should be made in writing directly to the party to whom it is addressed. The request should be clear. This is best achieved by identifying the paragraph in the relevant pleading or document or witness statement in respect of which the request is made and setting out the information required in short numbered requests. These requests should be concise and confined to matters which are reasonably necessary to enable the party to understand and deal with the case of his opponent. CPR Practice Direction 18 makes detailed provision for the making of an RFI.

13.25 The response to such a request must be in writing, dated and signed by the party or his legal representative with a statement of truth [CPR 18.1(3)].

13.26 If a party fails to respond to a written request for further information, the party requesting the information may issue an application to the court for an order requiring the party to answer the request. The court will make an order for the request to be answered only where it is satisfied that the request was proper and proportionate in the circumstances of the case. If an application for an order is opposed whoever loses the application will usually have to bear the costs of that application and pay them within a few weeks of the hearing even if that is before the case comes on for trial.

Security for Costs [CPR 25.12-25.15]

13.27 A party who has to give 'security for costs' is required to pay a sum of money into court or provide other security to protect his opponent from the costs of defending the action, if the claimant eventually loses. Only a claimant may be ordered to give security for costs, but a defendant who brings a counterclaim is a claimant on that counterclaim and so may be ordered to security for the costs of the counterclaim.

13.28 The circumstances in which the Court will order one party to give security for costs are very restricted. CPR 25.12 and 25.13 contain detailed rules which should be studied with care, but in summary:-

(1) The Defendant applying for security must establish one of the following circumstances:-
   (a) the Claimant is resident abroad (ie outside the EU and certain other European countries),
   (b) the Claimant is a nominal claimant and there is reason to believe he will be unable to pay the defendant's costs if ordered to do so,
   (c) the Claimant is a company and there is reason to believe it will be unable to pay the defendant's costs if ordered to do so, or
   (d) the Claimant has changed his address with a view to evading the consequences of litigation or has failed to give his correct or any address, or
   (e) the Claimant has taken steps to put his assets out of reach so as to make it difficult to enforce any costs order (for example by transferring them to another person or abroad).

(2) The court retains a wide discretion and must be satisfied that in all the circumstances it is just to make the order. The court also retains a wide discretion as to the amount of any security and the manner and time within which such security is to be given

13.29 The defendant should apply to the Court as soon as he becomes aware of any circumstances in which security could be ordered. Delay is one matter which the court will take into account when considering whether to exercise its discretion to order security for costs. The application must be in writing and be supported by evidence establishing the relevant criteria. It should ideally also give details of any costs already incurred and an estimate of future costs up to the trial.

13.30 Any order will state the amount of any security and specify by when and in what manner it is to be made. Failure to give the security demanded by the court will usually result in judgment being entered for the defendant against the claimant

Striking Out [CPR 3.4]

13.31 The Court has power to strike out any statement of case if it appears to the court:

(a) that the statement of case discloses no reasonable grounds for bringing or defending the action or

(b) that the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of proceedings, or

(c) that there has been a failure to comply with a rule practice direction or court order.

13.32 The Court may exercise this power on its own initiative or a party may apply to the Court to strike out the whole or part of his opponent's case. Generally, such an application should be made at an early stage in the proceedings but there is power to make such an application at any time (even during a trial). If the statement of case is struck out in its entirety, the opponent will be able to obtain judgment and costs. If only part of the statement of case is struck out, the party will not be able to rely on that part in any subsequent trial.

13.33 The court will strike out the whole or part of a statement of case if it is "vexatious" by which is meant that the statement of case is unreasonably vague, incoherent, scurrilous, or obviously ill-founded. Similarly, it will be struck out if the statement of case does not set out a legally recognisable claim or defence or if a party is attempting to re-litigate a case upon which a court has previously come to a decision. Where one party considers that his opponent's case can be described as vexatious or is otherwise hopelessly weak or lacking in merit, an application may be made to the court to strike out the

case and award judgment in his favour, to avoid further waste of money and court time.

13.34 Such an application will only succeed if the court is satisfied that the claim or defence is bound to fail. An applicant for a strike-out order must remember that the essence of the civil litigation process is a trial at which witnesses give oral evidence. The standard approach for a Judge faced with an application to strike out a statement of case on the basis that it is vexatious is to ask whether, on the basis that all the matters of fact asserted by the litigant will be proved at trial, the case is still hopelessly weak and bound to fail. The Judge will not engage in fact-finding. He proceeds on the basis that the facts pleaded are true even though he may be of the view that the litigant has little prospect of proving these facts at trial.

Summary Judgment [CPR Part 24]

13.35 The court has power to award summary judgment (ie a judgment without a trial) against a claimant or defendant on the whole of a claim or on a particular issue raised in the proceedings. Judgment may only be given summarily if the court is satisfied that either

(1) the claimant has no real prospect of succeeding on the claim or issue, or that the defendant has no real prospect of successfully defending the claim or issue, and

(2) there is no other compelling reason why the case or issue should be disposed of at a trial.

13.36 Applications for summary judgment should not be made lightly. The applicant must be entirely confident that his case is unanswerable or that his opponent's case is really unarguable. Summary judgment applications should usually be made early in the proceedings, but it is possible for a party after reviewing his opponent's evidence to conclude that his opponent is bound to lose either the whole case or a particular issue and apply for summary judgment to save the costs of, or costs at, trial. An applicant who brings a summary judgment application before disclosure should bear in mind that the court will be concerned to ensure that there is no injustice done by considering the matter before disclosure, and should include copies of all relevant documents in his evidence.

13.37 An applicant for summary judgment will usually wish to upon written evidence by way of witness statements verified by a statement of truth. That evidence must be filed and served on the opponent at least seven days before the hearing (although it is preferable to serve it with the application) so that the respondent to the application has an opportunity to serve evidence of his own.

13.38 The court hearing a summary judgment application will not entertain detailed evidence or enter into complex analysis of the facts. It will not conduct a mini-trial and will only give summary judgment where the issues are clear, and one

party has no reasonable prospect of succeeding either on the case as a whole or on a particular issue. In cases where the court takes the view that the applicant has a strong argument but there are sufficient doubts to justify order the proceedings to continue to trial the Judge may impose conditions on the respondent as to the basis on which it may defend the claim or continue to trial.

13.39 A litigant in person facing an application for summary judgment against him should take care to ensure that he puts forward his strongest case in his witness evidence and to point out to the court where there may be documents, as yet not disclosed, which may have an important bearing on the outcome of a trial.

Preliminary issue

13.40 There will be occasions where one particular issue is of such paramount importance to the claimant's claim (or defendant's defence to the claim) that if it is lost the claim or defence is inevitably lost whatever the court may decide on the other issues. In such cases it can make sense to have a trial of that issue in advance of all the others, hence the term 'preliminary issue'. There is no point both parties spending time and money on preparing for the issues which arise if the preliminary issue goes in favour of the claimant (or defendant) and the remaining issues become irrelevant.

13.41 So far so good. Where it is clear that there is an issue which if determined one way will put an end to the proceedings it will often be sensible to try it first at a separate hearing. But parties do sometimes persuade the court that it would sensible to try one or more issues in advance of the others only to find that the resolution of these issues leave the parties no further forward. There are many examples of the Court of Appeal (wise of course after the event) cautioning parties against preliminary issues and the court from ordering them. Nevertheless it can seem very attractive to have a preliminary issue so that the parties know whether it is necessary to contest the others.

13.42 Proposing or agreeing to the trial of a preliminary issue can be fraught with difficulty and should not be lightly done. It should be remembered that although issues may be independent of each other the credit of one party's evidence may be seriously dented on one issue and this may impact on the decision the court makes on the others. It is for this reason that insurers regularly oppose applications in personal injury actions for liability to be tried ahead of damages. Of course if the claimant fails to establish that the defendant is liable for the accident which caused the claimant's no question of awarding damages arises and all the cost and trouble in preparing for issues on damages will apparently be wasted. But where the defendant wishes to dispute the claimant's version of events he may find it much easier if the court disbelieves the claimant on matters of damages.

13.43 For the litigant in person it is probably wiser to leave the court to decide whether the case is appropriate for a trial of one or more preliminary issues and do oppose any application your opponent may make for a preliminary

issue if you consider that there may be an advantage for you to have all the issues tried together.

G. Interim remedies

13.44 In certain proceedings it is possible to obtain an order for a remedy which will operate until the hearing of the trial. Where a claimant is concerned that the defendant is continuing to do something which he should not, and will make matters worse by the time the case comes on for trial, the court may make an order preserving the position until trial. Many such orders are in the forms of 'injunctions' that is an order preventing a party from doing something (or, occasionally, requiring a party to do something) but injunctions are not the only interim remedy which a court may give. Examples of interim remedies include an order:

(a) not to do something until after the final hearing (eg. to stop building works on land which the claimant asserts is his)

(b) to detain and keep safe a particular object over which the parties are litigating (eg a car or other valuable asset)

(c) not to deal with certain assets or not to remove them from the jurisdiction (a freezing injunction, which before trial can only be ordered by a High Court judge)

(d) to pay some damages to the Claimant in advance of the final hearing (an order which will only be made where it is clear that some damages will be payable by the Defendant, but the parties are disputing the amount);

(e) to file accounts of a business (for example in a shareholders or partnership dispute);

(f) to pay money received in the course of business or in the exploitation of an asset into a nominated account or into court (another order which might be appropriate in a dispute over a business)

13.45 A party seeking an order for an interim remedy must issue an application with written witness statements and relevant documents in support. This is a difficult area for a litigant in person, but it some cases may be essential to preserve the position before trial for without such protection the litigant may find that he is left with a worthless victory at the end of the trial.

13.46 Orders for interim remedies are always in the discretion of the Court. The general rule is that a party applying for an interim remedy must show two things, namely that:

(1) there is a serious question to be tried

(2) the balance of convenience is in favour of making the interim order.

These principles were stated in a House of Lords case *American Cyanamid Co (No.1) v Ethicon Ltd* [1975] AC 396 and a litigant in person may well find lawyers and the judge referring to 'American Cyanamid' principles. Two important points emerge from the case. First, it is not necessary for the claimant to show that he has a good case, or is likely to win at trial. It is sufficient that he shows that he has a proper case which is not obviously hopeless. Secondly, the Judge has to consider all the relevant circumstances and decide whether the 'balance of convenience' lies with or against making the order sought. Strictly, the American Cyanmid principles apply only to interim injunctions, but they indicate the general approach the court will take to any application for interim remedies.

13.47 The Judge making an interim remedy order (often referred to as 'interim relief') will always be conscious that at the eventual hearing the trial judge may decide that the Claimant does not have a good case, and therefore the making of the interim remedy may have harmed the Defendant eg in preventing him doing something he was lawfully entitled to do. Almost invariably, the Judge granting interim relief will do so only where the Claimant gives a 'cross-undertaking in damages', that is makes an enforceable promise to compensate the Defendant for any losses (to be determined by the court) the Defendant may sustain as a result of his compliance with the interim remedy order.

13.48 It follows that a litigant applying for interim relief should ordinarily offer to give a cross-undertaking in damages and (most importantly) file evidence to show that he has sufficient assets to satisfy any order for damages which might be made under the cross-undertaking. The result is that interim relief may not be available to a litigant with few assets in circumstances where a wealthy litigant would obtain relief. There is really no avoiding this situation, but in appropriate cases the courts will do what they can to protect litigants pending trial.

H. Costs on interim hearings

13.49 Where the court holds a Case Management Conference or a Pre-Trial Review to consider the state of the case and whether and if so what directions should be made, the usual order for costs is 'costs in the case'. That means that whoever loses the case at the end of the day must pay the successful party's costs unless the trial judge orders otherwise.

13.50 In all other applications the court will make an order for costs as the judge considers appropriate. Where the application has been contested the usual order is for the loser to pay the winner's costs, but a different order may be made if in the circumstances of the application the Judge considers that another order is justified. Sometimes it is not easy to be sure which party has been successful, and the Judge may order costs in the case.

13.51 Under CPR, the general principle (contrary to the previous practice) is that the costs of an interim hearing should both (a) be summarily assessed by the judge

hearing the application, and (b) be paid within a short time after the hearing (14 to 28 days), and not wait for the end of the case. To help the judge assess costs at the hearing each litigant hoping to obtain an order for costs should file a costs schedule setting out the costs he will claim.

13.52 A litigant in person has only a very limited opportunity to claim costs (see chapter 17) but he should still file a schedule. When faced with a solicitor's costs schedule filed by an opponent, a litigant in person may find it very difficult to challenge the costs claimed. The Judge hearing the application should be able however to assess the costs and reduce the bill where it is appropriate to do so without the need for the litigant in person to argue the matter. This will now be done by reference to the costs budget a represented party now has to produce for costs management purposes, see Chapter 14.

Chapter 14
Costs Management

A. The 'Jackson' Reforms
B. The impact on Litigants in Person
C. Costs management in multi-track cases
D. Costs capping

Headlines

(1) From 1 April 2013 substantial changes to the Civil Procedure Rules have been made which are designed to enable the court to control, and, hopefully, bring down, the costs which a successful represented party may recover from his opponent, whether represented or a litigant in person.

(2) The court has an obligation to deal with cases "justly and at proportionate cost". This means that the costs recoverable by a successful litigant may not be more than the case warrants, taking into consideration both the amount of the sum at stake or the value of any non-pecuniary remedy awarded and the complexity of the individual case.

(3) In all multi-track cases represented parties must produce budgets showing the costs which have been incurred and which are likely to be incurred in the future conduct of the litigation. These budgets must be in form 'Precedent H'.

(4) Litigants in person are exempted from the obligation to produce a budget.

(5) The court will conduct one or more Costs Management Conferences to consider the budget of a represented litigant. Unless the litigant in person agrees his opponent's budget the court may revise a budget if the judge considers that it is disproportionate.

(6) A litigant in person should not agree his represented opponent's budget unless he is quite sure that it is reasonable. It is better to leave it to the judge to decide whether the costs proposed are proportionate.

(7) It is possible for a litigant in person to apply for a costs capping order limiting the amount his represented litigant may recover if successful.

(8) The provisions of the CPR make obtaining a costs capping order difficult, but you should give it some thought.

A. The 'Jackson Reforms'

14.1 It had been hoped that the introduction of the Civil Procedure Rules [CPR] following the final report of Lord Woolf's 'Access to Justice' inquiry might serve to bring down legal costs in civil proceedings. Such hopes were in vain, and legal costs continued to rise, if anything at a quicker pace than previously. In 2008 Sir Rupert Jackson, a Lord Justice of Appeal, was requested to prepare a report into the cost of civil litigation and associated aspects of funding in civil cases. His Final Report, published in December 2009 after a widespread consultation exercise is an immense work reflecting the enthusiasm and energy of its author.

14.2 While the Final Report recommended the introduction of a system of costs management in civil cases, Sir Rupert acknowledged that such a system would have both positive and negative factors. Among the latter would be the generation of additional costs by introducing new procedures into the litigation process, and the additional demands a costs management system would have on already stretched, and very limited, court resources. Nevertheless Sir Rupert considered that it would be sensible for the court to have regard to cost when case managing a case and felt that, if done properly, costs management would save more costs that it generated.

14.3 The result of the Jackson report is the introduction of a Costs Management structure based on four essential elements:

(1) the parties are to prepare and exchange litigation budgets which may be amended as the case proceeds;
(2) the court is to consider the budgets and state the extent to which they are approved;
(3) so far as possible, the court is to manage the case so that it proceeds within the approved budgets;
(4) at the end of the litigation, the costs recoverable by the winning party are assessed in accordance with the approved budget.

This new structure is in force for all multi-track cases commenced on or after 1 April 2013 in any county court or in the Chancery or Queen's Bench Divisions of the High Court with the exception of the Admiralty and Commercial Courts and in Defamation cases. It is part of a package of reforms brought into effect in the Legal Aid, Sentencing and Punishment of Offenders Act 2012. It is beyond the scope of this work to discuss this reform package, but it includes the abolition of the ability of litigants to recover success fees payable under conditional fee agreements and the cost of premiums to fund after-the-event insurance policies. Another part of the package will see awards for general damages in personal injury claims increased by 10% after 1 April 2013.

14.4 The new costs management structure is implemented by amendments to the CPR. These amendments go wider than a simple introduction of rules providing for costs management. Changes have been made to the definition of the Overriding Objective [CPR1.1], the rule governing relief from sanctions [CPR 3.9], the introduction of the 'Directions Questionnaire' in place of the former Allocation Questionnaire [CPR 26.3], the rules relating to Disclosure [CPR 31.5], and the rules relating to witness statements [CPR 32.2]. It is important to note that any text or commentary you may have which was published before March 2013 is almost certainly out of date in these respects. The relevant changes to the CPR have been incorporated into the text of this Handbook as appropriate.

B. The impact on litigants in person

14.5 Litigants in person are exempted from the requirement to prepare and file a costs budget [CPR 3.13]. However, a represented litigant opposing a litigant in person must file a costs budget and this will have to be served on the litigant in person unless the court orders otherwise [CPR 3.13]. When the court holds a costs management conference it will be open to the litigant in person to make representations as to the size of his opponent's budget. This may be a difficult task for a litigant who has no experience of assessing solicitors' costs, and most litigants will have to rely on the judge to investigate the reasonableness of the budget and keep it under control. Most District Judges will have been solicitors in private practice before becoming judges and will be well placed to assess the reasonableness of the budget.

14.6 The main advantage of costs management for the litigant in person will be in having a clearer idea of the cost of losing the litigation than he had in the days before costs management. From an early stage in the litigation the solicitor for the represented party will have to provide estimates of all the costs that will be incurred in the litigation, and while there will be some scope for those estimates to be varied up or down if any significant developments occur in the litigation, the litigant in person will know well in advance of the trial what the cost of losing is likely to be.

C. Costs management in multi-track cases

14.7 The purpose of costs management is that the court should manage both the steps to be taken and the costs to be incurred by the parties to any proceedings so as to further the overriding objective [CPR 3.12(2)]. The overriding objective is 'to enable the court to deal with cases justly and at proportionate cost' [CPR 1.1]. This means that the court will have to take into account the amount at stake, or, in the case of non-pecuniary remedy the value of that remedy, when assessing the costs which a represented party proposes to incur in contesting the proceedings. The amount at stake will not be the only criterion however. The court must also consider the complexity of the claim or any defence to the claim. If comparing

two cases concerning the same amount of money it will be proportionate for the litigating parties to incur more costs in the case which is more complex and has the greater number of issues.

14.8 At the heart of costs management is the costs budget or 'budget'. This is defined in the glossary to the CPR as "An estimate of the reasonable and proportionate costs (including disbursements) which a party intends to incur in the proceedings". A budget must in the form *Precedent H* [CPR PD3E.1], a copy of which will be found at appendix A. This is a lengthy form which divides the litigation process into phases. Costs estimates must be provided for each phase. However, in cases where the party's budgeted costs do not exceed £25,000 that party need only complete the first page of Precedent H.

14.9 A represented party must both file at court and serve on the litigant in person his budget by the date, if any, specified in the Directions Questionnaire (see 7.27), If no date is specified the budget must be filed not later than seven days before the first management conference. Failure to file a budget is met with the draconian remedy that the party in default is to be treated as having filed a budget comprising only the applicable court fees [CPR 3.14]. In other words the party cannot claim any of its legal costs or disbursements apart from the court fees.

