# Practice Note on Litigation Procedure

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This Practice Note sets out a general overview of the litigation process in England and Wales under the Civil Procedure Rules (CPR). It includes information about the steps to be taken before a claim is commenced, but it is not a comprehensive explanation of litigation procedure. This Note takes into account the civil litigation reforms that came in to force on 1 April 2013, commonly known as the Jackson Reforms.

## Pre Action

In any case where litigation (that is, a Court claim) is contemplated, a party must consider the potential impact of its behaviour at the pre action stage. The Court requires the parties to a dispute to regard litigation as a last resort and can penalise parties who do not comply with the CPR by making an adverse Costs Order against them or imposing other sanctions on them.

Prior to commencing legal proceedings, the Court will expect the parties to act reasonably in exchanging information and documentation that is relevant to the issues between them and to make appropriate attempts to resolve their dispute without the need for Court proceedings. This will usually involve complying with guidance known as "Pre Action Protocols". There are specific Pre Action Protocols for various types of dispute, for example, defamation and professional negligence claims. In cases not covered by these specific Protocols, for example, contractual disputes, parties are expected to comply with the Practice Direction - Pre Action Conduct and Protocols.

It is sensible for parties to consider settlement at all stages of litigation, including the pre action stage. This is referred to below.

## Issuing Court Proceedings and Statements of Case

### Claim Form

The Claimant starts proceedings by issuing a Claim Form (which is stamped by the Court with a seal showing the date that it is issued) and paying the required Court fee. If the claim is for a sum of money of £10,000 or less, the Court fee (currently) will be between £35 and £455 depending on the value of the claim. For claims for a sum of money over £10,000 the fee is 5% of the value of the claim up to a maximum fee of £10,000. Where the claim is for any remedy other than the recovery of a sum of money, the fee is £480 for claims issued in the High Court and £280 in a County Court.

The Claim Form contains a brief summary of the nature of the claim and the remedy the Claimant is seeking. If the claim is for a sum of money, the Claim Form must include a statement of value of the amount claimed.

The Claim Form must be served on the Defendant within four months of the date the claim is issued if the Claim Form is served within the jurisdiction. The time limit is six months from the date of issue when the Claim Form is served out of the jurisdiction.

**Particulars of Claim**

The Claimant must set out full details of the claim in the Particulars of Claim including the facts alleged by the Claimant on which the claim is based. The Particulars of Claim may be included on the Claim Form but are usually contained in a separate document.

The Particulars of Claim must, in most cases, 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. This is a form on which the Defendant must indicate whether he/she intends to defend all or part of the claim, or whether he/she intends to contest the Court's jurisdiction to hear the claim.

**Defence**

Unless the Defendant admits the whole of the claim, he/she must file a Defence either:-

- Within 14 days after service of the Particulars of Claim, if he/she has not filed an Acknowledgment of Service; or
- Within 28 days after service of the Particulars of Claim, if he/she has filed an Acknowledgment of Service.

The Claimant and the Defendant may agree an extension of time of up to an additional 28 days for filing the Defence. If the Defendant needs any further time, he must make an application to the Court for a longer extension. If the Defence is not filed, the Claimant may apply to the Court for Judgment to be entered in default of the Defence being filed.

The Defendant must state in the Defence which allegations in the Particulars of Claim he/she admits, which he/she denies and which are neither admitted nor denied but he/she requires the Claimant to prove. If the Defendant denies an allegation, he/she must state the reasons and put forward his/her own version of events.

**Counterclaim and Third Party Claims**

The Defendant may serve a Counterclaim together with the Defence or make a claim against a third party, for example, for a contribution or an indemnity in respect of the claim.

A Court fee is payable when a Counterclaim is made at the same rates as for a claim.

**Reply and Defence to Counterclaim**

There is no requirement for a Claimant to file a Reply to the Defence and, even if he/she does so, if the Reply does not deal with a particular matter raised in the Defence, the Claimant is not taken to have admitted that matter but is taken to require that matter to be proved by the Defendant.

