

Guide to dispute resolution

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INTRODUCTION

Whilst this is a guide to dispute resolution it focuses on matters which ultimately end up in court. Most disputes are settled without going to court and the modern approach is very much to consider litigation as a last resort. However, it remains the most common formal method of dispute resolution. Its language and processes can seem very strange to people who are not used to them and this guide is intended to try and guide you through the litigation process whilst identifying alternative ways to resolve disputes.

TERMINOLOGY

As with most specialist subjects, there is a good deal of terminology connected with litigation. While we have attempted to avoid jargon in this guide, some terminology is inescapable and the meanings of some of the terms used are given in the glossary at the end of the guide.

THE AIM OF THIS GUIDE

Litigation is a complex formal process for resolving disputes through the Courts which is governed by a large number of rules. These set out what must be done at each stage, the way in which it must be done and the time limit for doing it.

This guide is intended to help you by explaining key steps in the basic litigation process and identifying where your solicitor is likely to require information, instructions or assistance from you, either as a claimant or as a defendant. The style of the guide assumes that you will have a legal advisor acting for you and references to "we" and "us" is to Cripps Harries Hall LLP or the relevant person from this firm dealing with the matter.

This guide is not intended to constitute legal or other advice. It is intended as a guide to assist users who are unfamiliar with the dispute resolution process. Legal advice should always be sought in relation to any particular circumstances. It does not, for example, deal with claims which are specialist proceedings or appeals. In addition, it is focused on 'fast track' or 'multi-

track' actions and many of the rules discussed are not relevant to 'small claims' which operate under a simpler procedure. Cripps Harries Hall LLP have produced a guide to the 'small claims' procedure. Please ask your contact at Cripps Harries Hall LLP for a copy. Generally, the value of the claim determines the track that will apply.

Value of claim

Up to £5,000
£5,000 to £25,000
Over £25,000

Procedure

Small claims
Fast track
Multi-track

FUNDING

How much will it cost? Litigation is a time consuming and expensive business. There can be a risk that in disputes of low monetary value the costs of taking a matter to trial may exceed the amount in dispute. The courts have recognised this and there are provisions in place which are intended to ensure that the costs are proportionate to the issues or amounts involved (see the later section on costs for further information). However, anybody embarking on litigation still needs to be aware of the likely costs of pursuing or defending an action.

Our charges

Our charges will normally be based mainly on the time taken by the person dealing with the claim and any other person they need to involve. However, this may be modified if we enter into a conditional fee agreement with you (see below) or, where permitted, a contingency fee agreement.

Estimates

In anything other than very straightforward cases (for example routine debt collecting) it is very difficult to give an estimate of the total cost at the outset. Much depends on the way in which your opponent approaches the litigation and on other factors which are outside our control.

We will give you the best estimate we can at the outset of the case and at appropriate stages as the case proceeds. Unless we enter into a specific agreement with you,

these estimates are only a 'best guess' and not fixed price quotations. This includes the estimate that is required to be given in the allocation questionnaire.

Expenses

In addition to the cost of our professional fees, other expenses such as court and barristers' fees, traditionally referred to as 'disbursements', may have to be incurred on your behalf. If these are likely to be substantial then we will endeavour to give you advance notice and obtain an estimate if requested to do so. We may require larger items of expenditure, particularly barristers' fees, to be paid in advance.

Conditional fee arrangements

In appropriate cases we are prepared to enter into conditional fee arrangements to pay for litigation. These are sometimes known as 'no win, no fee' arrangements. Under these agreements we agree to charge lower fees, or in some cases only disbursements, if the case is lost, in return for higher fees than we would normally charge if the case is won. If you are interested in entering into such an agreement, please discuss this with the person who is dealing with your matter.

Contingency fee arrangements

In some instances where there are no proceedings we may agree to enter into a contingency fee arrangement. On this basis our charge will be a percentage of any recovery we achieve for you or a similar arrangement. Contingency fees are not permitted when court proceedings are involved.

Insurance

There is a wide range of insurance products now available to cover the risk of having to pay your own or your opponent's costs in the event that your claim is lost. These can be purchased as stand alone policies or in conjunction with a conditional fee agreement. Premiums are typically between 10 and 35% of the amount of cover that is required. We are not in a position to advise you as to which

policy best suits your circumstances but can, if requested, give you details of insurers and brokers you can contact to obtain such advice.

You should also check any household or business insurance policies as these may include legal expenses insurance which covers you for the case.

STEPS PRIOR TO COMMENCING LEGAL ACTION

The emphasis in modern litigation is on a 'cards on the table' approach and the court rules encourage and in some respects require certain procedures to be carried out before a legal claim is issued.

In personal injury claims, clinical disputes, construction and engineering disputes, defamation claims, professional negligence claims, disease and illness claims, housing disrepair cases, possession claims based on rent arrears and on mortgage arrears and actions for judicial review the parties must follow detailed pre-action protocols which set out a series of steps which should be gone through before proceedings are issued. Other protocols are in draft form and will be introduced from time to time. Failure to comply with a relevant protocol can result in the court imposing a costs penalty. If your case is one that is governed by a pre-action protocol then the person who is dealing with your claim will explain the process to you.

Pre-action behaviour in all cases, whether or not subject to a specific pre-action protocol, must meet the requirements of the Practice Direction on Pre-Action Conduct, which forms part of the Civil Procedure Rules (see below). The court will expect the parties to act reasonably in exchanging information and documents relevant to the claim and generally in trying to avoid the necessity of litigation. This means that it is appropriate to explore the possibility of settling a claim by alternative dispute resolution (ADR – see below) before issuing a formal legal claim. Failure to do so may be seen by the court as being unreasonable.

