Overview of the Litigation Process

Client Guide

OVERVIEW OF THE LITIGATION PROCESS

This guide sets out a general overview of the litigation process in England and Wales under the Civil Procedure Rules (CPR), including steps to be taken before a claim is commenced. It does not cover every possible stage of the process but highlights those which are likely to apply to most cases.

As each case is different, the particular steps required, and timetable followed, will depend on the facts and circumstances and the dispute. There are also factors that cannot be predicted in advance, such as actions taken by the Defendant, evidence that emerges during the case and directions or orders given by the Court. The following summary is intended to give you a general indication of the procedure and steps that may be required.

The overriding objective

One important principle that underpins litigation in the English Courts is the *"overriding objective"* of enabling the Court to deal with cases justly and at proportionate cost. The key factors include:

- Enforcing compliance with the CPR and any Court orders.
- Dealing with a case in a way that is proportionate to the:
- amount of money involved;
- importance of the case;
- complexity of the issues; and
- financial position of each party.
- Saving expense.
- Ensuring that the case is dealt with expeditiously and fairly.
- Giving effect to the overriding objective in relation to vulnerable parties or witnesses.

These factors must be borne in mind at each step of the litigation process. When either the CPR or a Court order requires you to carry out a particular step in the proceedings, it is very important that you do so in the manner stipulated and within the relevant time limit. As part of its case management powers, the Court may impose penalties on any party that does not comply with the Court rules or orders. These penalties can include costs sanctions or striking out all or part of your evidence or claim.

Pre-action protocols

The Courts will expect potential parties to act reasonably in exchanging information and documents relevant to the dispute before proceedings are even commenced. The aim is to avoid the need for legal proceedings where possible. There can be adverse costs consequences if a party fails to follow the relevant pre-action procedure.

To ensure we comply with the Courts' guidelines, we should send a "l*etter before claim"* to the potential defendant. This letter sets out the details of your claim and the remedy sought and lists the key documents relevant to the dispute. It may include a request for documents or information from the defendant. The letter should also invite the defendant to agree to some form of alternative dispute resolution (ADR) procedure, such as mediation.

We would need to allow the defendant a reasonable time to respond to the letter before claim. This is usually 30 days. Depending on the response, it may be appropriate to issue proceedings, or to continue correspondence with the defendant.

Use of Counsel

It can be appropriate to instruct an independent barrister or counsel at an early stage. Counsel can give advice on the merits of the claim, help with preparing the claim form and particulars of claim, and represent you at Court hearings.

Statements of case

Each party to the proceedings must prepare certain documents that contain the details of the case they wish to advance. These documents (the statements of case) must be filed at Court and served on the other party. The documents that comprise the statements of case are each dealt with below.

Claim form

Proceedings are started by issuing a claim form at Court and paying the required Court fee. The claim form contains a concise statement of the nature of the claim and the remedy sought (for example, damages). There will be a Court fee to pay on the issue of the claim form.

It is necessary to serve the claim form on the defendant within the prescribed time. The time limit is generally four months after the claim was issued, but, if it is necessary to serve the defendant outside England and Wales, we would have six months from the date of issue. We should take steps to serve the claim form as soon as possible after issue, unless there are good reasons to delay.

Particulars of claim

The particulars of claim set out full details of the claim, including the alleged facts on which the claim is based. The particulars of claim must be served on the defendant within 14 days of service of the claim form.

Acknowledgment of service

The defendant must file an acknowledgment of service within 14 days of service of the particulars of claim. In the acknowledgment of service, the defendant must indicate whether the intention is to defend all or part of the claim. The defendant may also indicate that the Court's jurisdiction to hear the claim will be contested.

Defence

Unless the defendant admits the whole of the claim, the defendant must file a defence. In the defence, the defendant must state which allegations in the particulars of claim are admitted, denied and which are neither admitted nor denied but the claimant is required to prove. Where the defendant denies an allegation, the reasons for the denial must be stated and the defendant's own version of events put forward.

The defendant must file a defence either:

- Within 14 days after service of the particulars of claim, if the defendant has not filed an acknowledgment of service.
- Within 28 days after service of the particulars of claim, if the defendant has filed an acknowledgment of service.

The parties may agree an extension of time of up to an additional 28 days for filing the defence. If the defendant wants more time, the defendant will need to apply to Court for a longer extension.

If a defence is not filed, you can apply to the Court for judgment in default of defence (if issuing a money claim).

Counterclaims and additional claims

Depending on the factual circumstances, the defendant may make a counterclaim against the claimant, or an additional claim against another party to the claim or a third party. For example, the defendant may make a claim for a contribution or indemnity from another party.

A counterclaim or an additional claim may be served with the defence without the Court's permission, or at any other time with the Court's permission.