In the event that the Claimant wishes to file a Reply it must do so at the same time as the Directions Questionnaire (see below). A Defence to Counterclaim should normally be filed within 14 days of service of the Counterclaim, however, given that the Reply to the Defence and Defence to Counterclaim usually form one document, the Court may make a different Order, for example, that the Defence to Counterclaim should also be filed and served with the Directions Questionnaire. The Court’s specific Order in that respect should always be checked so that no deadlines are missed.

### Statements of Truth

A number of documents filed with the Court, including Statements of Case (such as the Particulars of Claim and Defence) and Witness Statements, must be verified by what is known as a Statement of Truth. This is a statement confirming that the person who has made it believes that the facts stated in the document are true. If a party fails to verify a document, this may have serious consequences and if a party signs a Statement of Truth without an honest belief in the truth of the facts being verified there are penalties which are potentially very severe.

## Case Management

Once proceedings have been issued, the Court has a general duty of case management, as well as specific case management powers. From 1 April 2013, there is a greater emphasis on the Court's case management powers, with a view to the Court taking a more proactive role and being less tolerant of unjustifiable delays.

The CPR require that the Courts actively manage cases by furthering the "overriding objective" to deal with cases:-

- Justly and at proportionate cost
- Within a reasonable time
- By proportionate use of the Court's and the parties' resources
- By enforcing compliance with rules, Practice Directions and Orders

### Allocation

All claims that are issued will be allocated by the Court to one of three procedural tracks, largely by reference to the complexity of the case and the amount in issue. The tracks are:-

- Small claims track - The upper limit for claims on this track is £10,000. Parties to small claims usually risk receiving very little, if anything, towards their legal costs even if successful.
- Fast track - This is usually for claims between £10,000 to £25,000, where the trial will not last for more than a day. These claims follow a strict timetable and fixed costs on a sliding scale may be awarded.
- Multi track - For claims over £25,000 or where the case is complex or the remedy is something other than damages, as well as certain specific types of claim.

Once a Defence is received, a Court Officer will provisionally allocate the claim to the track that appears most suitable. The Court will serve a Notice of Proposed Allocation on the parties, which will specify any matters to be complied with and the time limit for doing so. This will include filing a completed Directions Questionnaire and serving it on the other parties.

Where the case appears suitable for allocation to the fast track or the multi track, the Notice of Proposed Allocation will also require the parties to file proposed Directions and in multi track cases that are subject to cost management, parties will also be required to complete a costs budget. The Directions Questionnaire and any other document required by the Notice of Proposed Allocation must usually be filed within 28 days after the Notice is deemed to be served (or 14 days in the case of small claims track matters). This date may not be varied by agreement between the parties and failure to comply with it may result in the claim being struck out. However, in the Chancery Division of the High Court, the parties may extend the time for up to 28 days without reference to the Court. They may also agree to stay the proceedings for the purpose of Alternative Dispute Resolution for a period of up to three months, in which case they must file a Consent Order before the date specified in the Notice of Proposed Allocation.

**Directions Questionnaire**

Directions Questionnaires replace Allocation Questionnaires. They are designed to provide the Court with sufficient information to enable the Court to give directions for how the case should be managed.

The Directions Questionnaire is set out in a number of sections, the first of which deals with the issue of settlement. Legal representatives must confirm that they have explained to their client the need to try to settle the case and all parties completing the Directions Questionnaire must state whether they wish to attempt to settle the case at that stage and, if so, whether they would like the proceedings to be stayed (i.e. put on hold) for one month. In the event that a party does not consider it appropriate to try to settle the claim at this stage, that party must give reasons why and so, unless there are compelling reasons to press ahead with the litigation, usually the parties should confirm that they do wish to attempt to settle the case.

In the event that the claim will be allocated to the multi track, the parties are required to say whether they have reached an agreement about the scope and extent of disclosure of electronic documents (or "e-disclosure") and, if not, whether any such agreement is likely. In the event that no agreement is likely to be reached, the parties must identify what issues the Court will need to address and set out proposals for disclosure. Parties to multi track cases need to have given serious consideration to the issue of disclosure at an early stage in order properly to complete the Directions Questionnaire and the Disclosure Report (as to which see below).