14.10 Once a budget has been filed by all represented parties it is for the court to manage the costs. This is done by the court making a Costs Management Order [CPR 3.15]. Represented parties are encouraged to agree their respective costs budgets and if they do the Costs Management Order will simply record the agreements. The court has no power to upset the agreement; a judge who considers that the costs agreed are too high will simply record his concerns in the order. But where the parties do not reach agreement the court will consider the budget(s), and may revise any aspect of a budget which the judge considers to be disproportionate. As a litigant in person you should rarely, if ever, agree the budget of your represented opponent, unless you receive advice from a reliable source that the budget is reasonable.

14.11 In most cases the court will make a Costs Management Order at a Case Management Conference (see 13.7) but the judge may decide to convene a hearing solely for the purposes of considering costs, and this will be termed a Costs Management Conference. CPR 3.15(2) provides that, where practicable, Costs Management Conferences should be conducted by telephone or in writing.

14.12 As a litigant in person you do not have to become involved in the costs management of your represented opponent's costs. But it may well be in your interests to ensure that your opponent does not seek to justify higher costs than the case warrants by exaggerating the complexity of the issues or in other ways making the case appear more complicated than it actually is. With this in mind it is important that you do not contest issues simply for the sake of it. You will need

to have a clear idea of the issues (or prospective issues) in the case (see Chapter 6). The fewer the issues the less complex the case and the lower the amount of costs which will be proportionate for the represented party to incur. It is good advice only to contest those issues which you know can property be contested. This is always good advice, for the litigant who fights points which he ought not to fight on the evidence available to him risks appearing to the Judge as a litigant who has a poor case. Your good points may be hidden by your bad points. Now, with costs management, there is a second good reason not to raise issues unnecessarily.

14.13 Whether the court makes a Costs Management Order covering the entire case at the first Case Management Conference, or makes a series of Costs Management Orders as the case progresses through its various stages, will depend on the circumstances and the complexities of the case. In cases where you are unsure as to the extent of the documentation your opponent may disclose (Chapter 10) or the number of witnesses he may propose calling to give evidence, you should consider inviting the court to restrict the phases of the litigation in respect of which it makes a Costs Management Order on the basis that the litigation may appear less complex after either or both of these stages have been completed.

14.14 In order to ensure that the costs involved in costs management do not themselves become disproportionate the CPR provide [CPR PD 3E.2] that 'save in exceptional cases':

(a) the recoverable costs of initially completing Precedent H must not exceed the higher of £1,000 or 1% of the approved budget and

(b) all other recoverable costs of the budgeting and costs management process must not exceed 2% of the approved budget.

It follows that unless the approval budget brings the costs recoverable by a successful represented party down by at least 3% (which it should, but this remains to be seen) an unsuccessful litigant in person may well end up paying more in costs to the successful represented litigant than he did before the implementation of the Jackson reforms.

D. Costs capping

14.15 The court has power to limit the amount of costs a represented party may incur in the future [CPR 3.19]. This is, potentially, an important power for the litigant in person. You should note that the court may only cap costs that have yet to be incurred. If you want the court to cap the costs of your opponent do not delay with your application. However a costs capping order may be made at any stage of the proceedings, so you should not be put off making an appropriate application simply because you could have made it earlier, although the later you leave it the less likely it is that the court will make an order.

14.16 A costs capping order may be made in respect of the whole litigation or in respect of any issues which the court orders to be tried separately [CPR 3.19(4)]. (Preliminary issues).

14.17 A costs capping order is a discretionary order. It may be made by the judge managing the case where he considers that:

(1) it is in the interests of justice to do so;

(2) there is a substantial risk that if an order is not made costs will be disproportionately incurred; and

(3) this risk cannot be adequately controlled by case management directions or detailed assessment of costs [CPR 3.19(5)].

This last requirement presents a high hurdle for an applicant to overcome. Most judges are likely to take the view that case management directions and a detailed assessment of costs by an experienced costs judge should be sufficient to keep costs under control. But that has not always been the experience in the past, and if you face a represented litigant who is, or appears to be, acting as if money is no object in fighting the litigation this is an application you should give thought to making.

14.18 In considering whether or not to make a costs capping order the court is required to consider all the circumstances of the case, including:

(1) whether there is a substantial imbalance between the financial position of the parties;

(2) whether the costs of determining the amount of the cap are likely to be proportionate to the overall costs of the litigation;

(3) the stage at which the proceedings have reached; and

(4) the costs which have been incurred to date and the future costs.

Once a costs capping order is made it will limit the costs the successful party may recover to that specified in the order. It is however open to a costs-capped party to apply to vary the order if, but only if, there has been a 'material and substantial change of circumstances since the date when the order was made' or there is some other compelling reason why a variation should be made to the existing order [CPR 3.19(7)].

14.19 These 'Post-Jackson' costs capping orders are new. (Costs capping has been possible for a short time, but the courts are to adopt a new approach after 1 April 2013.) It is not therefore possible to give advice as to how the judges will approach cost capping alongside costs management. The best advice for a litigant

in person at present would appear to be to attend the first costs management conference and raise any arguments you think may be helpful in persuading the judge to limit the costs of your represented opponent. If you consider that your opponent is much wealthier than you (i.e. that there is a substantial imbalance between the financial position of the parties, see 14.18) draw this to the attention of the judge. If you consider that the risk of an adverse order to pay litigation costs has been improperly used by your opponent as a threat to warn you off bringing or defending proceedings, or that your opponent has been deliberately exaggerating the complexity of the dispute, that too may be drawn to the judge's attention. You should be able to get a feel as to how the judge views your opponent's budget, and that should assist you decide whether or not to apply for a costs capping order. Remember that if you make an application and lose it, the court is likely to order you to pay your opponent's costs of the application which may run into several thousands of pounds.

Application for a costs capping order

14.20 Any application for a cost capping order must be made in accordance with CPR Part 23 (see 13.13) [CPR 3.20(1)], and will proceed in much the same way as any other application. Make sure that you have marshalled your arguments in advance. It is a good discipline to prepare a 'skeleton argument' which summarises your arguments on paper whether or not you forward the skeleton argument to the judge. If you cannot set out a cogent argument in summary on paper, you should not be bringing the application.

14.21 Your application notice must:

(1) set out whether you are asking for a costs capping order for the whole litigation or just for a particular issue which is ordered to be tried separately;

(2) explain why a costs capping order should be made;

(3) be accompanied by a budget setting our the costs and disbursements which you have incurred to date and the costs and disbursement which you are likely to incur in the future conduct of the proceedings.

You may find that the court proceeds to list the hearing of your application straight away, or gives directions requiring further information to be provided by either party. You should comply with any directions, but, assuming the directions have been given on paper without a hearing, you may apply to the judge to vary the directions if you have a good reason to do so provided you apply within the timescale specified, usually 7 days.

Chapter 15
Preparing for your Hearing

A. Introduction
B. Basic Preparation
C. Court Directions
D. A complete chronology
E. The issues and further evidence
F. Your witnesses
G. Preparing your witnesses
H. Written Evidence – The Trial Bundle
I. Preparing to question your opponent and his witnesses
J. A Skeleton Argument
K. Do I need to go to trial or can the case be settled?

Headlines

(1) Do not delay the preparation of your case for trial. When you come to prepare you may find that there are gaps in your evidence which will take time to fill.

(2) Some courts will require you to complete a pre-trial checklist (or listing questionnaire) in Form 170.

(3) Do check that you (and your opponent) have complied with all the court's directions. If necessary make an application to the court to extend time, or ask for a sanction to be imposed on your opponent.

(4) Make sure that you have a full chronology and list of issues before you when preparing for trial.

(5) If you have not covered all the important issues in your witness evidence you should apply for permission to serve a further witness statement as soon as you can.

(6) Make sure that your witnesses know when and where the trial will take place. Check that they will come willingly; if necessary issue a witness summons to compel attendance.

(7) You may prepare a witness, by taking him through his statement, showing him your opponent's witness statements where they conflict with his, taking him through the relevant documents. You may not 'coach' a witness, that is tell him how to answer particular questions in a way other than in his own words.

(8) If you are responsible for preparing the trial bundle remember that this is a time-consuming task that must be taken seriously. Make sure you comply with CPR APD.3.

(9) Note down all the matters you need to challenge in the witness statements of your opponent so that you can question the witness at trial.

(10) Assess how strong you feel your case is, and with this assessment in mind attempt to compromise the case with your opponent. With a trial imminent he may be more willing to compromise than he may have been earlier in the proceedings.

A. Introduction

15.1 There will always be a period between the date on which the last direction as to evidence takes effect and the trial date. Make sure that you use this time productively. Waiting until the last minute to prepare your case for trial runs the risk that you find that there are important gaps in your case which cannot be filled in the time available or that you turn up to the hearing without being in a position to do yourself justice either in questioning your opponent's witnesses or arguing the points you wish to get across to the judge.

15.2 In most multi-track cases there will be a pre trial review about four weeks before trial. You should aim to do all your basic preparation before the pre-trial review so that you are in a position to inform the judge as to your state of readiness and if necessary ask for additional directions.

15.3 In many courts you will be directed to complete a listing questionnaire or pre-trial checklist. The aim is to help the court fix the date of trial, and to collect a fee. It is not a checklist which assists a party prepare for trial. The pre-trial checklist is a three page form which asks the parties to state:

A. whether they have complied with the court's directions, and if not to specify which are not yet complied with and when they will be complied with together with any other directions you wish to seek;
B. the name of their witnesses and whether there are dates which need to be avoided when listing the matter for trial, and whether any special facilities are required for any witness;
C. the name of any expert who will be giving expert, whether he has met the expert on the other side, and, if giving oral evidence, whether he has any dates to avoid;
D. who will be presenting the case at trial;
E. the time estimate for trial
F. a proposed timetable for trial, and estimate of costs and the listing fee (for a claimant), together with any application and fee for additional directions.

The rule which governs pre-trial checklists [CPR 29.6] is not mandatory and while many courts require them, many others dispense with them. Few county courts have the resources to enable a judge or an experienced member of administrative staff to look through the checklist and flag up matters which required attention. Do not be surprised if no-one actually considers your checklist.

15.4 Whether a pre-trial checklist is helpful depends very much on the procedure your county court adopts to fix the date of the trial. Most courts operate a 'trial window' system. The Judge giving directions fixes a 'window' (a period of anything between about 2 weeks and 3 months) within which the trial must take place. Each party then informs the listing manager, by post or e-mail which dates he can and cannot do within that trial window and the manager fixes the date. If no dates are convenient to all parties it may be necessary to have a listing hearing before a Judge who decides when the case is to be heard. A variant on this system, eg at Central London County Court, is a telephone listing appointment where all parties take place in a conference call to decide when the trial should take place within the trial window. Each party has to be primed before the call with the dates he can and cannot conveniently do. The parties are encouraged to agree a date in advance of the call, and it will usually be possible to fix the trial for that date. In smaller court centres however this may be difficult to arrange, and the parties will have to negotiate with the court when the trial takes place and if necessary have a hearing before the judge.

15.5 All listing matters are the responsibility of the judge. If you have a very good reason to ask for a hearing on a particular day you can ask the judge to fix a date, either when appearing before him on an application or case management conference, or at an application made specifically for the purpose of fixing a date. If you have your opponent's agreement to a particular date you can ask the judge to fix this date on an application without a hearing, but whether the judge will be able to accommodate you will depend upon the pressures on the court from other cases.

B. Basic Preparation

15.6 There are a number of questions you should ask yourself:

(1) Have I followed the court directions which have been made already in the case?
(2) Have the other parties (or party) to the action followed the court directions made so far?
(3) Do I have a complete chronology?
(4) What are the (remaining) issues to be decided at the trial?
(5) What oral evidence will I need to prove those issues?
(6) What written evidence will I need to prove those issues?
(7) What will the court need in order to understand the issues and the evidence at the hearing?
(8) Do I need to go to court or is it possible to settle the case in a way that satisfies both me and the other party or parties to the case?
(9) What do I risk if I go to court?

C. Court Directions

15.7 It is very important that all parties have followed the case management directions that will have been given by one or more judges earlier in the course of the action going through its interim stages. Although it is possible for the parties to agree in writing to vary the dates for compliance with evidential directions, eg the date for exchange of witness statements, the court remains in overall charge of the case and will have given directions which will be necessary for an efficient disposal of the case. The parties may not agree to vary the date that the court has set for the return of a pre-trial checklist, the trial or the trial period, or, in the case of a multi-track trial, the date for a case management conference or a pre-trial review.

15.8 If you have failed to follow a direction and there is a risk that the court will impose a sanction, or, more seriously, the court has imposed a sanction on you which seriously affects your case, you may need to apply to the court to relieve you from the consequences of the sanction. You should make an urgent application to the court by a notice of application.

15.9 If the other party or parties to the case have failed to follow an important direction of the court and you consider your case has been or may be prejudiced as a result, you may wish to make an urgent application to the court either to order the other party to comply with the direction, or impose a sanction on the other party for failing to comply with the direction.

D. A complete chronology

15.10 If you have followed the advice given in Chapter 8 on pleadings you will already have a chronology, and you will have brought it up to date after disclosure, see Chapter 11 on witness statements. If you do not have a chronology prepare one now. The importance of a chronology cannot be understated. It is folly to engage in contested litigation without a chronology. You may think you know all about the case, and indeed you might, but preparing a chronology puts everything in context. Frequently a chronology helps you understand the events underlying the case in a much more coherent way than you did before. If you need advice as to preparing a chronology, please see paragraph 8.34 above.

15.11 Most judges will prepare their own chronology if neither party has done so. There have been several occasions for the authors where, having prepared a chronology of the main facts in advance of the hearing they appear to have a much more sound grasp of the case and the relevance of the various issues than do the parties and their representatives. This is experience at work more than ability. There is always a risk that a party or his representative preparing for trial loses sight of the wood for the trees. A comprehensive chronology helps keep the wood in view. It also assists you as a litigant look at the events objectively, something which is understandably very difficult to do when the events so closely concern you.

E. The issues and further evidence

15.12 After the close of pleadings you will have worked out what the issues of fact and law are. You will have noted what matters have been agreed. After disclosure you will have checked whether any of the documents disclosed by your opponent have caused you to review the issues and your assessment of them. Your witness statements (and if necessary expert reports) should have covered the issues, as reviewed after disclosure.

15.13 You should now check through the pleadings and disclosure again to make sure that you have not missed anything. Make (or remake) your list of matters which are in dispute. Ask yourself whether you have missed a point, and if so whether your existing witness evidence, or the documentary evidence covers the point in question. If the point is not covered you must consider whether you need to adduce further evidence, and if so how you are going to do it. If the point is a really serious one you may need to consider how best to make serious overtures to your opponent to settle the case.

15.14 It will be very rare that a point of critical importance is missed by anyone who has taken the trouble to prepare a list of issues after the pleadings are closed and who has made sure that his witness statements cover all the factual issues in the case. If there are matters which you now feel that you missed before, the chances are that they can be dealt with by yourself or your existing witnesses. Sometimes however you will have to find further witnesses.

Further witness evidence

15.15 If you find that you need to cover new points in your witness statements there are two ways you can go about it. First, the formal way, is to prepare one or more further witness statements and make an application to the court for permission to serve them as part of your evidence. Your application will have to explain why you did not cover the point before. If the truth is simply that you missed the point it is best to say so. Most judges will be sympathetic with a litigant in person. Unless either (a) your opponent is really seriously prejudiced, and this will happen only rarely in exceptional circumstances (eg a witness who could respond to your new point has died) or (b) you have left it so late that the trial date will be lost, you will almost certainly obtain permission. You may possibly face a cost penalty if your opponent can demonstrate that you have caused him additional expense by serving witness evidence late. Even where there is prejudice to your opponent or the trial date will be lost the court may conclude that the interests of justice are better served by allowing you to serve additional evidence than by refusing you permission.

Additional evidence 'in chief'

15.16 The second way you can cover new points is by yourself or any of your witnesses giving oral evidence of the new points at trial. The standard rule is that a witness's statement stands as his 'evidence in chief' (which means the evidence which the party calling the witness adduces at trial) and that no additional evidence may be given without the court's permission. The Judge

will not ordinarily give permission where the additional evidence is significant and or likely to take the opponent by surprise and put him in a position where he may not be able to deal with it by calling evidence of his own. In this regard, a useful approach is to notify your opponent in advance of your intention to ask the court to give you permission to deal with additional matters with oral evidence at trial. If you send your opponent a synopsis of the additional evidence you want to call in sufficient time for him to be able to think about it, and consider what response he might make to it, you will considerably increase your prospects of being given permission by the trial judge. Much will depend on the significance of the matters in question. If they do not go to the heart of the case and do not involve a change of case on your part there should be no difficulty. Where the additional matters do however go to the essence of the dispute you should adopt the formal approach and seek the court's permission to serve a further witness statement dealing with the additional matters before trial in a separate application.

15.17 Always ask your opponent first whether he objects to your further evidence. You may often find that he too wants to put in further evidence and is happy to agree.

15.18 Never delay. The earlier you make an application for permission to serve further evidence or notify your opponent of additional matters you wish to raise, the better your prospects of obtaining the permission you need.

15.19 In this regard, and generally, openness is definitely the best policy. Do not try to gain an advantage by not disclosing evidence in advance of the trial You will almost certainly be refused permission to rely on it, and, probably worse still, the judge may have doubts as to your integrity.

F. Your witnesses

15.20 Contact your witnesses and notify them of the date, the time and the place of the trial or hearing. If they are unwilling to attend, or are willing to attend but are concerned about the attitude of their employer, you must apply to the Court to issue and have served upon your witness a summons ordering him or her to attend trial.

15.21 One or more of your witnesses may have become unable to attend trial. They may have gone abroad, or be ill, or have died, or you may have lost contact. If you still wish to rely on their evidence and it is contained in a witness statement, you must notify the other parties of your desire to rely on your witness's evidence as soon as you know that there is or might be a problem over their attendance. Tell your opponent why the witness is unable to attend trial. Generally, if you have given adequate notice, you will be able to rely on the evidence. You run the risk that the judge may place less weight on that evidence, which the other parties will not be able to test by cross examination, but that cannot be helped.

15.22 Remember that the Court is always in control of what evidence is admitted at trial and may exclude evidence, even when that evidence would normally be capable of being given at trial. The Court may limit evidence where the judge decides he or she does not want to hear evidence on a particular issue or that there is sufficient evidence on any one issue.

G. Preparing your witnesses

15.23 The distinction must be drawn between preparing a witness to give evidence and coaching a witness. Coaching means telling a witness what to say in answer to certain questions or lines of cross-examination. Coaching is plainly wrong for it implies asking a witness to say something other than the evidence which the witness himself believes to be the truth. It is very likely to blow up in a party's face. Always remember that the vast majority of Circuit Judges, the judge who is likely to be trying your multi-track case, practiced at the Bar for upwards of 25 years. If your case is tried by a Recorder, he or she will be a part-time judge who is in regular practice at the Bar and will have been for at least 20 years. Such a judge will be very quick to spot a witness who has been coached. Usually, incidentally, a coached witness will be obvious to anybody.