Subsequent statements of case

As a claimant, you may file a reply to the defence, but you are not obliged to do so. You will not be taken to have admitted any matter raised in the defence if you fail to deal with it in a reply; you will be taken to require that matter to be proved by the defendant.

If a counterclaim is served, you should normally file a defence to the counterclaim within 14 days of service of the counterclaim.

In principle, it is then possible for there to be further statements of case, such as a reply to the defence to counterclaim. In addition, a party may seek to amend its claim or defence, although it is likely to require the Court's permission to do so.

Statements of truth

Each statement of case must be verified by a statement of truth. This confirms that the person making the statement believes that the facts stated in the document are true and understands that proceedings for contempt of Court may be brought against anyone who makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth.

Statements of truth must also be signed in each witness statement and certain other documents filed in proceedings.

A failure to verify a document can mean that the party will be unable to rely on the document as evidence of any of the matters set out in it, or that a statement of case is struck out. If this matter proceeds to litigation, further information will be provided regarding statements of truth.

Interim remedies and final judgments without trial

There are certain procedures that might enable us to obtain a remedy or judgment against the defendant before a trial. In some circumstances, this might avoid the need for a trial altogether. It is worth bearing in mind that these remedies might be available to you and, in some cases, the defendant. Some examples of interim remedies are mentioned below.

Default judgment

If the defendant fails to file a defence, you may obtain a judgment in default of defence, which means that judgment is entered on the claim without a trial.

Summary judgment

Summary judgment is a means of obtaining judgment against the defendant at an early stage, avoiding the need to pursue the claim to trial. It may be appropriate to apply to Court for summary judgment, either on the whole of the claim or on a particular issue, if it can be established that:

- The defence has no real prospect of succeeding.
- There is no other compelling reason why the claim or issue should be disposed of at a trial.

Summary judgment may also be sought by a defendant on the grounds that there is no real prospect of the claim succeeding.

Strike out

The Court has the power to strike out a party's statement of case (including a claim form, particulars of claim or defence), either in whole or in part, if one of the following applies:

- The statement of case discloses no reasonable grounds for bringing or defending the claim.
- The statement of case is an abuse of process.
- There has been a failure to comply with a rule or Court order.

Security for costs

The defendant might seek an order that you provide security for the defendant's costs of the proceedings, for example, by paying a sum of money into Court. The Court will only make an order if it is satisfied that it is just to do so in all the circumstances of the case. The rationale for this measure is to offset any possible injustice to defendants who may otherwise be unable to recover the costs of defending proceedings against them.

Interim injunctions

An injunction is an order that requires a party to do, or to refrain from doing, a specific act or acts. For example, a freezing injunction could be sought to preserve the assets, pending judgment or final order, if there is a risk that assets that would otherwise be available to meet any judgment, will be disposed of.

An application for injunctive relief is not a step that should be taken lightly. A claimant is usually required to give an undertaking in damages, that is, an undertaking to compensate the defendant for any loss incurred, should it later transpire that the injunction was wrongly granted. Should it appear that it would be appropriate to seek an injunction, instructions will be provided.

Case management

After a defence has been filed, the Court will serve a notice of proposed allocation. Assuming the case appears suitable for allocation to the multi-track as opposed to the more simplified procedures on the other tracks, the notice of proposed allocation will require the parties, by the specified date, to:

- Complete, file and serve a directions questionnaire.

- File proposed directions.
- Comply with any other matters.

➢ Directions questionnaire

The aim of the directions questionnaire is to provide information to assist the Court in allocating the case to the appropriate track and in giving directions for how the case should be conducted. In the directions questionnaire, you must set out your proposals in relation to the following:

- Disclosure of documents.
- Scope and extent of disclosure of electronic documents.
- Expert evidence that will be required.
- Witness evidence that will be relied on.
- Directions, that is, the procedural timetable for the matter.
- Possible settlement, or reasons why they do not wish to settle at that stage.

Each party must also file a costs budget for each stage of the litigation including trial.

The directions questionnaire must be filed by the date specified in the Court's notice of proposed allocation. Therefore, it is necessary to address each of these issues at an early stage in the proceedings.

Case management conference

A case management conference (CMC) is a procedural hearing where the Court gives directions for the future conduct of the case until trial. There may not be a CMC if the parties have agreed directions, or the Court issues its own directions, and there is no other reason to have a hearing.

If a CMC is held, the Court will usually:

- Consider the issues in dispute and whether they can be narrowed before trial.
- Consider the suitability of the case for settlement.
- Set a pre-trial timetable for the procedural steps required, such as the disclosure of documents, exchange of witness statements and expert reports.
- Fix a trial date or period in which the trial is to take place.