The Directions Questionnaire also requires information about the experts and witnesses on which the parties intend to rely and other matters that will assist the Court to manage the claim.

Once the Court has considered the parties' Directions Questionnaires, it may make an order for directions or require the parties to attend a Case Management Conference.

**Case Management Conference ("CMC")**

A CMC is a procedural hearing when the Court gives directions for the future conduct of the case until trial. At the CMC, 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, for example, the disclosure of documents, exchange of witness statements and experts' reports;
- Fix a trial date or a "trial window" (a period during which the trial will take place).

The parties are required to carry out various steps prior to the first CMC to enable the Court to deal properly with the case. These are as follows:-

**Disclosure Report**

Not less than 14 days before the first CMC, each party has an obligation to file and serve a Disclosure Report, verified by a Statement of Truth, which:-

- Describes briefly the documents that exist (or may exist) and are relevant or may be relevant to the issues in the case;
- States where, with whom and/or how such documents are stored;

- Estimates the broad range of costs that would be involved if standard disclosure were to be Ordered; and
- States which of the Disclosure Orders from the "disclosure menu" in the CPR the party will be seeking. This could include an Order dispensing with disclosure altogether (although this is likely to be rare), an Order limiting Disclosure to certain issues or (most common) an Order for Standard Disclosure.

**Telephone call/Meeting between the parties re Disclosure**

Not less than 7 days before the first CMC, the parties must discuss and seek to agree a disclosure proposal that meets the overriding objective. If the parties are able to reach agreement and the Court considers the proposal appropriate, the Court can approve it without the need for a hearing.

**Directions**

Not less than 7 days before the first CMC, the parties are obliged to try and agree directions for the management of the proceedings and to submit to the Court either agreed directions or, if directions cannot be agreed, their proposed directions. The parties are required to take as their starting point the model directions and standard directions published on the Ministry of Justice website. The Court may approve agreed directions without the need for a hearing and, if so, it will notify the parties of its decision and vacate the CMC.

**Costs Budgets**

Within the deadline set by the Court - or, if none, 7 days before the first CMC - all parties except for litigants in person must complete, file and exchange costs budgets in the form of Precedent H, verified by a Statement of Truth. Parties who fail to do so will only be able to recover the relevant Court fees on any assessment of costs, unless the Court orders otherwise. Where the budgeted costs of the party do not exceed £25,000, the party will only need to estimate the overall costs for each stage of litigation; otherwise, the party will need to provide a full breakdown of costs.

The costs budget must set out an estimate of the reasonable and proportionate costs that the party intends to incur at each stage of the litigation process. Any assumptions on which the budget is based should be stated, as well as any contingencies (i.e. steps that are anticipated but may not be necessary).

It may be that the parties do not anticipate that a certain type of application will be necessary and if any interim applications are made which were not included in the costs budget because they were not reasonably anticipated at that stage, then the associated costs will be treated as additional to the budget.

The Court may at any time make a Costs Management Order (CMO) in which it will record the extent to which the budgets are agreed between the parties or record the Court's approval of a budget. Each party is required to revise their costs budget if necessary as the case progresses. If a party's costs exceed the amount specified in a CMO or, if there is no CMO and the costs exceed the budget by more than 20%, the excess may not be recoverable from the paying party.

Although completing the costs budget will be a time consuming process, a party can only recover £1,000 or 1% of the approved budget, whichever is the higher, for completing Precedent H. Furthermore, all other recoverable costs of the budgeting and costs management process must not exceed 2% of the approved budget.

## Evidence

To succeed at trial, the Claimant will need to prove their case on the balance of probabilities. To do so, the Claimant will need to produce evidence to support the claim and, likewise, the Defendant will adduce evidence to support the defence.