15.24 It is however sensible to prepare your witnesses. Legitimate preparation of a witness involves:

(a) taking him through his statement (again!),

(b) taking him to the statements of your opponent's witnesses where they impact on your witness's evidence and asking him to consider how confident he is that he is correct in what he says,

(c) taking him through the documents in the trial bundle, and checking with him that he remembers those documents with which he was concerned, and asking him to remember the circumstances in which the document came to be prepared. Most people have a recollection of significant documents, but they may need time to think about them. If can be hard to remember all the relevant circumstances of a document and its making when being asked questions in the witness box where the document is several years old and the witness has given it little thought since the date it was made.

(d) with really important documents it makes sense to go through them line by line with your witness. We can all think we know what is in a document, without being clear about our thoughts. Your opponent (especially if he is represented by a barrister) may well take your witness through an important document sentence by sentence. If your witness is going to say something unfortunate to your case in the course of this exercise, it is far better that you know in advance than learn the hard way in the middle of a trial.

H. Written Evidence – The Trial Bundle

15.25 There must be a trial bundle in every case. The trial bundle (which may spread over several lever arch files or ring binders) contains all the relevant documents in the case. It is essential that care is taken to prepare the trial bundle properly. Conducting a trial without a proper bundle can be exasperating; indeed many judges will (very properly) refuse to start a trial until there is a bundle properly paged and indexed.

15.26 The Court will, almost certainly, have given directions about the preparation of a trial bundle for use by the court and by the parties and witnesses. If the court has not given a specific direction the Rules apply [CPR 39.5] and the Claimant must prepare and file the trial bundle "containing documents required by (a) a relevant practice direction, and (b) any court order" not more 7 nor less than 3 days before the first day of the trial.

15.27 The usual court direction, consistent with the Rule, is that it is the Claimant's responsibility to prepare the trial bundle. Where the Claimant is a litigant in person and the Defendant is represented however the court will often order the Defendant to prepare the trial bundle as the lawyers will be more used to doing so. (It is however a sad fact that there a many solicitors in practice who really do not know how to prepare a good trial bundle). If you do not have, or have access to, a good photocopier it may be best to let a represented Defendant prepare the bundle. If you have to do it yourself look around for a local printer or photocopy shop which has an automatic feed facility.

15.28 The relevant practice direction is CPR 39APD.3. This direction provides for the documents which should be in the bundle but does not specify in what order. Unless there is an excellent reason to use a different order prepare your bundle as follows:

(1) Index – this must be a detailed index listing each and every document in the order in which it appears and giving its page number. Page numbers must be sequential throughout the entire bundle. This is important. No two pages should have the same number, however many files you use, and however many dividers you put in those files. Note: preparing a trial bundle index is hard work. Do not shirk it.

(2) Case summary, chronology, and skeleton arguments – these are often ordered, and you may have been required to agree a summary and a chronology with your opponent. A case summary should really be a summary, usually no more than one side of A4. It should explain what the case is about in an non-contentious way. It is important at the interim stage of the case, not so much at trial. If you have got as far as preparing a trial bundle without being ordered to do one, you need not trouble to prepare one now. A chronology however is another matter. Unless the case is very simple you should always have a chronology. That too should be as non-contentious as possible. Skeleton arguments are entirely different. They will contain the party's argument and will be highly contentious. It is rare that they will be prepared early enough to

be put in the trial bundle however. They are usually served separately under the terms of a court direction.

(3) Statements of case, the pleadings. All the pleadings should be in order, ie claim form, particulars of claim, defence (and counterclaim), reply (and defence to counterclaim) and so on. If one party has made a request for further information that request, and the answers should be included in this section of the bundle. Put these at the end of the pleadings section unless the request relates solely to one particular pleading. In this case you might conveniently put the request and the answer immediately behind the pleading.

(4) All the court orders that have been made to the date of the bundle. You do not have to include the notices of hearing that the court has sent, but occasionally a party may wish to do so it he anticipates an argument about directions given in the absence of the other party.

(5) The Claimant's witness statements. The Claimant himself (or the principal witness where the Claimant is a company) should go first. It rarely matters in what order the other witness statements appear. If a witness statement has been served with supporting documentation do not include that documentation in the witness statement section. It should go into the documents section, and that section only.

(6) The Defendant's witness statements. As above, defendant first. Do not include supporting documents.

(7) Any expert reports in the case, including medical expert reports.

(8) Any plans or photographs which will be relied on at trial.

(9) All documents relevant to the matters in dispute in the case. These must be in chronological order, with the earliest first. Sometimes it is necessary to put different copies of the same document in the bundle, because, for example, there is handwriting on one or more copies of the document which is important to the issues in the case. Put these copies in the bundle following each other, any 'clean' copy first with an endorsed copy next. If there is a handwritten document which may be difficult to read, put a typed version next to it.

(10) The litigation correspondence. You have to use your judgment here. It is relatively rare for the judge to be taken to correspondence passing between the parties from the letter before action onwards. But it can be important where, for example, the litigant or his solicitor has made an assertion or given an explanation about a relevant matter which is inconsistent with that party's pleaded case, or where he appears to have changed his mind during the lead up to the trial. This may cast doubt on the litigant's reliability, and, provided the correspondence was not written as part of an effort to settle the case ('without prejudice'

correspondence) it is perfectly legitimate to use this material for this purpose.

15.29 The trial bundle must be prepared from copies of documents, never the originals. Each side must however bring its original documents to court [CPR 39APD 3.3] in case they need to be consulted.

15.30 The trial bundle should be contained in a ring binder or lever arch file. [CPR 39APD 3.6] This makes adding documents to the appropriate part of the bundle much easier. If there are too many pages to go into one binder or file, use your discretion as to how they are divided up. It is usually helpful to have the relevant documents [ie (9) above] in a separate file. If your case has lengthy experts' reports a separate binder of expert's reports may be advisable.

15.31 The practice direction [CPR 39APD 3.5] requires numbered dividers to be used where the bundle is more than 100 pages long. It usually makes sense to use dividers between each of the ten sections listed above. Do not, on any account, restart the page numbering after each divider. The numbering must continue sequentially through the trial bundle however many dividers are used (and too many dividers can be an irritant) and however many files or binders are need to contain all the documents

15.32 The contents of the trial bundle must be agreed. This is straightforward. The party responsible for the bundle should prepare a draft index which he sends to his opponent. The opponent should check very carefully that all the documents he wants in the bundle are listed in the index, and if they are not he should inform the first party that he wishes to have the further documents in the bundle (it is usually helpful to amend the index). The first party must then include the documents. There is no room for gamesmanship.

15.33 There will be occasions that one party will object to the inclusion of particular documents either on the grounds of relevance or on the grounds of privilege. Quite frankly there is usually little purpose served arguing about relevance. If the other side insists, have the document in the bundle. (If there are many such documents it may be possible to argue about the cost involved later). Privileged documents are quite another matter. If there has been correspondence passing between the parties in an effort to compromise the case, including of course Part 36 offers, such correspondence ought not to be in the bundle. It is usual to mark letters sent in an endeavour to settle the case 'without prejudice' but the without prejudice rubric is neither essential nor determinative as to whether the letter in question is privileged.

15.34 Where there is an argument as to the propriety of putting a document in the trial bundle, the bundles should be prepared and then those documents extracted from the bundles sent to the court for the use of the judge and the witness. At the start of the trial the matter should be raised before the judge for his determination. Sometimes it is necessary for the judge to pass that particular issue to a judicial colleague for determination so that he is not made aware of the contents of the disputed documents.

15.35 All documents in the trial bundle will be treated as genuine documents (and will not therefore have to be formally proved) unless one or other party makes it clear that any particular document is not accepted to be a genuine document. By 'genuine' is meant that the particular document was created on the date indicated, if any, containing the words that appear on its face. There is no presumption that the matters stated in the document are true; the truth of the contents of any document has to be proved by the party relying on it.

15.36 If you do challenge the genuineness of a document you should have done so on disclosure, but even though there may be difficulties about a late challenge you should raise the matter as soon as possible with your opponent and make your position clear to the trial judge.

I. Preparing to question your opponent and his witnesses.

15.37 *Cross-examination*. This is the very stuff of court-room dramas. You may have seen cross-examination on television or video, especially on American shows. In comparison your county court action may seem very tame. But of course it is a civil action not a criminal trial, and therefore there will be no jury (save in certain cases against the police or prison officers), and it is a real and serious determination of a dispute; no-one has any interest in making it exciting or entertaining.

15.38 There are no golden rules for cross-examination, only basic ones. Work your way through your opponent's witness statements, paragraph by paragraph, if necessary sentence by sentence. Note down against each witness what you do not accept as correct, so that you can ask questions to challenge what is stated. Pay particular attention to the contemporaneous documents. Does what the witness asserts in his statement stack up against what he or others wrote at the time? Does what he says make sense against the context of the events as they existed at the time? Your chronology may be very helpful here. Has the witness engaged in some post-event reconstruction?

15.39 Keep questions short. In cross-examination you are allowed to suggest an answer, and it can be very tempting to phrase your questions to suggest the answer you want the witness to give. But short neutral questions may often be a more sure route to the objective you wish to achieve. If you detect an inconsistency between witness A and witness B, you can ask A whether he is sure of what he says, and then take him to what witness B says, and ask him whether he remains sure. Might not witness B be correct? Or you may consider that what your opponent says does not fit with the letters he wrote at the time. Take him through what he says now. Suggest that back then he saw things a little differently. Refer him to the letters he then wrote. How does he account for the inconsistency or difference in emphasis? Remember your aim is to raise doubts in the judge's mind as to the reliability of the witness's evidence, not force the witness into a metaphorical corner and beat the stuffing out of him.

15.40 In pre-CPR and witness statement days, it was a rule of practice that the defendant should put all the essential features of his case to the plaintiff and his witnesses, as appropriate, in the course of his cross-examination. That was because in the absence of exchange of witness statements it was possible for there to be a fair number of cards held close to the chest, and it was necessary for the judge to know what the plaintiff's response was to any assertion that was later made by the defendant, and for the plaintiff to have an opportunity to deal with the defendant's evidence in the course of giving his evidence. Now matters are rather different. All parties and the Judge know what any witness will say in advance. Nevertheless it is still a good discipline for the Defendant to challenge the Claimant's witnesses on anything of importance which is in dispute. It is also sensible for the Claimant to challenge the Defendant's witnesses on all important disputed issues of fact.

15.41 One point for the litigant in person to be alive to when there are lawyers on the other side is the solicitor-drafted witness statement. These can be the bane of the county court judge's life. Witnesses sign and then confirm the truth of statements that are written in excellent prose (at least from a lawyer's standpoint) that meet perfectly all the issues of the case from the litigant's perspective. The language is plainly quite different from anything the witness may use in real life. All too often witnesses tell the court that they simply signed what the solicitor put before them, and that parts of the statement are not actually correct. A simple technique, often effective, is to take a part of the sequence of events, ask the witness whether he has any recollection of the events independent of the witness statement and then, assuming he says that he has, ask him to tell the court in his own words what happened. He may then give a rather different account to that which the lawyers would like him to say!

J. A Skeleton Argument

15.42 In most courts each party will be directed to 'file' (ie send to the court) and 'serve' (ie send to the other parties) a "skeleton argument". It is so described because it is supposed to be brief. Many barristers put a fair amount of flesh on their skeletons. They are not the better for it. Do not be concerned if your represented opponent prepares a much longer skeleton than you do.

15.43 The purpose of the skeleton argument is to notify the judge in advance what your case is and what your main arguments will be. This will help the judge when he prepares for the trial. Your skeleton should aim to do two things.

First the skeleton argument should explain briefly what you say the case is all about. If you have prepared a case summary you may make use of the material in it. But while a case summary should attempt to put matters neutrally, you may be as partisan as you like in your skeleton argument, so you may well want to rework your case summary. Explain the case as you see it.

Secondly, the skeleton argument should identify all the issues (factual and legal) which you consider need to be determined by the court, and state what your argument is on each issue individually. As a litigant in person you may be concerned about what to say about legal issues, although you should by this

stage of the action have a reasonably clear idea what they are likely to be, if indeed there are any legal issues. Do not be worried if you have a barrister opponent who cites cases ('authority') to the judge. Barristers have a duty to bring to the judge's attention all cases which are relevant to any legal issue the judge has to decide, and in the rare case which turns on a legal issue you should be able to rely on the judge to identify the issue, explain it to you, and deal with it appropriately. Your main concern should be the factual issues. You will already have prepared a list of factual issues and thought about the evidence you will bring to court to prove your assertions of fact. Setting out your arguments on each factual issue on paper will not only help the judge, it will help you sort out your thoughts and refine your arguments.

15.44 Do make sure you send your skeleton argument in to the court in time for the judge to read it with the papers. The court order may direct a time, but if there is no specific direction as to when you should file your skeleton, send your skeleton into the court 3 days before the case is due to be heard. Even if you are not required by a court order to file a skeleton it is a good idea to prepare one and send it to the judge. The earlier you can get the judge thinking along the lines you want him to the better. Check how the court wants the skeleton argument. You will usually send it in hard copy, but some courts accept, and indeed encourage, skeletons to be sent by e-mail.

K. Do I need to go to trial or can the case be settled?

15.45 It ought to be a last resort for parties to litigation to go to court for a hearing or trial to resolve the issues between them. It is far better for parties to resolve their issues by agreement. It is only where that is not possible that the Court has to decide the case. Unfortunately it takes two to settle a case, and it is quite impossible to remove the element of gamesmanship from settlement negotiations or the adoption a hard stance in the hope that the other side will throw in the towel.

15.46 It remains possible up to trial (and indeed, generally speaking, up to the time when the Judge actually begins his or her judgment in the case) for the parties to settle the case, that is, to reach an acceptable agreement about the case. It is better that discussions about settling cases take place in writing in letters or e-mails between the parties so there is clear evidence about what has been agreed. If you are writing a letter which contains proposals by you to settle a case, it is sensible to head the letter "Without Prejudice" . This makes it clear that your proposals are not meant to be read by the Judge at trial, and enables you to be open and frank in your proposals. Provided that the letter contains settlement proposals, or has clearly been written with a view to compromising the case, the Judge will not look at the letters before deciding the case. He may look at them after he has reached his decision because the offers made by one party to the other to settle the case may be a relevant consideration in the award of costs. If you are writing a letter offering settlement terms it is sensible to make sure that it contains nothing else, so that it may conveniently be kept out of the trial bundle.

15.47 Agreements between the parties should include agreement about the costs of the case. In extreme circumstances it is possible for the parties to agree to allow the court to decide who should pay what costs, but such an agreement puts the judge in a difficult position for he will not have heard all the evidence in a trial and will probably have to carry out some form of factual investigation before he can reach a decision.

15.48 A later chapter of this handbook deals with formal offers of settlement made by one party to another which offers have special consequences about the costs of the case ("Part 36 offers").

15.49 You have to keep in mind what you risk by going to trial. You may lose, and this may be very expensive if the other party is represented. Someone is almost certain to be the loser in every case. The Judge has to make an objective decision about the factual issues in the case, applying the law which the judge decides should be applied in the case. Sometimes the Judge may have to decide who is telling the truth about facts critical to success or failure of an action.

15.50 If you lose the action, or lose important issues in the action, then you may be liable to pay the costs of the other party or parties to the action, and these costs may be substantial. That is the basic rule, although in exceptional cases the Judge may exercise his discretion not to award a successful party his costs, or decide to deprive a successful party of some of his costs. It is important that you balance the risks of the action against the potential benefits.

Chapter 16
Conducting the Trial

A. When and where is the trial?
B. What does a court room look like?
C. Who is the judge and how should I address him or her?
D. What is the judge there to do?
E. Behaviour in Court.
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J. Final Submissions. What do I say in a speech?
K. The judge's ruling.
L. The judgment or order of the court.
M. The costs of proceedings.
N. Can I appeal and what should I do about appealing when the case is finished?

Headlines

There are no headlines to this chapter. You should read it all.

A. When and where is the trial?

16.1 You will have received a written notice from the Court telling you when and where your trial is to take place. That notice will give you the address of the court but will probably not give you the number of the court room in which the trial will take place. In the foyer of the court you will see lists of what cases are in which courts, the name of the judge trying the cases in a particular court with his or her judicial title, and the time and place in the list when the case will be heard.

16.2 Make sure you know where the Court is and how to get there. Leave plenty of time to park, if you are coming by car, and ensure you are at court well before the time the Court is due to start. You may need to speak to the other party or parties before the case starts or they may wish to speak to you. If the other party or parties are represented by a solicitor or barrister, they will introduce themselves. Solicitors and barristers not only represent the interests of their client but they are also "officers of the court". That means they owe duties to the court, including a duty not to mislead the court and not to mislead you, the opposing party. You ought to be able to trust what they say to you. If they do deliberately mislead you, you are entitled to complain about their conduct to their professional organisation.

16.3 If a solicitor or a barrister is relying on a legal authority (a case decided by a court and reported) or on a statutory provision, or on a passage from a legal textbook, he or she should provide you with a copy. If the lawyer refers the judge to such material without providing you with a copy, tell the judge so that he can ensure

you are given a copy. You should aim to give copies of any statutes, cases, textbooks or other similar material to your opponent.

B. What does a court room look like?

16.4 This Handbook is essentially for litigants in multi-track trials but its advice applies also to fast track trials. A fast track trial will most often be heard by a District Judge. The trial may take place in a court room or it may be held in a District Judge's chambers. If it is in a chambers the judge will sit across a table from the parties and their representatives (if any).

16.5 A multi-track trial will be held in a courtroom. The judge will sit opposite the parties and will usually be raised slightly from the level of the parties and their representatives. The front row of the area where the parties and their representatives (if any) sit is reserved for the advocates which will include those litigants representing themselves. There may be a table for witnesses to sit at to give their evidence or there may be a purpose built witness box in which a witness may stand or sit to give evidence. There will usually be an area reserved for representatives of the press and there will be an area for the public. Your friends or family may sit in the public area.

16.6 Normally the parties' witnesses will sit in the court room or chambers while other witnesses give their evidence. This is in contrast to a criminal trial where no witness hears the evidence of any witness who goes before him. However in a civil trial, where there is good reason to do so, the judge can order witnesses to remain out of court until they have to give their evidence. Any of the parties may request the judge to make such an order which may be made when there is a very important issue of fact between the parties and more than one witness for one party gives evidence on that factual issue.

C. Who is the judge and how should I address him or her?

16.7 The trial (or hearing) may be heard by either a Circuit Judge or a District Judge or a part time Judge who will be a Recorder, or, in fast track trials may be a deputy District Judge. Fast track trials will usually be heard by a District Judge or a deputy District Judge and multi track trials will usually be heard by a Circuit Judge or a Recorder. Certain trials of great importance or value may be heard by a High Court Judge or a deputy High Court Judge.

16.8 You will see the name and the title of the Judge on the court list in the foyer of the court building and usually also outside the court room or chambers. There should be ushers or other court officials who may be able to help you in case of difficulty.