The Court may order that a further CMC be held, particularly in complex cases.

Interim applications

An interim application is made when a party seeks an order or directions before the trial or substantive hearing of the claim. An application may be made for a variety of procedural

or tactical reasons, depending on the circumstances. For example, to seek an interim injunction, specific disclosure of documents or an extension of time to complete a procedural step.

If the other side makes any interim applications, it will be necessary to incur some additional time and cost in responding to them. Any costs orders that the Court makes in relation to an interim application may have to be paid during the course of the proceedings.

Settlement, ADR and Part 36 offers

It is important to keep settlement in mind at all stages of the proceedings. The CPR and the Courts encourage settlement of disputes in a number of ways; in particular, by the use of ADR or Part 36 offers to settle the case. In certain circumstances, the Court can order the parties to enter into ADR, and it may also impose costs penalties on a party who unreasonably refuses to participate in a form of ADR. If there are any prospects of settling, it usually better to do so sooner rather than later, to avoid further legal costs.

Part 36 offers

A Part 36 offer is an offer by a claimant or a defendant to settle the claim that complies with the requirements in Part 36 of the CPR. The rules provide for specific costs consequences where there has been a Part 36 offer that was not accepted, and the party to whom the offer was made then fails to achieve a better result at trial.

Part 36 offers can be an important tactical step in litigation, as they put pressure on the other side to settle the case and to some extent protect the offeror's position on costs. Advice will be provided separately about the consequences of making or accepting a Part 36 offer and whether, or at what stage, it might be appropriate.

Evidence

To succeed in litigation, a claimant must prove its case on the balance of probabilities. It is necessary to adduce evidence to support each of the essential ingredients of your claim. The defendant will also need to adduce evidence to support its defence to some or all of the essential ingredients of the claim.

The evidence usually comprises of:

- Contemporaneous documents (including electronic documents as well as hard copies) intended to prove the issues in dispute.
- Statements of factual witnesses, to tell the story behind the dispute and to fill in any gaps that the documents leave.
- Expert evidence (where appropriate and permitted), to assist the Court when the case involves complex technical, academic or foreign law issues.

It is important to consider, at an early stage, the evidence that is likely to be required to prove your case to enable us to prepare for the first CMC as discussed above.

Disclosure of documents

The purpose of disclosure is for each party to make available documents which either support or undermine any party's case. This may include documents that are harmful, sensitive or confidential. Disclosure is often a time-consuming and costly stage in litigation.

Initially, it will be necessary to identify:

- What documents exist (or may exist) that are or may be relevant to the matters in issue in the case.
- Where and with whom those documents are or may be located.
- The estimated cost of searching for and disclosing them.

Documents are disclosed by listing them and serving the list on the defendant. It will be necessary for you or an appropriate senior representative to organise and supervise the disclosure search. This individual should also sign a disclosure statement in the list of documents, certifying that the duty of disclosure is understood and that, to the best of that individual's knowledge, it has been complied with.

The most important point to note at this stage is to preserve all documents that are potentially disclosable, including electronic documents such as emails, voicemails and text messages. Care should also be taken to avoid creating any document that might damage your case, and to limit the circulation of existing documents relating to the dispute.

Inspection of documents and privilege

After the parties have exchanged their lists of documents, each party is entitled to inspect the other's disclosed documents. In practice, inspection often takes place by way of exchange of copy documents.

Privilege entitles a party to withhold documents from inspection. In particular:

- Legal advice privilege protects confidential communications between a client and their lawyer that came into existence for the purpose of giving or receiving legal advice.
- Litigation privilege arises when litigation is contemplated, pending or in existence, and protects communications between a client or their lawyer and a third party, provided certain criteria are satisfied.
- Without prejudice privilege applies to communications made in a genuine attempt to settle a dispute.

Witness statements

It would be helpful to identify the individuals who were involved in the events giving rise to the claim. If the claim proceeds, it will be necessary to prepare a written statement of the evidence that each individual intends to give to support the claim. These statements will be sent to the defendant who will prepare and serve their own statements.

The time period for exchanging witness statements will be agreed by the parties or ordered by the Court at the first CMC. The Court may also give directions identifying the witnesses who may give evidence or limiting the number of witnesses and the issues that may be addressed.

A witness statement must:

- Be in the witness's own words, if practicable.
- Indicate which of the statements in it are made from the witness's own knowledge and which are matters of information or belief and state the source of those matters.
- Include a statement of truth.

A witness may be called to trial to be cross-examined on their statement.

Expert evidence

Expert evidence is used where the case involves matters on which the Court does not have the requisite technical or academic knowledge, or the case involves issues of foreign law. In this case, it may be helpful to obtain evidence from an expert on any issues in relation to which expert evidence is likely to be required.