Evidence usually comprises some or all of the following:-

- Contemporaneous documents in either hard copy or electronic form;
- Evidence provided by factual witnesses who are able to give first-hand information regarding the dispute; and
- Expert evidence, if appropriate and allowed by the Court, when the case involves complex technical, academic or foreign law issues.

**Disclosure of Documents**

This is the process by which each party makes available to the other documents that either support or undermine either party's case. It is often a time consuming and costly process and should be considered and discussed with the opposing party from an early stage. Most importantly, as soon as any litigation is contemplated, the parties must preserve all disclosable documents, including any electronic documents such as emails, voicemails and text messages.

In the event that the Court orders that standard disclosure is to take place, each party must carry out a reasonable search for documents that are or have been in their control including electronic documents. Standard disclosure involves the party disclosing to the other side the documents on which they rely, those which adversely affect their case or another party's case and those which support another party's case. This may include documents that damage the party's own case, or are commercially sensitive or confidential.

Documents are disclosed by listing them, usually in chronological order, and serving the list on the other party. The list of documents must contain a Disclosure Statement which sets out the extent of the search carried out. The Disclosure Statement must be signed by the party, who will need to certify that they understand the duty of disclosure and that to the best of their knowledge, they have complied with that duty.

Certain documents may be withheld from disclosure on the grounds of either:-

- Legal advice privilege - this relates to confidential communications between a client and its lawyers, whether or not they relate to litigation; or
- Litigation privilege - which may apply to confidential communications with certain third parties if contentious proceedings were either in existence or contemplated when the documents were generated, provided the communications relate to those proceedings.

After the parties have exchanged their lists of documents, they are entitled to inspect the other party's disclosed documents or, more usually, the parties each provide the other with copies of the documents requested from their lists.

**Witness Statements**

The parties will usually exchange witness statements that contain the evidence of their factual witnesses. The parties will either agree the time period for exchanging their witness statements or this will be set out in the Order for directions made at the first CMC.

All witness statements must be verified by a Statement of Truth. The Court may give directions identifying or limiting the witnesses who may give evidence, the issues that may be addressed and the length and format of witness statements. Witness statements may only contain factual evidence and not opinion.

**Expert Evidence**

Expert witnesses, on the other hand, provide opinion evidence on matters within their expertise.

The Court's permission to call expert evidence is always required and when applying for permission to rely on expert evidence, the parties must identify the expert by name or by field of expertise, specify the issues the expert will address and estimate the cost that will be incurred by the expert evidence. In order to limit costs, the Court may direct that evidence is to be given by a single joint expert - that is, an expert who is instructed on behalf of both parties.

Expert evidence is usually produced in the form of a written report and, where the parties have their own experts, the reports are usually exchanged simultaneously. The expert's overriding duty is to the Court and not to the party who instructed them.

Following exchange of experts' reports, either party may put questions to the other's expert and the Court will usually direct that there be a discussion between the experts with a view to them seeking to identify the issues and reach an agreement on any issues where possible. The experts are usually then required to produce a joint statement for the Court setting out the areas on which they agree and disagree, with a summary of the reasons.

At the trial itself, the Court may hear evidence from experts concurrently, known as "hot-tubbing".

## Preparation for Trial

The Court may send the parties a Listing Questionnaire (or Pre Trial Check List) approximately two months before the trial. This questionnaire enables the Court to establish whether the parties have complied with all of the directions made previously and the Court will usually seek information about the trial such as the number of witnesses to be called and an updated estimate of the likely length of the trial.

In more substantial cases, the Court may order that a further procedural hearing, or Pre Trial Review, be held.

It is the responsibility of the Claimant's solicitors to prepare trial bundles of the documents that will be referred to at the final hearing. The Court expects the parties to cooperate in order to try to agree the documents that will be included.

The parties will also be required to supply the Court and the other party with a written skeleton argument, which is an outline of that party's case and the arguments it intends to put forward at the trial. Usually, the skeleton arguments are drafted by Counsel (a Barrister) who will usually present the party's case to the Court at the trial.