A District Judge will be referred to on the lists as "District Judge……". A deputy District Judge will be referred to as "Deputy District Judge…..". A Recorder will be referred to as "Mr (Mrs., Miss) Recorder ….. or simply Recorder……" A Circuit Judge will be referred to as "His" or "Her Honour Judge ……." A High Court Judge will be referred to as "Mr." or "Mrs. Justice ….". Sometimes a

Circuit Judge or a Recorder may be sitting as a deputy High Court Judge, in which case that will be indicated on the list.

16.9 In court, whether that is in a court room or in a Judge's chambers, you should address a District Judge or deputy District Judge as "Sir" or "Madam" as the case may be. A Recorder or a Circuit Judge is called "Your Honour" or "His" or "Her Honour". A High Court Judge is referred to directly as "My Lord" or "My Lady" as the case may be or, indirectly, as "His Lordship" or "Her Ladyship". When a Recorder or a Circuit Judge is sitting in the High Court as a deputy High Court Judge, he or she is also referred to as "My Lord" or "My Lady".

Do not worry if you forget the correct way to address a judge. As long as you are polite and respectful, no judge will take offence!

D. What is the judge there to do?

16.10 The judge has three roles to perform. He is the judge of fact (originally the role of the jury), he is the judge of the law (which has always been his role) and he presides over the trial, ensures it is conducted in an orderly manner, and rules on matters of law and admissibility of evidence during the trial.

16.11 The judge listens to and assesses the reliability and credibility of the witnesses and the evidence in a purely objective way without prejudice or sympathy. He will make a note of the evidence for his own purposes. Some judges type their note on a computer, others write in a notebook, sometimes quite slowly. You may have to be patient. When the evidence is complete the judge listens to the arguments of the parties both in relation to the facts and the law. He is entitled to and often does ask questions of the witnesses and of the parties. However, it is not his task to assist either side.

16.12 The judge has complete control of the trial. Where he considers it appropriate he may make directions which are inconsistent with directions given before trial, for example as to the calling of a witness or the matters on which a witness may give evidence. Any directions given in the course of a trial must be made with due regard to the interests of all the parties, but you should appreciate that the course of any trial cannot be confidently predicted beforehand, and the judge may have to give directions to take account of changing circumstances where to do so is in the interests of justice.

16.13 A prime example where a trial judge may have to give directions which conflict with earlier directions is a trial timetable. At a Case Management Conference a judge may have set a trial timetable [CPR 28.6 (fast track) CPR 29.8 (multi track)]. He will have done so in consultation with the parties [CPR 39.4]. But you cannot expect the trial judge to stick rigidly to the trial timetable. New matters may arise which necessitate a witness spending much longer in the witness box than anticipated, or a witness finds that he cannot come on a particular day and has to fitted in at another time. Alternatively, in a case where no timetable has been set, the trial judge may decide that the case should have one. You have to be prepared to be flexible.

16.14 Having heard the evidence and the arguments of the parties the judge decides what facts have been proved by the party who has the burden of proving the various issues in the case (usually the Claimant) and reaches a judgment as to whether that party has proved his or her case – in other words, decides who has won the case. The judge decides issues on the basis of what is more likely than not to be correct – "on the balance of probabilities". There may be different issues to be decided and it is possible that a party may win on some issues but lose on others.

E. Behaviour in Court

16.15 It is of the highest importance that all those present in a civil court, whether a hearing is being heard in a court room or in a judge's chambers, behave quietly, courteously, and respectfully. Barristers and solicitors have practical training on how to dress and behave in court. It is a very good idea to visit a court and watch a hearing in advance of the day of your trial or hearing and see how a trial is conducted and how a barrister or solicitor behaves in court. You are not expected to dress like a barrister or solicitor but a hearing in court is a solemn and important matter and sensible and tidy clothing should be worn and you should avoid wearing shorts or other inappropriate dress.

16.16 All judges aim to treat all litigants fairly, courteously, and equally. If you feel that the judge is not treating you in accordance with these principles or in some way does not understand you and your concerns, you should speak up and let him know what concerns you have. You should apply similar principles to the other parties to your action and to their witnesses. Please also bear in mind that you have a duty to get on with the case and not waste the court's time. There are many other litigants who want their cases to be heard, each as concerned as you are about their case.

16.17 All judges are aware that trials and hearings can be very stressful and are often emotional occasions. The issues which are being dealt with may be of considerable, sometimes overwhelming importance, to the parties. That is why it is essential that everyone in court should try as hard as they can to behave properly so that all parties have an equal opportunity to present their respective cases. The modern judge will endeavour to do justice with a light touch, conscious that some litigants, particularly litigants in person, may be overawed by too much formality and may become tongue-tied unable to say all that they need to in giving evidence or advancing argument. But do not take advantage of any informality. The proceedings must remain orderly throughout. Only one person should speak at any one time. The judge will ensure that people speak in turn and in an orderly fashion.

16.18 Serious or persistent misbehaviour in a court room or chambers may be a contempt of court punishable by up to 2 years imprisonment.

F. Can I have help at Court?

16.19 If you have a physical or mental disability you may need assistance in gaining access to the court room or chambers or need some adjustments to be made in the court building or in the court room or chambers to ensure you can play a full and equal part in the proceedings. It would be very helpful if you could let the court staff know in advance if you need adjustments or help as a result of your disability but even if you are not able to give advance warning, tell a member of the court staff when you arrive.

16.20 In a small number of court Centres (in the Royal Courts of Justice in London and in Cardiff Civil Justice Centre, for example) there are branches of the Personal Support Unit (PSU), a charitable organisation that gives non-legal practical and emotional support to litigants in person, witnesses, family members and other supporters.

16.21 You may be permitted by the Judge (and normally will be) to have assistance in court from a friend or supporter – known as a "McKenzie Friend". That person may provide moral support for you, take notes, help with your case papers and quietly give you advice on any aspect of the conduct of the case. However, that person may not address the court, make oral submissions or examine witnesses on your behalf. Neither, incidentally, may he act as your agent in relation to the proceedings or manage your case outside court, eg by signing court documents.

16.22 The Judge may refuse to permit you to make use of a McKenzie friend where the Judge is satisfied that, in a particular case, the interests of justice and fairness do not require you to receive such assistance.

16.23 If you want to have a McKenzie friend with you in court, you should inform the judge as soon as possible indicating who he or she will be. The proposed McKenzie friend may be asked to produce a short curriculum vitae or other statement setting out his or her relevant experience, confirming that he or she has no interest in the case and understands the role of a McKenzie friend and the duty of confidentiality he or she owes to you.

16.24 The Court will only grant the right to a lay person (that is someone who is not a suitably qualified solicitor or barrister) to speak on your behalf at a hearing in exceptional cases. One such case might be if you suffer from a disability which makes it difficult for you to speak for yourself. If you think you should be entitled to have a lay person speak for you, tell the judge why you think that at the beginning of the hearing so he or she can make a decision on it.

G. Help from the judge

16.25 Some litigants in person are told by advice workers that the judge will help them. They are disappointed when they find that he does not give them all the help they want. Consider the matter from the viewpoint of the judge. He will want the trial to go smoothly and make sure that each party has the fullest opportunity to adduce the evidence and advance the arguments they wish to, consistent with proper trial

management. He will tell a litigant in person, who is uncertain as to court procedure, what should happen next, whether calling a witness or making submissions and so forth, and generally assist the litigant about matters of procedure.

16.26 But a judge can only go so far. All judges have taken a judicial oath in which they promise to "do right to all manner of people after the laws and usages of this realm, without fear or favour, affection or ill will". If a judge were to help a litigant in person by, for example, giving advice on the law, suggesting legal arguments that might be advanced, or questioning witnesses on behalf of the litigant in person, there would be a real risk that he was not 'doing right' by the opposing party. Rightly or wrongly the opposing party may feel that the judge was becoming involved in the litigant in person's case. A judge has to be very careful not to appear to be favouring either party. No judge should "enter the arena" and become involved with the case in any way which may appear partisan however good the motive behind such involvement.

H. Who goes first and what is the order of evidence and speeches at trial?

16.27 Normally the Claimant will give a short opening speech to introduce the case and the issues to the judge. It may be helpful to draw the attention of the judge to any documents in the trial bundle on which you place particular importance. Do not be surprised if the judge asks you questions during your opening speech or during the evidence. If you feel unable to answer a question straight away you should say so, and perhaps make a note to find out the answer at the next adjournment. But you should prepare your case thoroughly so that you are able to answer any questions which the judge poses to you. The questions will almost certainly be highly pertinent to what the judge has to decide. If you think that a question is not relevant, perhaps even that the judge has missed the point, do not be afraid to say so. It is not difficult to do so. You could simply say "The point I am making is…" but wrapping it up in a piece of politeness such as "I am sorry if I have not explained myself properly but the point I wish to make to your honour is…" may be better.

16.28 The Claimant will then normally present his evidence, calling his witnesses in such order as he chooses. Each witness may be questioned by the other parties, through their representatives if they have them. Once the evidence of the Claimant is complete the Defendant will call his evidence. If there is more than one Defendant, the order in which their evidence is called will be the order on the pleadings but this can be altered either by agreement or the judge will direct the order in which witnesses are called.

16.29 You will find that the judge will be flexible, certainly as far as the circumstances may allow. A witness may be "interposed" that is called out of order, if this is necessary because of the witness's commitments. A witness who is having difficulty in the witness box will be given a few minutes to compose himself. A judge may rise early if a vital document needs to be fetched, or sit late if a witness has to be finished on a particular day because of other commitments.

16.30 If both sides have experts it is common for the respective experts to be called one after the other. This helps the judge, who hears all the expert evidence together. It will also help the parties. It is sensible to have your expert in court when your opponent's expert gives evidence, to give you his views on what is being said and to tell you where he thinks the other side's expert may be wrong and should be challenged. The attendance of an expert at court can be a costly business. If both experts are called together that should keep attendance fees to a minimum.

16.31 At the end of the evidence each party will have the opportunity to address the judge and argue his case in his 'final submissions' or 'final speech'. This is the party's opportunity to persuade the judge to find in his favour in the light of all the evidence, oral and written, which has been presented before the judge. The usual practice is for the Defendant to go first and the Claimant last, because the Claimant will usually have the burden of proof. But practice can differ between cases. In commercial and TCC (Technology and Construction Court cases) the Claimant often goes first and the Defendant last. There may be variations on the order of speeches when there are more than 2 parties or depending on whether evidence is called by the Defendant. It is open to the parties to agree an order of speeches and propose this to the judge. Ultimately the Judge decides on the order. Do not be concerned about the order of speeches. Judges will not be swayed by the last word.

I. How do I ask questions?

16.32 The written statement of a witness will normally stand as the witness' main evidence on behalf of the party calling that witness ('evidence in chief'). There is no need for the witness to repeat orally what he or she has said in the statement. A judge may permit additional questions of a witness by the litigant calling him. These may be to deal with matters raised in other parties' witness statements, or matters which have arisen since the service of his witness statement, or matters of which notice has been given, see para 14.16. The judge is likely to restrict additional questions strictly.

16.33 When asking questions of your own witness you may not ask 'leading questions', that is questions posed in such a way as to suggest the answer you want to get from the witness.

16.34 You may test the evidence of witnesses of the other party or parties by asking them questions (including leading questions), but do remember that the time for giving speeches is at the end of the evidence.

J. What happens when I give evidence?

16.35 You will first be asked to take a religious oath or make your affirmation. An oath (a religious promise to tell the truth) will vary according to what religion you adhere to. The court should have cards setting out a number of different kinds of religious oaths and also should have a number of holy books for different religious oaths. It is your right to take an oath in accordance with your own

religious belief. If you do not hold a religious belief or your religious beliefs are such that you may not take a religious oath then you may make an affirmation, a form of non-religious promise to tell the truth. The court clerk or usher will usually ask you before the trial starts to list your witnesses and state whether they will swear an oath, and on what holy book, or affirm.

16.36 A witness must appreciate that swearing an oath or making an affirmation is a serious matter. The court should be in complete silence while this is done. There must be no talking or even movement in court when an oath is sworn or affirmation made.

16.37 Whether you take an oath or make an affirmation you are then bound to tell the truth, the whole truth, and nothing but the truth. If you tell lies on oath you commit a contempt of court which can be punished by up to 2 years imprisonment. Alternatively you may be prosecuted for perjury, which is a serious criminal offence punishable by imprisonment. It is also a contempt of court and a criminal offence punishable with imprisonment to tell lies in a witness statement or to rely on a witness statement which, to your knowledge, contains false information.

K. Final submissions

16.38 Your final submissions are important. It is your chance to persuade the Judge to your point of view. If, as is advised, you have prepared a skeleton argument that can form the basis of your final submissions. However you approach your final submissions do not just talk at the judge. It always helps a judge to know what issue you are dealing with at any point in your submissions, so that he can put you say in context. With the factual issues you are likely to face different accounts of the same events between your witnesses and the other side. Explain to the judge why your view is to be preferred; what it is about the other side's witnesses that may suggest that they are unreliable.

16.39 During the course of the trial the evidence may not have come out as you expected. You may well have to adjust your arguments to take account of the actual evidence as opposed to the written statements. Do so. A mere repetition of your original argument as set out in your skeleton argument will not assist you if it is now plainly untenable.

16.40 Speeches should be kept as short as necessary to cover the live issues in the case. No long or detailed analysis of the evidence should be necessary. Sometimes, but only rarely, you may be concerned to ensure that the judge appreciates how the evidence all hangs together to support your case and an analysis of the evidence will be appropriate. But do make sure you work it out carefully in advance.

16.41 In a long case it will help the judge if you can type out a list of bullet points summarising what you say are the strengths of your case or the weaknesses of the other parties' cases. You may prefer to rework your skeleton argument into a document setting out the basis of your final submissions. You may hear a legal representative refer to a 'speaking note' and this is usually what it is.

16.42 The standard practice is to go straight from the last witness to final submissions. You may not feel ready to assimilate all the material and make a good job of your final submissions. Never feel embarrassed to ask the judge for some time to collect your thoughts.

16.43 Some judges sit quietly and listen to the submissions without a word. Others will interrupt and ask questions to elucidate points they are concerned about, or tell you that you need not argue a particular point because they "are with you" on it. You will have to manage the best you can with the judge allocated to try your case. When a judge asks you to deal with a particular matter it is plainly something about which he is concerned. It is in your interests to deal with it, and, ideally, deal with it straight away. But if you have a prepared order of points to deal with, and the judge asks a question which you will come to later, tell him that you will deal with his question but would prefer to do so in the order you had prepared.

16.44 Whoever goes first will be allowed to reply on any matters of law raised by an opponent who makes his submissions later. Parties are expected to deal with all matters of fact in one speech, but if a point occurs to you that you did not mention during your speech, the judge will normally accede to a polite request to be allowed to make the point.

L. The Judge's ruling

16.45 The Judge may give an oral judgment immediately after final speeches are finished, or he may withdraw to the Judge's chambers for a short time to consider the case and then give his ruling, or he may adjourn the case to another date to prepare a judgment which may then be handed down in writing or given orally ("reserving judgment").

16.46 The judgment will set out what the case is about, what the legal and factual issues are, what the critical evidence on those issues is, what factual findings the judge makes, what legal principles have been applied, and give the judge's conclusion on all that material with reasons. All judgments must be reasoned. All important issues of fact should be determined, and, where necessary, the law being applied to the case explained sometimes with citations from statutes or decided cases in higher courts.

L. The Court Order

16.47 The Judge will give effect to his judgment by making an Order. This is sealed with the court seal and served on all parties. Normally the court will be responsible for drawing up the order. However in more complicated cases, especially where there is a need for specific directions for bringing an order into effect, the judge may ask counsel to prepare a 'minute of order' for him to consider, approve or amend as necessary. As a litigant in person you will not be expected to prepare a minute of order, but counsel for you opponent prepares such

a minute he should send you a copy of his draft and ask for any comments you may have.

16.48 You will be sent a copy of the Order as a matter of course. If you want a transcript of the judgment, that is the judge's full explanation of why he or she has reached the decision in the case, you will have to apply for one from an official shorthand-writer. The court office will give you a form. Unless you are fee exempt you will have to pay the shorthand-writer's fee for the transcript.

M. The costs of proceedings

16.49 The judge will usually make an order as to costs immediately after giving judgment. Costs are dealt with in another chapter. There are a wide variety of orders a judge may make, both as to who should pay and what should be paid. In most cases however 'costs follow the event', that is the loser is ordered to pay the costs of the winner.

16.50 If the case has been allocated to the fast track or if the hearing has lasted no more than one day, the general rule is that the judge will make a summary assessment of the costs of the case. The court will not only decide in principle who should pay the costs of the whole or any parts of the action but will also assess how much those costs should be. All parties should have filed at court and served on the other parties a Statement of Costs to assist the judge in this process. A statement of costs should be on a model form. Where the judge does not summarily assess costs he will order a detailed assessment of the receiving party's costs.

N. Can I appeal? What should I do about appealing when the case is finished?

16.51 The grounds on which you may appeal the judge's decision are limited. These grounds are discussed at 20.3 to 20.7. You will need to permission to appeal, either from the trial judge or from the appeal court. The trial judge will only give permission in obvious cases, and it is usual to have to ask the appeal court to give you permission. If you consider you may be able to appeal against the decision of the judge you should ask him for permission to appeal at the end of the hearing. You should briefly give your reasons why you believe the judge's decision is wrong or why otherwise you should be permitted to appeal. If you do not ask the judge orally at the hearing at which judgment is given, you must ask in writing for permission either from the judge whose judgment you wish to appeal or from the appropriate appeal court.

16.52 The normal period for filing a notice of appeal is within 21 days after the date of the decision appealed against. You may ask for more time either from the trial judge or from the appeal court. More detailed guidance about appeals is given in Chapter 20.

Chapter 17
Discontinuance

A. Discontinuing a claim
B. Procedure for discontinuing
C. When court's permission necessary
D. Liability for costs
E. Subsequent Proceedings

Headlines

(1) A claimant may bring his claim, or part of his claim, to an end at any time by serving a 'notice of discontinuance'.

(2) It is not necessary to obtain the court's permission to discontinue a claim unless the court has given an interim injunction or accepted an undertaking in relation to the claim to be discontinued.

(3) A claimant who discontinues his claim will have to pay the defendant's costs except in exceptional circumstances

(4) Once a claimant has discontinued his claim he may not start a new claim or similar claim on the same facts without the permission of the court.

A. Discontinuing a claim or part of a claim

17.1 Discontinuing a claim or 'discontinuance' means terminating the claim, or a part of a claim, before it comes to trial or is otherwise disposed of by the court. Both a claim brought by a claimant or a counterclaim brought by a defendant to the claim may be discontinued at any time [CPR 38.2(1)]

17.2 There may be many reasons for discontinuing a claim. The claimant may realise that his claim stands little chance of success, or he may be worried about increasing costs, or he may just be tired of the whole litigation process. No reason need be given for discontinuing a claim.

17.3 Where the claim is brought against two or more defendants the claimant may discontinue against one or more defendants and maintain his claim against others. It is not necessary to discontinue against all of several defendants.