The Court's permission to call expert evidence is always required. If it grants permission, the Court will limit the evidence to the named expert or field ordered and may specify the issues which the expert should address. Parties may instruct another expert to assist them, but any evidence from that expert will not be admissible and the costs of instructing that expert will not be recoverable from the other side.

The Court may order that expert evidence is to be given by a single joint expert, namely an expert who is instructed on behalf of both parties.

Expert evidence is usually given in the form of a written report, which must be the independent product of the expert. The expert's overriding duty is to the Court and not to the party that instructed them. Where separate experts are instructed by the parties, reports are usually exchanged simultaneously, but may be exchanged sequentially.

Following the simultaneous exchange of expert reports, a party may put questions to the other party's expert for the purpose of clarifying that expert's report. Questions must normally be put within 28 days of service of the report. There is then likely to be a discussion between the experts for the purpose of reaching an agreed opinion on the

issues where possible. An expert may give oral evidence at trial only with the Court's permission.

Preparation for trial

The Courts are reluctant to postpone a trial date or period that has been fixed without a very good reason. Therefore, although most cases settle, it is important to be properly prepared in case the matter does proceed to trial. Some of the steps required are set out below.

Pre-trial review

The Court may order that a pre-trial review (PTR) be held, particularly in more substantial cases where there are significant issues between the parties. The main purposes of the PTR are to:

- Check that the parties have complied with all previous Court orders and directions.
- Prepare or finalise a timetable for the conduct of the trial, including the issues to be determined and the evidence to be heard.
- Fix or confirm the trial date.

Preparation of trial bundles

Trial bundles are files of the statements of case, relevant orders and key evidence that are used by the Court and the parties during the trial. Preparing the trial bundles is usually the responsibility of the claimant's solicitors but the Court expects co-operation between the parties to try to agree the documents to be included. It can be a time-consuming task and requires significant planning and attention to detail.

Preparation of skeleton arguments

Each party will be required to supply the Court and the other party with a written skeleton argument, namely a written outline of that party's case and arguments before trial. Skeleton arguments are usually drafted by counsel.

Trial and judgment

You should note that:

- The length of the trial will depend on the complexity of the legal and factual issues to be resolved and the number of witnesses permitted to give evidence.
- The trial will be held in public, unless the Court has ordered that it may be held in private because it involves matters of a confidential nature and publicity would cause harm or damage.
- The trial will be heard by a single judge alone except in some fraud and defamation cases.

- The judgment may be given immediately after the trial but is often "reserved" to a later date, particularly in complex matters. This means that the parties would not know the judge's decision until sometime after the end of the trial.

Costs

The general rule regarding costs in litigation is that, if your claim succeeds, you will be entitled to recover your costs from the defendant. On the other hand, if the claim fails, you are likely to be required to pay the defendant's costs. However, the Court has discretion to make a different costs order. The Court will take into account factors such as the conduct of the parties and any Part 36 or other admissible offers to settle the case.

It is very unusual for a party to be able to recover all of the costs incurred in the litigation. The actual amount of costs to be paid is subject to an assessment process, unless the parties can agree the amount that will be paid. The standard basis of assessment is to allow costs to be recovered that were reasonably incurred, reasonable in amount and proportionate to the matters in issue. Costs which are disproportionate in amount may be disallowed or reduced even if they were reasonably or necessarily incurred.

The Court will also take into account the party's costs budgets for each stage of the claim. Each party is required to submit a costs budget and to revise it as appropriate as the case progresses. If a party's actual costs exceed its budget, the excess may not be recoverable from the paying party.

The estimated costs of the litigation can be one of the most significant factors to consider when deciding whether to pursue a case.

Enforcement

Once judgment has been obtained, the judgment debtor should pay voluntarily any money owed under the judgment. If payment is not made, there are a number of enforcement procedures available to the judgment creditor to enforce payment. Examples include:

- Execution against goods owned by the judgment debtor, where an enforcement officer is commanded to seize and sell a judgment debtor's goods.
- An attachment of earnings order, under which a proportion of the judgment debtor's earnings is deducted by their employer and paid to the judgment creditor until the judgment debt is paid.
- A charging order over property owned by the judgment debtor.

The appropriate procedure will depend on the circumstances, including the nature and location of the debtor's assets.

Appeals

It is open to the unsuccessful party to apply for permission to appeal a judgment or order. A decision may be appealed only on the basis that it was either wrong or unjust because of a serious procedural or other irregularity in the proceedings. The general rule is that notice of an appeal must be filed within 21 days of the judgment or order (subject to certain exceptions).

If there is an appeal, it may be necessary to apply for a stay of any order or enforcement of the judgment.