## Trial

The length of the trial will vary in each case depending on the complexity of the legal and factual issues. It will be held in public unless the Court has ordered otherwise and almost all trials are heard by a single Judge. Although Judgment may be given immediately following the trial, it will usually be "reserved" to a later date.

Once a Judgment has been obtained, it may be necessary to take steps to enforce the Judgment if the losing party does not comply with it, for example, by paying the sum of money ordered by the Court.

## Costs

The award of costs is always within the discretion of the Court. The general rule is that costs "follow the event", which means that the unsuccessful party will pay the costs of the successful party. However, the Court will take into account various factors including the conduct of the parties and any settlement offers (see below) when it comes to consider the award of costs.

In most cases, the actual amount of costs that will be paid will either be agreed by the parties or

subject to an assessment by the Court. The usual Order is that costs will be assessed on the standard basis, which allows a party to recover costs that were reasonably incurred and that were reasonable and proportionate in amount to the matters in issue. The Court may disallow disproportionate costs even if they were reasonably or necessarily incurred.

The definition of proportionality provides that costs incurred are proportionate if they are reasonable in relation to:-

- The sums in issue in the proceedings;
- The value of any non-monetary relief in issue in the proceedings;
- The complexity of the litigation;
- Any additional work generated by the conduct of the paying party; and
- Any wider factors involved in the proceedings, such as reputation or public importance.

In addition, the Court will also take in to account the parties' costs budgets for each stage of the litigation process.

## Settlement - Mediation and Part 36 Offers

The parties will be encouraged to try to settle their dispute throughout the course of the litigation process. Parties will often attend a mediation, which involves an independent third party seeking to "broker" an agreement between them. There is further information on this in our Practice Note on Mediation, a copy of which can be found on our website.

There is a specific mechanism under Part 36 of the CPR which enables either party to make an offer to settle the claim that may have very important costs consequences.

For example, if a Claimant issues a claim for a specific sum of money, the Defendant may make an offer to pay a lesser sum than the Claimant is seeking. If the Claimant accepts the offer within 21 days, he/she is automatically entitled to his/her legal costs up to the date that the offer is accepted. If, however, the Claimant does not accept the offer, the matter will proceed to a trial and the Judge will make a decision without knowing about the offer that has been made (or any other offers). If the Judge awards the Claimant a sum equal to or lower than the amount offered by the Defendant, the Claimant will still receive that amount and his/her costs up to the end of the 21 day period. However, the Claimant will usually be ordered to pay both his/her own costs and the Defendant's costs (plus interest) after that 21 day period. The reasoning for this is that, because the Judge awarded the Claimant no more than the Defendant had offered to pay, all of the costs incurred after the 21 day period were unnecessary. The costs of the trial will often be substantial and so, if the Defendant makes a realistic Part 36 Offer, there is a powerful incentive to the Claimant to accept it.

The Defendant's offer will be irrelevant if the Judge awards the Claimant more than the sum offered by the Defendant at a trial. However, the Claimant may make his/her own Part 36 Offer and, if this is accepted by the Defendant, the Defendant will also be liable to pay the Claimant's costs up to the date of acceptance. If the Defendant does not accept the offer then the Defendant risks more severe consequences if the Claimant is ultimately awarded the same or more than the sum offered in the Claimant's Part 36 Offer. In that event, the Defendant will risk having to pay:

a) the Claimant's costs on the indemnity basis (which means that the Claimant can recover a much higher proportion of his/her costs);

b) interest on the Claimant's damages and costs at up to 10% above base rate; and

c) an additional amount of either 10% of the damages awarded in money claims or 10% of the costs awarded where the claim is for something other than damages. This applies to awards

of up to £500,000. For cases where the damages or costs are more than £500,000, the additional amount will be 10% for the first £500,000 and 5% of the second £500,000, making a maximum additional amount of £75,000.

This does, therefore, place considerable pressure on a Defendant to accept a Claimant's Part 36 Offer, particularly if it is pitched at a realistic level.

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