17.4 The claimant may wish to discontinue part only of a claim. This is unusual but it will be the appropriate thing to do where a claimant has brought two or more claims which are distinct from each other, in the sense that they involve do not overlap factually, and the claimant is concerned that one or more of these claims will not be successful. Where a claimant brings separate claims in the same proceedings, and he wins one or more and loses others, there is a significant risk that the court will order the claimant to pay the costs of the

defendant in successfully defending the claims the claimant loses. Depending upon the amount of work involved these costs might be substantial. By discontinuing poor claims early the claimant will limit his exposure to an adverse costs order.

17.5 Where there is more than one claimant one of those claimants may not discontinue a claim or part of a claim without the written consent of all other claimants. But see paragraph 17.11 below.

B. Procedure for discontinuing

17.6 To discontinue a claim or part of a claim the claimant must file a 'notice of discontinuance' in court and serve a copy of that notice on every other party. [CPR 38.3] The notice should be in Form N279. This is a simple form where the claimant states that he discontinues all his claim (or counterclaim) or a specified part of his claim (or counterclaim). The claimant must certify in his notice that he has served every other party. No reason need be given. Neither is it necessary to obtain the court's permission except in certain specified circumstances.

17.7 Discontinuance against any defendant takes effect on the date when the notice of discontinuance is served on that defendant [CPR 38.4] or, where the court's permission to discontinue is required, when the court orders it to take effect.

17.8 A defendant may apply to set aside a notice of discontinuance if he applies within 28 days of the notice being served on him.[CPR 38.4]. The circumstances would have be very exceptional for the court to insist that the claimant continues with his claim.

C. When the court's permission is necessary

17.9 The court's permission is required when a claimant wishes to discontinue all or part of a claim in relation to which the court has granted an interim injunction or has accepted an undertaking in place of granting an injunction, [CPR 38.2(2)]. Asking the court to grant an interim injunction (i.e. an injunction before the trial) is a serious matter, and in the usual course the court will only do so if the claimant give a "cross undertaking in damages", i.e. agrees to pay damages to the defendant should it later transpire that the injunction should not have been granted. This rule allows the court to monitor claims where injunctions have been granted before trial.

17.10 Where the claimant has received an interim payment (i.e. a payment in advance of the trial) in relation to a claim the claimant requires the defendant's written consent to discontinue. If the defendant refuses unreasonably to give his consent the court may give permission for discontinuance.

17.11 Where there is more than one claimant one claimant wishing to discontinue requires the written consent of the other claimants to do so. If the other

claimant or claimant refuse to give their consent unreasonably the court may give permission for discontinuance.

D. Liability for costs

17.12 A claimant who discontinues a claim or part of a claim will be liable to pay the costs of any defendant against whom he discontinues incurred before the notice is served in relation to the claim or part of a claim which is discontinued [CPR 38.6].

17.13 The court has a discretion to order that the defendant should not have all or part of his costs of a discontinued claim. This is an unlimited discretion, and a claimant may raise any argument he considers appropriate to avoid paying the defendant's costs. The claimant will have to have a very good reason however to avoid paying costs. Examples of good reason are where a defendant has misled the claimant as to the factual position on which he based his claim, or where the circumstances have changed so that a good claim becomes unnecessary. Defendants have had their costs reduced for failing to comply with a pre-action protocol, or for adopting an unreasonable and unjustified stance in settlement negotiations.

E. Subsequent Proceedings

17.14 A claimant who has discontinued a claim may regret having done so. If the claim is still within the limitation period (see para 7.38 above) the claimant is able to issue new proceedings. However where a claimant has discontinued a claim after a defence has been filed, he must first obtain the court's permission before he may bring another claim against the same defendant where the new claim arises out of facts which are the same or substantially the same as those relating to the discontinued claim [CPR 38.7]. To obtain the court's permission the claimant will have to explain why he discontinued the first claim and give a good reason for wishing to start again. He will almost certainly be required to pay any outstanding costs due to the defendant on the first proceedings before he is allowed to commence new proceedings.

Chapter 18
CPR Part 36 and Costs

A. CPR Part 36 : Offers to Settle
B. How to make a Part 36 Offer
C. Clarification of a Part 36 Offer
D. Acceptance of a Part 36 Offer
E. Offers outside CPR Part 36
F. Restriction on disclosure of a Part 36 offer
G. Costs
H. Litigant in person's costs

Headlines

(1) A 'Part 36' offer is a formal offer to settle the case made by either party. For a defendant it is a useful way of protecting yourself against having to pay costs where the claimant makes a claim in an excessive amount. If you are a claimant it is way of encouraging settlement by indicating to the defendant that you will settle for less than your full claim.

(2) If you receive a Part 36 offer consider its terms very carefully. If you do not accept the offer, and decide to go to trial, then if you do not do better than the offer at the end of the trial, you are likely to face financial penalties by way of having to pay an additional 10% on the sum(s) awarded against you by way of judgment award and greater amounts by way of costs and interest on costs.

(3) You should always consider whether or not to make a Part 36 offer after you have assessed the merits of your case after disclosure of documents and exchange of witness statements.

(4) An effective Part 36 offer must meet the requirements specified in the Rules.

(5) If a Part 36 offer is accepted the action is 'stayed' (ie stopped) except for the purpose of enforcing the agreement reached in the terms of the offer.

(6) Neither you nor your opponent must ever tell the Judge even that a Part 36 offer has been made let alone the terms of the offer. If you do let this slip you may find that the trial has to be adjourned at your expense.

(7) At the end of the trial the judge will make costs orders requiring one party to pay the whole or part of another party's costs. Costs may be awarded on the 'standard basis' or on the 'indemnity basis', the latter being a more generous basis.

(8) The general principle is that the loser pays all the costs of the winner. However, in appropriate cases, particularly where the winner has lost on some parts of the case, the judge may make a costs order based on issues won and lost or, more probably, deduct a proportion of the costs recoverable by the winner to reflect the cost of fighting the issues on which he has lost. The judge may also penalise a party in costs if he has not behaved properly in the course of the litigation. That may be by reducing a winning party's award of costs, or by requiring the losing party to pay the winner's costs on the indemnity rather than the standard basis.

(9) There are particular rules governing the costs that may be recovered by a successful litigant in person.

A. CPR Part 36 : Offers to Settle

18.1 The usual rule is that the loser has to pay the legal costs of the winner. This has serious implications for the loser even where he has no legal costs of his own. The CPR recognise that there may be occasions where a party has genuine concerns as to the outcome of proceedings, but that these concerns are not such as to cause him to stop contesting the proceedings. The prime example is a defendant who accepts that he is, or is probably, liable to pay money to the claimant but not as much as the claimant is asking for in his Claim Form.

18.2 CPR Part 36 gives either party to proceedings the opportunity to make a formal offer to settle which will protect the party making the offer from an adverse order for costs should the other party continue with the proceedings after the offer is made. For example, a defendant who accepts that the claimant is entitled to £25,000 but not to the £75,000 he is claiming may offer to settle the case for £25,000. If the claimant refuses the offer and continues to trial where he wins the case but is only awarded £25,000 then the court will ordinarily award the costs incurred after the offer was made to the defendant, not to the winning claimant. Furthermore, the award of costs will often be on the more generous (indemnity) basis than the standard basis on which costs are usually awarded at the end of a trial

18.3 An important aim of the CPR is to encourage litigants to settle their cases rather than take them all the way to a trial. With this aim in view CPR Part 36 not only enables defendants to make offers where they consider the claimant is valuing his claim too highly, it also enables claimants to make offers to defendants to accept less than the full stated value of the claim in an encouragement to settle. A defendant who does not accept a claimant's offer to settle, and who later is ordered to pay as much as or more than the claimant's offer, faces the potentially very serious sanction of being ordered to pay the claimant:

(1) an additional 10% of any money sum awarded against him;

(2) the claimant's costs on the more generous (indemnity) basis, and

(3) a penal rate of interest (up to 10% above base) on those indemnity costs.

Remember for these purposes a defence who brings a counterclaim is a claimant on that counterclaim and is therefore able to recover these additional benefits if the defendant to the counterclaim (ie the claimant) fails to beat a Part 36 Offer he has rejected.

The rule [CPR 36.14(3)] provides that the court must award the claimant these additional benefits "unless it considers it unjust to do so".

18.4 Because there is almost always uncertainty as to the outcome of litigation, the possibility that a money judgment will be increased by 10%, a costs order may be made on the indemnity basis rather than the standard basis, and that a penal rate of interest may also be awarded, after a Part 36 Offer has been made and rejected adds to what may be seen as a 'gambling' element in civil litigation. This is recognised, but the principle that no party should be able to carry on to trial incurring more and more costs without his opponent having some form of counter-measure is more important than reducing the uncertainties inherent in litigation.

18.5 The provisions of CPR Part 36 are very technical, and considerable care needs to be taken when making a Part 36 offer or considering how to respond to a Part 36 offer made by your opponent.

B. How to make a Part 36 Offer

18.6 CPR Part 36.2 specifies five requirements which must be met for a valid Part 36 Offer. These are that the offer must:

(1) be in writing;

(2) state specifically that it is a Part 36 Offer and is intended to have the consequences of Section I of Part 36;

(3) specify a period of not less than 21 days within which the defendant will be liable for the claimant's costs in accordance with CPR 36.10;

(4) state whether it relates to the whole of the claim or to part of it or to an issue that arises in it and if so which part or issue;

(5) state whether it takes into account any counterclaim.

There are additional provisions which apply to claims for personal injury where those claims include (a) future pecuniary loss, [CPR 36.5], or (b) a claim for provisional damages, [CPR 36.6], or (c) deduction of social security benefits, [CPR 36.15].

18.7 Requirement (3) means that a Part 36 offer really should be made at least 21 days before trial. The Rules permit a Part 36 offer within three weeks of trial, but the party making a late offer which is not accepted may find that the court does not give him the full costs benefit of an offer made in time.

18.8 Where a defendant makes a Part 36 offer to pay a sum of money, the offer must be to pay a single sum within no more than 14 days after acceptance of the offer, [CPR 36.4]. This provision does not prevent a defendant making an offer to pay in instalments or a claimant accepting such an offer within the provisions of Part 36, but an offer to pay in instalments which is not accepted by the claimant will not automatically have the consequences of a Part 36 offer, in other words it will not necessarily protect the defendant against an adverse order for costs. It will be a matter which the judge will take into account when deciding what order to make.

18.9 An offer to pay a specific sum of money, or accept a specific sum of money, is taken to be inclusive of any interest payable up to the date specified under requirement (3) above, which is usually the minimum 21 day period specified in the Rules, [CPR 36.3(3)].

18.10 A Part 36 offer may not be withdrawn or made less advantageous within the period specified in the offer for acceptance, except with the permission of the court, [CPR 36.3(5)]. After this period has expired a Part 36 offer which has not been accepted may be withdrawn or changed without the court's permission, [CPR 36.3(6)]. Any withdrawal or change in the offer must be in writing.

C. Clarification of a Part 36 Offer

18.11 A party who receives a Part 36 offer (called in CPR the offeree) is entitled to ask the offeror, that is the party making the Part 36 offer, for clarification of the offer. He must make his request within 7 days of receiving the offer, [CPR 36.8]. The CPR is not at all clear as to the extent to which the offeree may seek clarification. Plainly it will cover cases where the wording of the offer is not clear and unambiguous. But it may be that clarification may go further and include the provision of information which would enable the offeree properly to assess the worth of the offer. For example, if a Part 36 offer is made before the offeror has given disclosure of documents in a case where particular documents may be at the heart of the case, the offeree may ask whether the offeror has the original or copies of particular documents and for details of the content.

18.12 If the offeror does not give the clarification requested the offeree may apply for an order that he does so. To do this the offeree will have to issue an application to the court under CPR Part 23.

D. Acceptance of a Part 36 Offer

18.13 A Part 36 offer must be accepted in writing, [CPR 36.9]. On acceptance of the offer the claim is stayed on the terms of the offer, and where the offer relates only to part of the claim that part is stayed, [CPR 36.11]. The court's permission is not required to accept a Part 36 offer, except where the trial has already started (a late offer) or the offer is made by one of several joint defendants and the offeree wishes to continue against the other defendants, or in certain situations in personal injury or Fatal Accidents Act cases.

18.14 Once accepted the Part 36 offer becomes an agreement between the parties. The court will enforce this agreement without the need for further proceedings. The court will also deal with questions of costs, [CPR 36.11(5)(8)].

18.15 It is important to note that where the offer is to pay or accept a lesser sum of money than that claimed, the agreement between the parties will be for the payment of that lesser sum. If the defendant (offeror) does not pay the sum agreed the claimant (offeree) may enter judgment for the lesser sum, and only that lesser sum can be recovered. If a claimant is prepared to accept a lesser sum only on the basis that it is actually paid in 14 days after the offer is accepted (14 days being the time within which the sum is supposed to be paid under the Rules) he must be careful to spell this out in his acceptance of a defendant's offer or in his offer to the defendant, and make it clear that if the money is not actually paid he reserves the right to proceed to trial on the full sum claimed.

E. Offers outside CPR Part 36

18.16 A party is perfectly free to make any offer to settle a claim at any time without adopting the Part 36 procedure. It would be open to the court, when it is considering orders for costs at the end of the case, to have regard to any unaccepted offers to settle, and if the court takes the view that the offeree has not accepted a reasonable offer to settle that may influence the order for costs. But many judges will expect there to be a good reason for the party making the offer not to use Part 36, and in the absence of good reason pay little or no attention to the fact that an offer was made.

F. Restriction on disclosure of a Part 36 offer

18.17 A Part 36 offer is treated as being made "without prejudice save as to costs". The fact that a Part 36 offer has been made must not be communicated to the judge, [CPR 36.13]. The same applies to offers made outside Part 36 unless they are expressly made as 'open offers'.

18.18 It is very important that litigants keep all offers (other than open offers) confidential until the judge has delivered his judgment. The making of an offer must not influence, or be thought to have influenced, the judge deciding the case. If a litigant wrongly discloses the fact of an offer the judge may have to adjourn the case to be retried by another judge, and the costs that are thrown away in having a second trial will have to be paid by the litigant in question.

G. Costs

18.19 The rules relating to costs are to be found at CPR Parts 44 to 48 inclusive. Costs is far too substantial a topic to make any but the briefest of comments in this Handbook.

18.20 The trial judge will make rulings of principle; which party should pay costs to which other party and on what basis. In all but simple cases, the amount of the costs to be paid, determined by reference to a bill of costs, will be adjudicated on by a specialist judge, called a Costs Judge. This is called a "detailed assessment".

18.21 The basic principle is that the loser pays the winner's costs, and the usual rule is that these costs are paid on the 'standard basis'. But the court has a complete discretion as to the award of costs. In appropriate cases the trial judge may make an 'issue based' costs order requiring different parties to pay the costs of different issues, or he may reflect the fact that the party who has come out on top has not succeeded in all his claims or on all the issues he has raised by making an order that only a percentage of his costs may be recovered. In any individual case the court has power to deprive a party of all or part of his costs, or even require some costs to be paid by a winner to the loser, where that party has behaved in the course of the litigation in an unacceptable or inappropriate way.

18.22 Where the court takes the view that a party has brought a claim that should never have been brought, or that a wholly improper defence has been raised to resist a good claim, the court may order costs on the 'indemnity basis' which will usually result in more costs being recovered than on the standard basis. A party who has made a Part 36 offer which was not accepted but which was more advantageous to the offeree than the eventual result will ordinarily be awarded costs on the indemnity basis from the date on which the offer took effect, usually the date 21 days after the making of the offer.

18.23 At the conclusion of a trial the court will usually order that the amount of costs to be paid by the paying party be subject to a detailed assessment by a costs judge in the absence of agreement. At the end of an interim application however the CPR encourage the judge to make a summary assessment of costs without the need for a detailed assessment, and order that the paying party pay the costs within a short

period (14 or 21 days) after the application has been determined. A party to an interim application should ordinarily prepare a summary bill of costs to be considered by the court at the end of the application.

H. Litigant in person's costs

18.24 Special rules apply where a party is ordered to pay the costs of a litigant in person, [CPR 48.6 and 48PD.3] and see also the Litigants in Person (Costs and Expenses) Act 1975 and the Orders made under the 1975 Act.

18.25 As a litigant in person you are entitled to claim:

(a) costs for work done and disbursements incurred in the same categories as if the work had been done by a legal representative;

(b) payments reasonably made by you for legal services relating to the conduct of the proceedings;

(c) any costs you incur in obtaining expert assistance in assessing the costs claim.

18.26 Under (a) charging for your own work, the amount you can charge is limited to the hourly rate provided for in the Rules, currently £18.00 per hour, unless you can show that you suffered financial loss in carrying out your work on the case. In this event you may claim the amount of your financial loss for time reasonably spent doing the work, [CPR 48.6(4)]. Your claim for your own costs is however capped at two-thirds of the amount which would have been allowed if you had been represented by a legal representative. You may charge disbursements, that is sums paid to third parties such as copying, travelling expenses or postage, in full provided that they were properly incurred. The two-thirds cap only applies to the cost of your own work.

18.27 Under (b) you may claim in respect of any solicitors' or barrister's fees you have reasonably incurred in seeking advice about your claim, its preparation and its presentation.

18.28 Under (c) you may claim for sums paid for expert assistance in assessing the claim for costs provided that the expert concerned come within the persons specified in the practice direction [48PD.3]. The expert providing the assistance must be one of the following: a barrister, a solicitor, a Fellow of the Institute of Legal Executives, a Fellow of the Association of Law Costs Draftsmen, a law costs draftsman who is a member of the Academy of Experts, or a law costs draftsman who is a member of the Expert Witness Institute.

Chapter 19
Enforcement

A. Methods of enforcement
B. Obtaining information
C. Warrants of Execution
D. Attachment of Earnings Order
E. Third Part Debt order
F. Charging order
G. Other methods of enforcement

Headlines

(1) Obtaining a judgment is only the first stage. If the defendant does not pay up you will have to enforce your debt. This is your responsibility. The court will not do it for you.

(2) There are various methods of enforcement of a debt which are tailored towards different assets:

If the debtor has sufficient goods, by means of a warrant of execution

If he is an employee, by an attachment of earnings order

If he has savings, by a third party debt order

If he owns a house or land, by a charging order.

(3) The court has leaflets which give details of each of these methods of enforcement and explain the procedure relating to each in more detail.

(4) You may apply to the court for an order requiring the debtor to provide information as to his assets and means. This may assist you decide how best to approach enforcing your debt.

A. Methods of enforcement

19.1 Should you succeed in obtaining a money judgment against the defendant there will be a Court Order requiring him to pay the money which has been awarded in your favour. The Order will usually give a date by which the money has to be paid. If no date is specified the defendant has 14 days to pay [CPR 40.11]. Interest will usually be payable on any outstanding money at 'judgment rate' currently 8% pa [CPR 40.8]

19.2 If the defendant ('the debtor') does not pay you will have to find a means of enforcing your judgment. The court will not do this for you. You have to make an application for one or more specific means of enforcement.

19.3 First, you should decide whether the debtor is worth pursuing (bearing in mind that the enforcement proceedings will incur further fees (unless you are a fees exempt litigant)) and whether the debtor has any assets or income from which the debt can be paid. The Court cannot guarantee that the debt will be paid. You are on your own when attempting to recover the debt.

19.4 Secondly, you will need to consider which method of enforcement is more likely to achieve success. The possible methods of enforcing a judgment are:-

(1) Warrant of Execution – instructing a Bailiff to take goods to the value of the debt

(2) Attachment of earnings order – where the Court requires the debtor's employer to deduct regular sums of money from the debtor's pay.

(3) Third Party Debt order – which freezes a Bank or Building Society Account until the money owed is paid

(4) Charging Order – which prevents a debtor from selling assets (house, land or shares) without paying the debt to the creditor

(5) Bankruptcy of an individual debtor, or winding up of a company debtor, where the amount owed exceeds £750. This is a specialised and expensive procedure and the creditor should only embark upon this after careful consideration and, if possible, obtaining advice.

B. Obtaining information

19.5 When deciding whether enforcement proceedings are likely to succeed the Creditor will need to consider whether the debtor:-

- owes money to other people or has other court judgments
- owns any goods or assets which can be taken and sold at auction
- is working for an employer
- has other income (such as from pensions or investments)
- has a bank, building society or other account
- owns a house, land or other property
- runs his own business
- is owed money by anyone else.

19.6 As a creditor you can search the Register of Judgments, Orders and Fines to see if the debtor has any outstanding judgment debts or fines. Judgments are retained on file for six years and fines for five years. A fee is payable for each name searched against. An application to search can made on line to www.registry-trust.org.uk or in writing to Registry Trust Ltd. 173-175 Cleveland Street, London WIT 6QR (Tel. 020 7380 0133).

19.7 You may also apply to the court for an order requiring the debtor (or an officer of a company debtor) to attend court to provide information as to his means or on any other matter about which information is needed to enforce a judgment [CPR 71.2] This order requires the debtor to attend the court to be questioned

by a court officer and to provide details on oath of his income, savings, property and other assets, and the order also require the debtor to produce relevant documents. You may attend the questioning and put questions yourself [CPR 71.6]. You do not have to attend. You will be able to obtain a copy of the record of examination which should help you decide whether to seek to enforce the judgment and, if so, which method of enforcement has the best prospects of success.

19.8 To seek an order you need to apply on Form N316 for an individual debtor or Form N316A for an officer of a corporate debtor. (The officers of a company can be identified by a search of the Companies Register at Companies House in London (Tel. 02920 388588). Upon receiving the application the court will issue a Form N39 ordering the debtor to attend for questioning. The N39 must be personally served on the debtor (but if the creditor is an individual and is not acting through a solicitor, the court bailiff will serve the N39 on the debtor). Failure to attend the examination can result in the debtor being committed to prison.

C. Warrants of Execution

19.9 A warrant of execution is suitable where you are reasonably confident that the debtor has sufficient assets at a known address or, if you consider that the debtor is hiding his money, you consider that he has sufficient money to pay the debt and stop the sale of his goods. The creditor must include the address at which the warrant is to be executed in his application. For debts up to £600 the warrant must be issued in the county court. For debts above £5000 the judgment must be transferred to the High Court (outside London this is often the same building as the county court) for the Enforcement Officer to enforce the judgment (Form N293A) (Note that a special rule applies for debts under Consumer Credit Act 1974).

19.10 For debts between £600 and £5000 the creditor has a choice of issuing a warrant in the county court or transferring the debt to the High Court. The High Court is more expensive and complicated and the creditor should consider taking advice from a solicitor or the Citizen's Advice Bureau.

You should be aware that the bailiff cannot seize for sale:

- items the debtor needs for his job (such as tradesman's tools)
- essential household items such as clothing or bedding
- goods which are on HP, rented or leased

The bailiff will therefore not usually seize items such as second-hand furniture or electrical goods which are unlikely to fetch much at auction.

19.11 You will have to provide an address or addresses at which the debtor lives or from which he trades. The bailiff will usually send the debtor a letter giving him seven days in which to pay the debt and costs. If he does not pay the bailiff will call at the address(es) given and try and identify goods which can

be sold at auction to cover the debt and costs (or collect payment from the debtor). If goods are taken they will be sold, and after auction and storage costs any balance will be paid to the creditor.

19.12 If the debtor has not sufficient goods or money to cover the debt and costs the creditor will be informed. The court will not however seek to trace a debtor or his assets and is entirely reliant upon the information supplied to it by you the creditor.

D. Attachment of Earnings Order

19.13 If the debtor is employed it may be possible to obtain an attachment of earnings order if the debtor owes more than £50 and is behind with at least one of the regular payments he has previously promised to make [CPR cc27]. Such an order cannot be obtained if the debtor is a firm or limited company. If he is in the armed forces or a merchant seaman then a special procedure applies and the creditor should ask the court staff for details.

19.14 The order to obtain information should inform the creditor if the debtor is employed or not. You can make a further search of the index of all attachment of earnings orders in the area where the debtor lives which will reveal whether the debtor has any other similar orders against him. If he does you can ask the court to join ("consolidate") the debt he owes you with the Debtor's existing debts.

19.15 Details of the method of applying for an order and the forms to be completed are contained in leaflets issued by the court office. The court will require the debtor to provide details of his income (and can issue a warrant to arrest him if he does not comply with the order). The court will decide the amount of any deduction based upon the debtor's statement of means. The debtor will be allowed sufficient funds from his income to provide for his (and his family's) needs (called his "protected earnings") and an order will only be made out of any income in excess of that protected amount. The creditor should appreciate that it may not be possible to make an attachment of earnings order if the debtor is on a low wage. It should also be noted that the order will lapse if the debtor becomes unemployed or leaves the employment named in the order. The creditor should inform the court if a debtor has a new employer and the order can be reissued against the new employer.

E. Third Part Debt order

19.16 The effect of a final third party debt order is to enable you as a judgment creditor to enforce your debt directly against another person or company (in particular financial institutions such as a bank or building society) who owe money to the judgment debtor, [CPR 72.2, 72.9]. These orders used to be called garnishee orders.

19.17 You must first apply for an interim third party debt order by filing an application notice in Practice Form N349 at the court which made the

judgment or order you are seeking to enforce. The information required is clear from the Form, which must be verified by a statement of truth [CPR72.3]. You do not have to give notice to the judgment debtor.

19.18 Provided the Judge is satisfied that there is a judgment which had not been paid in full, and the details in the application form are duly completed, he will make an interim third party debt order in a specific amount. This binds the third party when it is served on him, and he must retain at least the amount specified in the order without paying it to the debtor. Where the third party is a bank or building society it is required [CPR 72.6] to carry out a search to identify all accounts held with it by the debtor, and, within 7 days of being served with the order, inform the court what accounts the debtor has and the balance in each account. A debtor may apply to the court for an order that some or all of the money be paid to him on the grounds of hardship in meeting ordinary living expenses, [CPR 72.7].

19.19 If either the debtor or the third party object to the making of a final order the objector must file and serve written evidence stating the grounds for his objection. This evidence must identify any person who is stated to have an interest in the funds in question. The court then holds a hearing and determines whether or not to make the interim order final, [CPR 72.8]. If there is no objection the court may make a final order without a hearing.

F. Charging order

19.20 This is an order which places a charge on property owned by the debtor for the amount of the debt. Property includes land, houses, stocks and shares. The money is not paid immediately to you as the judgment creditor but if and when the property is sold (and as a judgment creditor you may apply for a sale) you will be paid any balance over (after selling expenses and earlier mortgages or loans secured on the property) up to the amount of your debt. The creditor can usually obtain details of land held by the debtor from HM Land Registry (www.landreg.gov.uk) and the Land Charges Registry should be informed when a final charging order is made.

19.21 As a judgment creditor you must make an application for an interim charging order using Practice Form N379 if the application relates to land, and Practice Form N380 if the application relates to securities [CPR 73.3]. For obvious reasons you do not need to give notice to the debtor. Provided the application is in order the judge will make an interim charging order without a hearing [CPR 73.4]. The interim charging order places a temporary charge on the property involved. That means that you will not be adversely affected by any disposal of the property by the debtor, [CPR 73.6].

19.22 The interim charging order will specify a date on which the court will consider making the order final. The interim order must be served at least 21 days before this date on specified persons who may have an interest in the property [CPR 73.5], and any one served can file objections at least 7 days before the

hearing and may appear at the hearing to oppose the making of a final order. As judgment creditor you should attend the hearing. If the application is in order and the court is satisfied that no third party has an interest in the property a final charging order will be made. It is not a reason for refusing an order that there are other creditors who will suffer if you become a secured creditor. That is the whole purpose of obtaining a charging order.

19.23 If you wish to apply for an order for sale you need to issue further proceedings in the court that made the charging order. You must use the Part 8 procedure, [CPR 73.10].

G. Other methods of enforcement

19.24 *Insolvency :* Provided the debt you are owed exceeds £750 you may serve a statutory demand under Insolvency Act 1986 s 268 preparatory to presenting a bankruptcy petition against an individual debtor, or a written demand under Insolvency Act s 123 preparatory to presenting a winding up petition against a company debtor. The law of insolvency is fairly technical, and litigants in person would do well to seek specialist advice before embarking on a petition to make the debtor insolvent. If you can come through a multi-track action successfully you might feel up to trying! However, be warned. There is a real cost-benefit drawback to insolvency. Petitioning for insolvency is expensive, and if the debtor is made insolvent all the creditors obtain an equal share of his estate. There is no advantage in being the petitioning creditor when the estate is shared out.

19.25 Other final orders of the Court may be enforced by means of further proceedings in the court by way of stop order or an injunction with a penal notice threatening a fine or even imprisonment if the Defendant fails to comply. The Claimant seeking to enforce such orders should seek specific advice before making application to the court.

Chapter 20
Appeals

A. Grounds of appeal
B. Permission to appeal
C. The appeal court
D. Procedure for appealing
E. Stay of execution
F. Costs

This Chapter is concerned with appeals in civil cases. It addresses:

(A) The grounds on which you may challenge a court's decision by way of appeal
(B) When permission to appeal is required, and how you may obtain it
(C) What is the appropriate court to hear your appeal
(D) How you should set about appealing
(E) Stay of execution pending appeal; and
(F) Costs.

This short guide can only provide a brief outline of the practice governing appeals in civil matters. For more detailed information, you should consult Part 52 of the Civil Procedure Rules – Appeals and Practice Directions 52A – 52E.

PD52A contains general provisions.

PD52B deals with appeals in the County Courts and High Court.

PD52C deals with appeals to the Court of Appeal.

PD52D (dealing with statutory appeals and appeals subject to special provision) and PD52E (dealing with appeals by way of case stated) are unlikely to be of any concern to readers of this guide.

Leaflet EX340, entitled "I want to appeal – what should I do?" contains useful information about bringing an appeal.

A. Grounds of appeal

20.1 Subject to very rare exceptions, the general rule is that an appeal is limited to a review of the decision of the lower court; and the appeal court will only re-hear a case if, in the circumstances of the individual appeal, it considers that it would be in the interests of justice to hold a re-hearing. A simple failure to put one's case before the lower court is not ordinarily sufficient to justify a re-hearing.

20.2 The appeal court will not usually receive evidence which was not before the lower court. Therefore an appeal will usually proceed on the basis of the evidence as it was before the lower court. Fresh evidence will generally only

be allowed where (a) it could not have been obtained with reasonable diligence for use at the trial; *and* (b) the evidence, if given to the lower court, would probably have had an important influence on the result of the case, although it need not have been decisive; *and* (c) the evidence must be apparently credible, although it need not be incontrovertible.

20.3 The appeal court will only allow an appeal where the decision of the lower court was either (a) wrong **or** (b) unjust because of a serious procedural or other irregularity in the proceedings of the lower court.

20.4 A decision may be "wrong" because the lower court made (a) an error of law, *or* (b) an error of fact, *or* (c) erred (to the appropriate extent) in the exercise of a discretion.

20.5 Whether he was the claimant or the defendant in the court where the action was tried, the litigant who appeals is called the 'appellant'. The opposing litigant is called the 'respondent'. An appeal is started by serving an appellant's notice. The appellant's notice must set out the grounds of appeal in a separate sheet attached to the appellant's notice. On appeals to the County Court and the High Court, these grounds must set out, in simple language, clearly and concisely, why the order of the lower court was wrong or unjust because of a serious procedural or other irregularity. In the case of appeals to the Court of Appeal, where skeleton arguments are required from all appellants (and most respondents), the grounds of appeal must identify as concisely as possible the respects in which the judgment of the lower court is wrong or unjust because of a serious procedural or other irregularity; but the reasons for this must not be included in the grounds of appeal and must be confined to the skeleton argument. An appellant's notice may not be amended without the permission of the appeal court. At the hearing of the appeal, the appellant may not rely on a matter not contained in his appellant's notice unless the appeal court gives permission.

20.6 The appeal court is likely to be reluctant to overturn primary findings of fact made by a trial judge who has seen the witnesses give evidence in a case in which the credibility of the witnesses was in issue. However, where the challenge is to the judge's evaluation of the facts, or the inferences which he drew from them, an appeal court may be more ready to interfere with his findings of fact.

20.7 The appeal court will not interfere with the exercise of the lower court's discretion unless the judge has either (a) erred in principle in his approach, or (b) has left out of account something he should have considered, or (c) has take into account some factor he should not have considered, or (d) his decision is wholly wrong because the appeal court is forced to the conclusion that he has not balanced the various factors fairly in the scale. An appeal court will not interfere with the exercise of a judge's discretion unless his decision falls outside the generous range of decisions within which a reasonable disagreement is possible.

20.8 Except where the claim has been allocated to the small claims track, in all appeals the appellant will need to obtain, and file with the court, an approved transcript or note of the judgment of the lower court giving the reasons for its decision, or (where the judgment under appeal has been handed down in writing) a copy of the written judgment. Where the judgment has been officially recorded, the appellant must apply for an approved transcript as soon as possible and, in any event, within 7 days of the filing of the appellant's notice. If the appeal alleges some irregularity in the course of the hearing in the lower court, a transcript of the full hearing is also likely to be required.

B. Permission to appeal

20.9 Permission to appeal is required in virtually all cases, except where the appeal is against a committal order. Permission to appeal may be given only where (a) the court considers that the appeal would have a real prospect of success, *or* (b) there is some other compelling reason why the appeal should be heard. Where permission is sought to appeal from a case management decision, the court dealing with the application may take into account whether (i) the issue is of sufficient significance to justify the costs of an appeal, (ii) the procedural consequences of an appeal outweigh the significance of the case management decision, and (iii) it would be more convenient to determine the issue at or after trial.

20.10 An application for permission to appeal should be made orally at the hearing at which the decision to be appealed against is made. Where the lower court is asked for permission to appeal, the judge will complete *Form N460* giving his reasons for allowing or refusing permission to appeal, and providing information concerning routes of appeal. A copy of the completed form will be provided to the parties. Where no application for permission to appeal is made at the hearing in the lower court, or that court refuses permission to appeal, an application for permission to appeal may be made to the appeal court in the appellant's notice.

20.11 Initially the appeal court will consider the application for permission to appeal on paper. If it is refused without a hearing, the appellant usually has the right, within 7 days after service of the notice that permission has been refused, to ask for the decision to be reconsidered at an oral hearing, at which the appellant may appear and challenge the reasons given for refusing permission to appeal. Notice of that hearing will be given to the respondent; but he is not required to attend (and he will not normally be allowed his costs of doing so).

20.12 Where the appeal court refuses permission to appeal, whether on paper or (where the appellant has asked for a paper refusal to be reconsidered) after an oral hearing, that is the end of the road: there is no further right of appeal from a refusal of permission to appeal.

20.13 Any application for permission to appeal from a decision of the High Court or a county court which was itself made on appeal must be made to the Court of Appeal. That court will only give permission if it considers that (a) the appeal

would raise an important point of principle or practice; *or* (b) there is some other compelling reason for the Court of Appeal to hear it. If permission for a second appeal is granted, the appeal will be heard by the Court of Appeal.

C. The appeal court

20.14 Most appeals from the decision of a district judge sitting in the County Court lie to a circuit judge. The principal exceptions are that any appeal from (1) a final decision of a district judge hearing a Part 7 claim allocated to the multi-track lies to the Court of Appeal; (2) a final decision of a district judge in specialist proceedings (under the Companies Acts, or by way of a Probate, Technology and Construction Court, Arbitration, Patent or other Intellectual Property claim) lies to the Court of Appeal; and (3) a decision of a district judge in insolvency proceedings lies to a single judge of the High Court.

20.15 Most appeals from the decision of a circuit judge sitting in the County Court lie to a single judge of the High Court. The principal exceptions are that all appeals from (1) a final decision of a circuit judge hearing a Part 7 claim allocated to the multi-track lies to the Court of Appeal; (2) a final decision of a circuit judge in specialist proceedings (under the Companies Acts, or by way of a Probate, Technology and Construction Court, Arbitration, Patent or other Intellectual Property claim); and (3) any order made by a circuit judge sitting on appeal from a lower court lies to the Court of Appeal.

20.16 Most appeals from the decision of a master, registrar or district judge sitting in the High Court lie to a single judge of the High Court. The principal exceptions are that any appeal from (1) a final decision of a master or district judge hearing a Part 7 claim allocated to the multi-track lies to the Court of Appeal; and (2) a final decision of a master or district judge in specialist proceedings (under the Companies Acts, or by way of a Probate, Technology and Construction Court, Arbitration, Patent or other Intellectual Property claim) lies to the Court of Appeal.

20.17 All appeals from the decision of a High Court judge lie to the Court of Appeal.

20.18 Appeals in the County Court and the High Court must be brought in the appropriate Appeal Centre, which may well not be the same as the court from which the appeal is brought. Tables at the end of *PD52B* set out the Appeal Centres for each of the six Court Circuits.

D. Procedure for appealing

20.19 When the judge delivers judgment in your case, you should consider whether there may be grounds for an appeal (see A above) and, if so, you should ask the judge for permission to appeal (see B above). Where no application for permission to appeal is made at the hearing in the lower court, or that court refuses permission to appeal, an application for permission to appeal may be made to the appeal court in the appellant's notice.

20.20 If you wish to pursue an appeal, you must file an appellant's notice at the appeal court (see C above). The appellant's notice should be in *Form N161* for cases allocated to the fast-track and multi-track and in *Form N164* for small claims track cases. These forms should also be used for an appeal from a decision of a county court or registrar of the High Court in insolvency proceedings, which in all cases will be an appeal to a Judge of the High Court. Guidance notes for completing the appellant's notice are available as *Form N161A*. The appellant's notice must be accompanied by the appropriate fee or, if appropriate, a fee remission certificate.

20.21 Unless the lower court specifies some other period, the time for filing an appellant's notice is 21 days after the date of the decision of the lower court that you wish to appeal (even if the order is not drawn up until a later date). Where the time for filing an appellant's notice has expired, the appellant must include in the appellant's notice an application for an extension of time, stating the reasons for the delay and the steps taken prior to the application being made. If you need permission to appeal, this must be requested in the appellant's notice. If you need to stay the operation of the lower court's order, then this should also be requested in the appellant's notice.

20.22 There are a number of documents which need to be filed with the appellant's notice. These are identified at paragraph 4.2 of *PD52B* (for County Court and High Court appeals) and paragraph 3 (3) of *PD52C* (for appeals to the Court of Appeal). If any of these documents are not available, you should not delay filing your appellant's notice; but you should indicate which documents are missing and the reasons why they are not currently available. You must also indicate when you are likely to be able to supply them; and you should file them as soon as reasonably practicable. As soon as practicable, but in any event within 35 days of filing an appellant's notice with the County Court or High Court, the appellant must file an appeal bundle containing the documents identified in paragraph 6.4 of *PD52B*. For appeals to the Court of Appeal, the timetable for lodging the appeal bundle is set out at paragraph 21, and the contents of the appeal bundle at paragraph 27, of *PD52C*. In all cases, the appeal bundle must be paginated and indexed and contain only those documents which are relevant to the appeal.

20.23 The purpose of a skeleton argument is to assist the court by setting out as concisely as practicable the arguments upon which a party intends to rely. Any skeleton argument must comply with the provisions of Section 5 of *PD52A* and (in the case of appeals to the Court of Appeal) paragraph 31 of *PD52C*. On appeals to the County Court or the High Court, subject to any order of the court, the parties to the appeal should file and serve skeleton arguments only where (a) the complexity of the issues of fact or law in the appeal justify them, or (b) skeleton arguments would assist the court in respects not readily apparent from the papers in the appeal. In the case of appeals to the Court of Appeal, the appellant must lodge a skeleton argument in support of the appeal with the appellant's notice. A respondent to such an appeal who files a respondent's notice must lodge and serve a skeleton argument within 14 days of filing the respondent's notice. Where there is no respondent's notice, the

respondent must lodge and serve a skeleton argument (in accordance with the timetable set out in Part I of the Timetable in Section 5 of *PD52C*) in all cases where the respondent is legally represented and proposes to address the court.

20.24 Unless you are appealing a claim allocated to the small claims track, or the judgment under appeal was handed down in writing, you will need to obtain an approved transcript or note of the judgment of the lower court. If you are asserting some irregularity in the proceedings in the lower court, you may also need to obtain a full transcript of those proceedings. Where the lower court or the appeal court is satisfied that you are entitled to fee remission, the court may certify that the cost of obtaining an official transcript should be borne at public expense. Otherwise, you will have to bear the cost yourself. If you ask for an official transcript of the evidence or proceedings (as well as the court's reasons for its decision) to be paid for at public expense, the court may also need to be satisfied that there are reasonable grounds for an appeal. Whenever possible, a request for a transcript at public expense should be made to the lower court when you ask it for permission to appeal. Failing that, such an application should be included within the appellant's notice.

20.25 Unless the appeal court orders otherwise, the appellant must serve the appellant's notice on each respondent to the appeal as soon as practicable and, in any event, not later than 7 days after it is filed. A copy of the appeal bundle should be served on each respondent with the appellant's notice if permission to appeal has been given by the lower court. If permission to appeal is given by the appeal court, a copy of the appeal bundle must be served as soon as practicable after notification and, in any event, within 14 days after the grant of permission. Where the appeal court directs that the application for permission to appeal is to be heard on the same occasion as the appeal, a copy of the appeal bundle is to be served on the respondent as soon as practicable and, in any event, within 14 days after notification of the hearing date. Unless the court otherwise directs, a respondent need not take any action until such time as he is notified that permission to appeal has been given; and any action he does take will be at his own risk as to costs.

20.26 A respondent must file a respondent's notice if (a) he seeks permission to appeal from the appeal court **or** (b) he wishes to ask the appeal court to uphold the order of the lower court for reasons different from or additional to those given by the lower court. The respondent's notice should be in *Form N162***.** Guidance notes for completing the respondent's notice are available as *Form N162A*. Where the respondent seeks permission to appeal from the appeal court, it must be requested in the respondent's notice.

20.27 Unless the lower court specifies some other period, the time for filing a respondent's notice is 14 days after (a) the date the respondent was served with the appellant's notice where permission to appeal was given by the lower court or permission is not required, *or* (b) the date the respondent was served with notification that the appeal court has given the appellant permission to appeal, *or* (c) the date the respondent was served with notification that the application for permission to appeal and the appeal itself are to be heard together.

20.28 Unless the appeal court orders otherwise, a respondent's notice must be served on the appellant and on any other respondent to the appeal as soon as practicable and, in any event, not later than 7 days after it is filed.

E. Stay of execution

20.29 Neither the grant of permission to appeal nor the filing of an appellant's notice operates as a stay halting the enforceability or effect of the order or decision of the lower court which is under appeal. If the appellant desires a stay of the order, he must apply expressly for a stay pending appeal. The application can be made orally to the lower court at the hearing at which the decision to be appealed is made. Where no application for a stay is made at that hearing, or the lower court refuses a stay, an application for a stay may be made to the appeal court in the appellant's notice.

20.30 The appellant must put forward solid grounds why a stay should be granted. Because the successful party should not generally be deprived of the fruits of his victory in the litigation pending an appeal, a stay is the exception rather than the rule; and the appellant must point to some form of irremediable harm if no stay were to be granted. The court must then perform a balancing exercise, considering all the circumstances of the case, weighing up the risks inherent in granting a stay against the risks inherent in refusing one, and asking itself where the balance of injustice to the parties lies if it were to grant, or to refuse, a stay.

F. Costs

20.31 The appeal court will usually make an order for costs at the conclusion of the appeal. The standard order is that the lower pays the winner's costs. If the appeal is allowed then the loser will usually be ordered to pay the winner's costs not only in the appeal court but in the original court ('the court below'). It is however open to the appeal court to make a different order for costs in appropriate circumstances. Where a costs management or costs capping order has been made in the court below, or where it is usual for one or other such orders to be made, the appeal court may make an order that the recoverable costs of an appeal be limited to an amount specified by the court [CPR Part 52.9A].

Chapter 21
Civil Restraint Orders

A. The Civil Restraint Order
B. Limited Civil Restraint Order
C. Extended Civil Restraint Order
D. General Civil Restraint Order

Headlines

(1) Litigants who make repeated unmeritorious applications may find themselves the subject of a Civil Restraint Order ('CRO'). The effect of the order is to prevent the litigant issuing a claim or an application within a claim without first obtaining the permission of a Judge. Permission will only be given for sensible applications which have a reasonable prospect of success.

(2) A limited CRO applies simply to applications within one particular claim. An extended CRO applies both to applications and to new claims relating to the subject matter of the original proceedings. A general CRO will apply to any proceedings in any court about any subject matter.

(3) All CROs have a limited life, which will be specified in the Order, subject to a maximum of two years.

A. The Civil Restraint Order

21.1 This chapter deals with Civil Restraint Orders (CROs). You may have heard of the term "Vexatious Litigant", used to describe a person who habitually and persistently and without reasonable cause has instituted a multiplicity of proceedings or made numerous unmeritorious applications in such proceedings. The Civil Procedure Rules now make provision for CROs to be made against litigants who persist in making claims, or making applications in proceedings, which are totally without merit. The detailed rules as to CROs are contained in Practice Direction 3C of the CPR.

21.2 The court is required to consider and may make a CRO, when proceedings, or an application, or an appeal have been dismissed, or struck out as being totally without merit [CPR 3.3(7); 3.4(6); 23.12; 52.10(6)]. A CRO may be granted on an application by a party to the proceedings, or it may be made on the court's own initiative.

21.3 You should be aware that if you receive an order striking out a claim, or dismissing an application, which states that the claim or application is totally without merit, there is a possibility that a CRO is under consideration by the court.

21.4 There are 3 types of CRO. A Limited CRO, an Extended CRO, and a General CRO. All are intended to protect parties from the cost and inconvenience of responding to court proceedings or applications which are without merit. They are also made to prevent a person abusing the process of the Court and placing an undue burden on the resources of the Court by pursuing unmeritorious proceedings or applications.

21.5 A breach of any of these orders, if applications are made or proceedings commenced without permission, may be treated as a contempt of court and punished accordingly.

B. Limited Civil Restraint Order

21.6 This order may be made by a judge at any level where a party has made 2 or more applications which have been dismissed as being totally without merit. The order will restrict further applications in the proceedings in which the order was made, without obtaining the permission of a judge.

21.7 If an application is made without permission it will be automatically dismissed. If a party who is subject to a Limited CRO makes repeated applications for permission to apply, the court may direct that decisions to dismiss such an application will be final, with no right of appeal.

21.8 The order remains effective for the duration of the proceedings.

21.9 Any application for permission under the rule must be made in writing and served on the other parties. Such an application will usually be dealt with, without a hearing.

C. Extended Civil Restraint Order

21.10 This order can only be made in the County Court by the Designated Civil Judge (DCJ) or a judge specifically delegated to make such an order by the DCJ, or by a High Court or Appeal Court Judge.

21.11 The order has a similar effect to the Limited CRO in restraining further applications. It applies not only to the original proceedings. It will also restrain the party subject to the Extended CRO from issuing further claims, "concerning any matter related to the proceedings in which the order was made".

21.12 The provisions for making applications for permission, are similar to those which apply to a Limited CRO.

21.13 The order will remain in effect for the specified period, not exceeding 2 years. It may be extended if the court considers it appropriate.

D. General Civil Restraint Order

21.14 This order may be made by judges who have the power to make an Extended CRO. A General CRO will be made where an Extended CRO is not sufficient or appropriate. The order will restrain a party against whom the order is made from commencing any proceedings in any court, if made by the Court of Appeal or a High Court Judge and any County Court specified by the order, if made by a DCJ.

21.15 The provisions for making applications for permission are similar to those which apply to a Limited CRO.

21.16 The order will remain in effect for the specified period, not exceeding 2 years. It may be extended if the court considers it appropriate.

Chapter 22
Conducting Legal Proceedings in Welsh

22.1 Section 22(1) of the Welsh Language Act 1993 provides:

> *"In any legal proceedings in Wales the Welsh language may be spoken by any party, witness or other person who desires to use it, subject in the case of proceedings in a court other than a Magistrates' Court to such prior notice as may be required by rules of court; and any necessary provision for interpretation shall be made accordingly."*

22.2 Accordingly you have a right to use Welsh in legal proceedings in Wales. A Welsh county court will send out all notices in a bilingual format. When the court sends the first documents in a case to a person (including when a case commenced in a court in England is transferred to a court in Wales) it will include a notice giving details of the court's Welsh language services. The notice will explain that Welsh or English may be spoken in the proceedings and invite you to let the Court know beforehand which language you wish to use. Once you notify the Court of your preferred language, the Court will honour your choice when sending subsequent forms and correspondence.

22.3 In order to facilitate the use of Welsh, Practice Directions have been made for the Crown Court and Civil Courts in Wales. Details of these Practice Directions can be found on the Internet at:

http://www.justice.gov.uk/courts/procedure-rules/civil/rules/welshpd

22.4 Copies of bilingual oath and affirmation cards will be readily available; and Welsh and English language Bibles will be available in all courts.

22.5 You may issue court proceedings in Welsh or English. At your request the court will translate into either Welsh or English initial court documents, court orders and court documents specifically prepared for the proceedings and to be used at hearings. This also applies to documents in cases transferred to a court in England where the Judge has allowed Welsh to be used. The Court will be responsible for any translation costs.

22.6 You have the right to speak Welsh at civil court hearings in Wales. When the Court is told that you or someone connected with your case wishes to speak Welsh at a hearing the court will take steps to ensure that you will be able to do so. In civil cases in the county court the Directions Questionnaire and the Pre-Trial Checklist contain questions as to language preference which should be answered. If this information is not automatically provided to the court, by means of the questionnaires, reasonable advance notice, ideally 5 working days, would be required so that the necessary arrangements can be made.

22.7 If it is possible that the Welsh Language may be used by any party or witness in your case (or in any document which may be placed before the court), you must inform the court of the fact so that appropriate arrangements can be made for the management and listing of the case.

22.8 If costs are incurred as a result of your failing to comply with these directions, a costs order can be made against you.

22.9 The court will ensure through its listing policy that a case in which the Welsh Language is to be used is listed:

(a) wherever practicable before a Welsh speaking judge; and

(b) where translation facilities are needed, at a court with simultaneous translation facilities.

22.10 Where each witness is called, the court officer administering the oath or affirmation will inform the witness that he or she may be sworn or may affirm in Welsh or English as he or she wishes.

22.11 Where a case is tried with a jury, the court officer swearing in the jury will inform the jurors in open court that each juror may take the oath or may affirm in Welsh or English as he or she wishes. It is not possible to request a fully bilingual jury.

22.12 The Welsh Language Act 1993 grants the right to use the Welsh language in courts in Wales but it does not grant the right to speak Welsh at a hearing outside Wales. The decision whether or not to allow Welsh to be spoken at a court outside Wales is for the judge presiding at the trial. Where the judge allows Welsh to be spoken HMCTS will arrange translation facilities as readily and freely as is done at courts in Wales.

22.13 Where a case is commenced at a court in Wales and, after the judge has given permission for Welsh to be used, the proceedings are transferred to a court in England, HMCTS will make arrangements to facilitate the use of the Welsh language in the English court.

Glossary

Additional claim	see Third Party claim
Affidavit	A written statement of evidence sworn before a solicitor or commissioner for oaths, now largely replaced by a witness statement verified by a statement of truth.
Allocation	The procedure by which a judge decides which of the 3 tracks, (small claims track, fast track or multi-track), the claim should be on.
Allocation questionnaire	The form sent by the court to all parties to complete at the commencement of the case and which will assist the judge in deciding on which track the claim should be placed (allocated). There are three forms. Form 149 where a case has commenced in the small claims court, Form 150 where the claim is for a liquidated (ie specified) sum, and Form 151 where the claim is unliquidated (ie a claim in damages where the court assesses the whole or part of any award). There are notes on each form to help the litigant fill it in correctly.
ADR	Alternative Dispute Resolution is a term which covers any method of resolving disputes other than by litigation. The most common form of ADR is mediation.
Arbitration	The settlement of disputes by referring them to one or more persons acting as arbiters (arbitrators) who are usually specialists in the field in which the dispute arises, but who could be lawyers or other suitable persons.
Assessment	The process by which the amount of costs which a party may claim from another under the terms of a court order. There may be a 'detailed assessment' or a 'summary assessment'.
Barrister	A professional lawyer who has been called to the Bar by one of the four Inns of Court after passing his professional exams and who has undergone a period of training, termed 'pupillage'.
Base rate	The interest rate set by the Bank of England.

Beneficial owner	A term used primarily in property (land) law to indicate a person who has the whole or a share of the benefit of property comprising land (including the right to any income generated by the property and the right to the proceeds of sale) whether or not the person also is a legal owner. Beneficial interests arise in equity (and accordingly may be termed equitable interests) in consequence of a trust. Trusts may be express, implied, resulting, or constructive. This is an important area of the law where two or more persons who are not married (whether or not they are cohabiting in a sexual relationship) have interests in the same property.
Boxwork	The description given to decisions made by a judge, of whatever level, without a hearing that is in the absence of the parties. In almost every case a litigant may ask the judge to review a decision made in boxwork after hearing argument (submissions) by the parties.
Budget	An estimate of the reasonable and proportionate costs (including disbursements) which a party intends to incur in the proceedings.
Case Management	The process by which a judge, usually a district judge, gives directions to the parties to prepare the case for trial. Directions will be given by Court Order, and failure to comply with the directions may be subject to sanctions.
Claimant	The litigant who starts the case by making a claim. Previously called the Plaintiff.
Contribution	The amount which a third person is obliged to pay towards the liability of a defendant to a claimant. The liability may arise in contract, tort, or under statute, and may amount to part of the defendant's liability or the whole of it, (in which event it may be termed a 'contribution amounting to an indemnity').
Counsel	A Barrister.
Counterclaim	A claim brought against the Claimant by the Defendant in the same legal proceedings as the Claimant's claim. Sometimes called a 'Part 20' claim because it is governed by CPR Part 20 but this can be confusing because CPR Part 20 also governs claims made against additional parties.

Courts Service	Shorthand for Her Majesty's Courts and Tribunal Service (HMCTS) the government agency responsible for managing the courts answerable to the Ministry of Justice.
CPR	Civil Procedure Rules. These Rules govern all civil proceedings and have the force of law. They date from 1998 when they replaced the old County Court Rules 1984. The CPR are divided into 'Parts' almost all of which have one or more associated Practice Directions.
Cross-Examination	The questioning of a witness called by a party to the proceedings other than the party who called the witness.
Damages	A sum of money awarded by the court as compensation. Damages may be: *General* – awarded in the court's discretion (although in accordance with established guidelines, for example compensation for pain and injury suffered in an accident or for upset for a spoilt holiday); *Special* – assessed by the court in accordance with established principle (for example claims for loss of earnings or repairing an article of property damaged in an accident); *Aggravated* – additional damages awarded as compensation for unacceptable behaviour by the Defendant to the Claimant; *Exemplary* – damages over and above the Defendant's actual loss awarded to show the court's disapproval of the Defendant's conduct.
Damages-based agreement	A Damages-based agreement is an agreement which complies with the provisions of the Damages-Based Agreements Regulations 2013 which permit a solicitor acting in litigation to be rewarded by a share of the litigant's damages up to a limit of 25% in personal injury cases and 50% in all other cases.
Default judgment	A judgment entered without a trial because the defendant has failed to comply with the rules requiring him to acknowledge service or file a defence or comply with a court order.
Defendant	The litigant against whom the claim is made.

Deputy District Judge	A part-time district judge usually a solicitor or barrister in private practice.
Detailed assessment	An assessment of the costs payable by one litigant to another involving the preparation of a detailed bill by the receiving party which is sent to the paying party who may object to items on the bill. If the parties cannot reach agreement the amount payable under the bill will be assessed by a costs judge or district judge after considering written submissions or hearing oral submissions from the parties.
Directions	Procedural orders made by the court in managing a case to trial.
Disclosure	The procedure by which each party notifies the others of any documents which the party has or has had in his control and which he must disclose under CPR Part 31 [see chapter 10].
Disposal hearing	A hearing after judgment on liability has been given when the amount due under the court's decision is determined by the court.
District Judge	A member of the judiciary conducting county court cases, primarily fast track or small claims track cases, and who exercises powers of case management in multi-track cases. Most District Judges will have been solicitors in private practice for many years before taking up appointment.
Document	Document means anything in which information of any description is recorded [CPR Part 31.4] Accordingly the term includes electronic documents (any document stored in electronic form including e-mails, texts, voicemail, word processed files, databases, files stored on memory sticks, mobile phones, servers and back-up systems).
Evidence	Any admissible means of proving a fact or expert opinion. Such means include oral testimony, a witness statement supported by a statement of truth, a document, a public record or an affidavit.
Evidence in chief	The evidence given by a witness for the party calling him. In most cases the written statement of the witness served in accordance with a case management direction will be treated as the witness's evidence in chief after the witness has confirmed the truth of the statement (with any alteration that the witness

	may wish to make) after taking the oath or affirmation in the witness box. Oral evidence in chief in addition to the witness statement will only be allowed with the permission of the trial judge, and evidence of new matters not covered in the witness statement will only be permitted if there is a good reason for it not being included in the witness statement.
Fast track	A case management track. Cases worth up to £25,000 in value which exceed the small claims track limit and which can be heard in no more than one day. An award of costs will usually be made to the winner of a fast track case, but the amount recoverable is limited by the Rules.
Filing	Providing a document to the court office (where the staff put the document on the court file). Documents for filing may be handed in to the court, sent by post, or (when specifically permitted) by e-mail.
Indemnity	The obligation of a third party to meet the whole amount which the defendant has to pay the claimant. Such an obligation will usually arise under a contract.
Injunction	A court order prohibiting or restraining a person from doing something (sometimes termed a negative injunction) or requiring a person to do something (a mandatory injunction).
Joint liability	Where two or more parties are liable together to share a single liability and the liability of each of them is dependant on the liability of the others (contrast 'several liability').
Legal executive	A professionally qualified lawyer under the Rules of the Institute of Legal Executives. Legal executives usually work for firms of solicitors.
Legal owner	The owner of property recognised in law who may own the property in his own right or as trustee for others. The legal owner may or may not be a beneficial owner of the property.
Legal representative	A barrister or solicitor (including legal executives and other employees of a firm of solicitors) instructed to act on behalf of a party to litigation.
Limitation period	The period prescribed by parliament within which a person who has the right to bring a claim against another must start court proceedings if he wishes to recover a judgment on that claim. The Limitation Act 1980 sets out general limitation

	periods which apply to certain categories of claim, but other statutes set out specific limitation periods for certain classes of action. These specific limitation periods (primarily but not exclusively in the case of claims arising out of transport whether by road, rail, sea or air) will be shorter than the general limitation period which would otherwise apply and the specific shorter period will override the general limitation period. It is important to note that the expiry of a limitation period under the Limitation Act 1980 (in contrast to limitation provisions under other statutes) bars the remedy, but does not extinguish the claim. If a defendant wishes to rely on a limitation period it is essential that this is pleaded in the defence. In personal injury and fatal accident cases (and also in defamation and malicious falsehood cases) the court has a (limited) discretionary power to override the limitation period in the interests of justice.
List	For administrative purposes cases will be assigned to different lists depending on the subject-matter of the case. Cases in specialist lists (eg Chancery, Housing Act Appeals, TCC lists) are likely to be heard by judges with specialist knowledge, and may be subject to different procedures to cases in the general list.
Litigant in person	A party to litigation who acts for himself without using a legal representative. Also called Self Represented Litigant.
Litigation friend	A person authorised by the court to act in a case on behalf of a litigant who is either a child (under 18 years) or is a protected party, that is a party who lacks capacity within the meaning of the Mental Capacity Act 2005 to conduct legal proceedings.
McKenzie friend	A person who assists a litigant in court during a trial or other hearing, but who has no right to address the judge.
Mediation	An alternative dispute resolution process, see chapter 2.
Multi-track	A case management track for cases worth more than £25,000 or which will take more than one day to determine.
Office copy entries	The official document issued by HM Land Registry to show the entries on the relevant title number of registered land. This will show the registered legal proprietor(s) of the land, whether the land is held under a trust which has been registered against the title, whether there are any charges (including mortgages) or charging orders registered against the land, and the terms of

	any restrictive or other covenants on which the land is held. While the office copy entries will be evidence of the ownership of the land they are neither conclusive of the legal ownership of the land nor of the extent of the land comprised in the title.
Overriding objective	The foundation principle of the Civil Procedure Rules to deal with cases justly, see Chapter 4.6.
Part 20 Claim	A claim made in an action by a litigant other than the original claimant. This may be a counterclaim by the original defendant or a third party claim brought by the original defendant against a person other than the original claimant. These claims are governed by CPR Part 20. (It is usually more convenient to describe them as 'counterclaims' or 'third party claims' as appropriate.)
Part 36 Offer	An offer to compromise (settle) the claim on specific terms made in accordance with the provisions of CPR Part 36, see chapter 17.
Particulars of claim	The pleading in which a claimant sets out the essential factual details of his claim and the 'relief' which the claimant will be asking the court to award.
Practice Direction	Rules of practice given in a formal direction. Most Parts of the CPR have practice directions supplementing the Rules, but there are also separate practice directions on particular topics, for example the *Practice Direction : Insolvency Proceedings.*
Practice Form	A procedural form which is required to be used for a particular purpose in legal proceedings under the terms of a Practice Direction.
Pre-action Protocol	A protocol designed to ensure that litigation does not begin unnecessarily. Individual protocols will differ in detail but the essence will be a requirement that the prospective claimant notifies the prospective defendant of the claim he wishes to bring in sufficient detail to enable the prospective defendant to understand what the claim is all about, and a requirement that the prospective defendant responds, explaining if it be the case, the basis on which he will resist any claim. See Chapter 7.1.
Privilege	The right of a litigant to refuse to disclose or give inspection of a document, or to refuse to answer questions on the ground of an interest recognised in law. The most commonly invoked privileges are *legal professional privilege* (the right of a party

	to keep confidential documents obtained or prepared for the purpose of receiving legal advice together with any advice received) and *litigation privilege* (which covers documents prepared specifically or primarily for the purpose of litigation, and extending beyond direct communication between the solicitor and client). Other privileges include the *privilege against self-incrimination* which entitles a party (or a witness) to refuse to disclose documents or answer questions which might tend to expose the litigant or witness to a criminal or civil penalty, and *public interest privilege* which renders immune from disclosure documents the production of which would be injurious to the public interest. Privilege is a complicated subject. If there is a dispute as to whether a document is truly privileged it may be necessary for the document to be shown to a judge (without disclosing it to the other side) to make a determination. If appropriate this judge will not be the trial judge. A party may waive privilege and show a privileged document to the court and to the other side, but it needs to be stressed that a party cannot pick and chose the documents in respect of which he waives privilege. The general rule is that if a party waives privilege on one document he waives privilege on all the documents in the same class.
Relief	A compendious term to describe what it is that the claimant seeks in his claim or is awarded by the court. 'Relief' may include damages, an injunction, a declaration, or any other form of order.
Reply	A pleading served by a claimant in response to the defendant's defence pleading.
Right of audience	The right to be heard by the court at a court hearing. Any litigant has a right of audience, as will a barrister or solicitor-advocate on his behalf. The Judge hearing a case has the power to control the procedure in his court and may permit persons who do not have a right of audience to address the court, for example a director or company secretary of a limited liability company or a friend who accompanies a litigant. However the judge is only obliged to hear the litigant himself or a duly qualified professional advocate on the litigant's behalf. A 'McKenzie friend' has no right to be heard.
Rule	One the Civil Procedure Rules. These are divided into Parts, see chapter 4.

Seal	The court seal is applied to a document to authenticate it as a document (usually an Order) issued by the court.
Self represented litigant	A party to litigation who acts for himself without using a legal representative. More commonly called Litigant in Person.
Service	The process by which documents in court proceedings are brought to the attention of a litigant. There are detailed rules as to service contained in CPR Part 6. A few documents will require personal service. Most documents will be served by post. Where a solicitor's notepaper includes a fax number or e-mail address documents may be served by fax or e-mail unless the solicitor's notepaper states that service by these means is not accepted.
Set aside	The cancelling or a judgment or order of the court, or of a step taken in the proceedings by a party.
Several liability	Where two or more parties are liable together to share a single liability but each party's liability is separate from the other parties' liability, (contrast 'joint liability').
Small claims court	A convenient term to describe the court hearing small claims. It is not however a separate court, but rather a District Judge sitting in the county court on a small claims track matter.
Solicitor	A professional lawyer who has been admitted to the Roll of Solicitors after passing the Law Society exams and undertaking a period of training.
Statement of truth	The formal statement verifying that a statement of case (pleading), witness statement, or other document is true.
Stay	A court order that no further steps may be taken in proceedings. Subject to the terms of the stay a party may apply to the court to lift the stay.
Strike out	A court order that the whole or any part of claim form, statement of case (pleading), or witness statement be treated as deleted with the result that it cannot be relied on in the proceedings.
Summary assessment	The procedure by which the judge hearing an application (or, less frequently, a trial) in which he has ordered one party to pay the costs of the other makes an immediate assessment of

	the sum payable by the paying party. A summary assessment will usually require a costs schedule prepared (in advance of the hearing) by the receiving party which should ordinarily have been served before the hearing on the paying party.
Summary judgment	A judgment for all or part of a claim made by the court without hearing live testimony from witnesses, see paragraph 13.30.
Third party claim	A claim made by a defendant against a person other than the claimant. Usually a third party is a person who is not yet a party to the proceedings, but a third party claim may be brought against an existing party to the proceedings in cases where there are multiple parties. In cases where the original defendant to the proceedings makes a counterclaim to the original claimant, that claimant may bring a third party claim. CPR Part 20 refers to these claims as "additional claims" but it is permissible to refer to them as "third party claims" (see CPR 20PD.7) this being the rather more descriptive title given to such claims under the previous rules. The third party claim should relate to the subject matter of the original claim. It is most often used where the defendant asserts that he is entitled to an indemnity against or contribution towards the claimant's claim from the third party.
Track	One of the three case management regimes to which a case is allocated at the start of the proceedings, see paragraph 7.22.
Tomlin Order	A form of Order in which the proceedings are stayed on terms with permission given to enforce the terms if necessary. The terms are usually set out in a schedule which can, in appropriate circumstances, be kept confidential to the parties. The formal part of the Order will simply state that the proceedings are stayed on the terms set forth in the schedule (or some clearly defined document eg counsels' briefs) with permission to apply to enforce the terms. The schedule will set out the terms the parties have agreed, occasionally after a court judgment. This form of order means that there is no judgment, as such, against a party and permits quite complex terms of agreement to be given the force of a court order. This form of order enables the terms of settlement to be enforced without the need to issue a fresh claim form.
Without notice application	An application made by one party without the knowledge of the other side. Previously called an 'ex parte' application.

Without prejudice	Communications between parties with a view to reaching a settlement which may not be brought to the attention of the court except after the end of the case when questions of costs are being considered. This allows a party to offer to settle a claim, or accept a settlement of a claim, without the court knowing.

In the: [to be completed]
Parties: [to be completed]
Claim number: [to be completed]

PRECEDENT H

Work done / to be done	Assumptions	Incurred		Estimated		Total (£)
		Disbursements (£)	Time costs (£)	Disbursements (£)	Time costs (£)	
Pre-action costs		£0.00	£0.00	£0.00	£0.00	£0.00
Issue / pleadings		£0.00	£0.00	£0.00	£0.00	£0.00
CMC		£0.00	£0.00	£0.00	£0.00	£0.00
Disclosure		£0.00	£0.00	£0.00	£0.00	£0.00
Witness statements		£0.00	£0.00	£0.00	£0.00	£0.00
Expert reports		£0.00	£0.00	£0.00	£0.00	£0.00
PTR		£0.00	£0.00	£0.00	£0.00	£0.00
Trial preparation		£0.00	£0.00	£0.00	£0.00	£0.00
Trial		£0.00	£0.00	£0.00	£0.00	£0.00
ADR / Settlement discussions		£0.00	£0.00	£0.00	£0.00	£0.00
Contingent cost A: [explanation]		£0.00	£0.00	£0.00	£0.00	£0.00
Contingent cost B: [explanation]		£0.00	£0.00	£0.00	£0.00	£0.00
Contingent cost C: [explanation]		£0.00	£0.00	£0.00	£0.00	£0.00
GRAND TOTAL (including both incurred costs and estimated costs)		£0.00	£0.00	£0.00	£0.00	**£0.00**

This estimate excludes VAT (if applicable), court fees, success fees and ATE insurance premiums (if applicable), costs of detailed assessment, costs of any appeals, costs of enforcing any judgment and [complete as appropriate]

[Statement of truth]

Signed

Position Date

In the: [to be completed]
Parties: [to be completed]
Claim number: [to be completed]

		RATE (per hour)	PRE-ACTION COSTS				ISSUE / PLEADINGS				CMC			
			Incurred costs	Estimated costs		TOTAL	Incurred costs	Estimated costs		TOTAL	Incurred costs	Estimated costs		TOTAL
			£	Hours	£		£	Hours	£		£	Hours	£	
	Fee earners' time costs													
1	Partner	£0.00			£0.00	£0.00			£0.00	£0.00			£0.00	£0.00
2	[fee earner]	£0.00			£0.00	£0.00			£0.00	£0.00			£0.00	£0.00
3	[description]	£0.00			£0.00	£0.00			£0.00	£0.00			£0.00	£0.00
4	[Ideally add extra lines]	£0.00			£0.00	£0.00			£0.00	£0.00			£0.00	£0.00
5	**Total Profit Costs (1 to 4)**		**£0.00**		**£0.00**	**£0.00**	**£0.00**		**£0.00**	**£0.00**	**£0.00**		**£0.00**	**£0.00**
	Expert's costs													
6	Fees					£0.00				£0.00				£0.00
7	Disbursements					£0.00				£0.00				£0.00
	Counsel's fees [indicate seniority]													
8	Leading counsel					£0.00				£0.00				£0.00
9	Junior counsel					£0.00				£0.00				£0.00
10	**Court fees**					£0.00				£0.00				£0.00
11	**Other Disbursements**					£0.00				£0.00				£0.00
12	Explanation of disbursements [details to be completed]													
13	**Total Disbursements (6 to 11)**		£0.00		£0.00	£0.00	£0.00		£0.00	£0.00	£0.00		£0.00	£0.00
14	**Total (5 + 13)**		0			**£0.00**	0			**£0.00**	0			**£0.00**

In the: [to be completed]
Parties: [to be completed]
Claim number: [to be completed]

		RATE (per hour)	DISCLOSURE				WITNESS STATEMENTS				EXPERT REPORTS			
			Incurred costs	Estimated costs		TOTAL	Incurred costs	Estimated costs		TOTAL	Incurred costs	Estimated costs		TOTAL
			£	Hours	£		£	Hours	£		£	Hours	£	
	Fee earners' time costs													
1	[Insert relevant]	£0.00			£0.00	£0.00			£0.00	£0.00			£0.00	£0.00
2	[fee earner]	£0.00			£0.00	£0.00			£0.00	£0.00			£0.00	£0.00
3	[description]	£0.00			£0.00	£0.00			£0.00	£0.00			£0.00	£0.00
4	[Ideally add extra lines]	£0.00			£0.00	£0.00			£0.00	£0.00			£0.00	£0.00
5	**Total Profit Costs (1 to 4)**		**£0.00**	0	**£0.00**	**£0.00**	**£0.00**		**£0.00**	**£0.00**	**£0.00**		**£0.00**	**£0.00**
	Expert's costs													
6	Fees	£0.00				£0.00				£0.00				£0.00
7	Disbursements					£0.00				£0.00				£0.00
	Counsel's fees [indicate seniority]													
8	Leading counsel	£0.00				£0.00				£0.00				£0.00
9	Junior counsel	£0.00				£0.00				£0.00				£0.00
10	**Court fees**					£0.00				£0.00				£0.00
11	**Other Disbursements**					£0.00				£0.00				£0.00
12	Explanation of disbursements [details to be completed]													
13	**Total Disbursements (6 to 11)**		£0.00		£0.00	£0.00	£0.00		£0.00	£0.00	£0.00		£0.00	£0.00
14	**Total (5 + 13)**		0			**£0.00**	0			**£0.00**	0			**£0.00**

In the: [to be completed]
Parties: [to be completed]
Claim number: [to be completed]

		RATE (per hour)	PTR				TRIAL PREPARATION				TRIAL			
			Incurred costs	Estimated costs		TOTAL	Incurred costs	Estimated costs		TOTAL	Incurred costs	Estimated costs		TOTAL
			£	Hours	£		£	Hours	£		£	Hours	£	
	Fee earners' time costs													
1	[Insert relevant]	£0.00			£0.00	£0.00			£0.00	£0.00			£0.00	£0.00
2	[fee earner]	£0.00			£0.00	£0.00			£0.00	£0.00			£0.00	£0.00
3	[description]	£0.00			£0.00	£0.00			£0.00	£0.00			£0.00	£0.00
4	[Ideally add extra lines]	£0.00			£0.00	£0.00			£0.00	£0.00			£0.00	£0.00
5	**Total Profit Costs (1 to 4)**		**£0.00**	0	**£0.00**	**£0.00**	**£0.00**		**£0.00**	**£0.00**	**£0.00**		**£0.00**	**£0.00**
	Expert's costs													
6	Fees	£0.00				£0.00				£0.00				£0.00
7	Disbursements					£0.00				£0.00				£0.00
	Counsel's fees [indicate seniority]													
8	Leading counsel	£0.00				£0.00				£0.00				£0.00
9	Junior counsel	£0.00				£0.00				£0.00				£0.00
10	**Court fees**					£0.00				£0.00				£0.00
11	**Other Disbursements**					£0.00				£0.00				£0.00
12	Explanation of disbursements [details to be completed]													
13	**Total Disbursements (6 to 11)**		£0.00		£0.00	£0.00	£0.00		£0.00	£0.00	£0.00		£0.00	£0.00
14	**Total (5 + 13)**		0			**£0.00**	0			**£0.00**	0			**£0.00**

In the: [to be completed]
Parties: [to be completed]

Claim number: [to be completed]

		RATE (per hour)	SETTLEMENT / ADR				CONTINGENT COST A: [EXPLAIN]				CONTINGENT COST B: [EXPLAIN]			
			Incurred costs	Estimated costs		TOTAL	Incurred costs	Estimated costs		TOTAL	Incurred costs	Estimated costs		TOTAL
			£	Hours	£		£	Hours	£		£	Hours	£	
	Fee earners' time costs													
1	Grade A	£0.00			£0.00	£0.00			£0.00	£0.00			£0.00	£0.00
2	Grade B	£0.00			£0.00	£0.00			£0.00	£0.00			£0.00	£0.00
3	Grade C	£0.00			£0.00	£0.00			£0.00	£0.00			£0.00	£0.00
4	Grade D	£0.00			£0.00	£0.00			£0.00	£0.00			£0.00	£0.00
5	**Total Profit Costs (1 to 4)**		**£0.00**		**£0.00**	**£0.00**	**£0.00**		**£0.00**	**£0.00**	**£0.00**		**£0.00**	**£0.00**
	Expert's costs													
6	Fees	£0.00				£0.00				£0.00				£0.00
7	Disbursements					£0.00				£0.00				£0.00
	Counsel's fees [indicate seniority]													
8	Leading counsel	£0.00				£0.00				£0.00				£0.00
9	Junior counsel	£0.00				£0.00				£0.00				£0.00
10	**Court fees**					£0.00				£0.00				£0.00
11	**Other Disbursements**					£0.00				£0.00				£0.00
12	Explanation of disbursements [details to be completed]													
13	**Total Disbursements (6 to 11)**		£0.00		£0.00	£0.00	£0.00		£0.00	£0.00	£0.00		£0.00	£0.00
14	**Total (5 + 13)**		0			**£0.00**	0			**£0.00**	0			**£0.00**