As a result, it is now usually necessary to gather together all of the essential

information with regard to a claim before it is issued. This information will normally include the key documents which will be subject to disclosure and the basic information that will go in witness statements or at least the identity of all witnesses who it is intended will give evidence. If expert evidence is required the identity of the proposed expert should, preferably, be determined prior to issuing.

Where a claimant or defendant is a company then at an early stage somebody in the company should be designated as the major contact with regard to the litigation and given, for example, authority to sign any statement of truth on behalf of the company.

It is also possible in certain cases to apply for pre-action disclosure against a prospective defendant. This means an application directed to the person(s) who is/are likely to defend your claim and asking them to disclose documents that relate to the claim. Such an application may be appropriate where a potential defendant refuses to reveal documents known to be in existence which may have a significant impact on the merits of a claim.

From this you can see that significant costs may be incurred prior to the issue of any claim although the aim of these requirements is to encourage more cases to settle at an early stage. Both claimant and defendant can make offers of settlement prior to commencing proceedings which may have significant cost implications (explained later). The approach adopted by both parties before proceedings may also be relevant to the question of who pays what costs at the conclusion of the case.

ALTERNATIVE DISPUTE RESOLUTION

Alternative dispute resolution (ADR) is a general term for alternatives to litigation such as arbitration or mediation.

As part of the court's aim of settling cases at the earliest possible moment, the parties are encouraged to consider such alternatives and either party can request a stay of proceedings while mediation or some other form of ADR is explored.

The person dealing with your claim can discuss with you the merits or otherwise of ADR in relation to your particular case but the following information may assist you in making a decision as to whether or not ADR should be attempted. There are a number of types of alternative dispute resolution. The main ones are as follows.

Negotiation

This is the simplest form of ADR and can be little more than an exchange of 'without prejudice' correspondence between the parties or their lawyers. A failure to engage in negotiation where it is appropriate may be seen by the court as being unreasonable and therefore incur a costs penalty.

Adjudication

This is a form of dispute resolution which is favoured in many building or construction disputes. A single adjudicator is appointed and he/she will reach a decision generally based upon the documents provided to him/her by each party. His/Her decision is binding on the parties unless it is overturned by the court.

Generally adjudication is only used in building and construction disputes and specialist advice should be sought if a dispute falls into this category.

Arbitration

This is a formal dispute resolution procedure in which a tribunal or sole arbitrator issues a ruling known as an award. The tribunal is expected to behave judicially and will determine the rights and liabilities of the parties on the issues put to it for decision.

Arbitration is mandatory under some contracts and the court will not allow the parties to litigate unless both waive their right to arbitration. The form of the arbitration will normally be agreed between the parties or one of the standard sets of arbitration rules will be adopted in the contract. Otherwise there are procedures set out in the Arbitration Act 1996.

The advantages of arbitration include a degree of flexibility in the procedure which can be adopted and also a degree of privacy as, unlike litigation proceedings, they are not open to the public. In addition a tribunal can be chosen that has specialist knowledge of the issues in dispute which may make arriving at a decision quicker and easier. One further advantage if a dispute has an international element is that there are various international agreements which require other countries to recognise arbitration awards when they might not recognise a judgment made in another country's courts.

The disadvantages include the fact that it can be more expensive than court proceedings and the tribunal is less likely to see itself as being bound by legal precedents — although there is a right to appeal to the court on a point of law — which may give rise to less certainty of outcome. In addition enforcement of the award still has to be done by application to the court.

Mediation

Mediation is negotiation conducted with the assistance of a neutral third party, the mediator. The parties meet with the mediator who guides the negotiation process, advising and listening to both sides, endeavouring to help the parties arrive at a negotiated settlement.

A mediator does not seek to impose a settlement on the parties and until encapsulated in a formal agreement a mediated settlement is not binding on the parties. Such a written agreement between the parties is enforceable by the courts like a normal contract.

Unlike litigation or arbitration, if either party is not happy with the way the mediation is progressing they are free to walk away at any time and try another form of dispute resolution procedure. Matters discussed during a mediation are considered to be without prejudice and cannot therefore be used in later court proceedings if the mediation fails.

Mediation can be relatively quick and inexpensive, the process is private and

confidential and since the goal is problem solving, it is often successful in preserving working relationships between parties. It is therefore particularly appropriate where the parties involved have an ongoing relationship which they do not wish to see irreparably damaged. Mediation does require the parties to enter into the process with a willingness to explore constructive solutions and the absence of a decision being imposed on the parties may mean that it is not suitable for all cases.

Expert determination

This is a voluntary process where a neutral third party, who is usually an expert in the field in which the dispute arises, gives a binding determination on the issues in dispute. It is probably most appropriate in relation to a dispute revolving around a specific technical issue between the parties.

The parties must agree in advance the choice of expert and his instructions and then agree to be bound by his finding. The advantage is that the procedure is quick and relatively inexpensive. The main disadvantage is that the decision is open to challenge on only very limited grounds.

CIVIL PROCEDURE RULES (CPR)

The Civil Procedure Rules (CPR) are the rules which govern all aspects of the litigation process. They contain the detailed framework within which cases proceed. As well as the rules themselves there are accompanying practice directions (PDs) which give guidance as to how the courts will operate the rules.

Underlying the CPR is the 'overriding objective', which is in effect a mission statement for the CPR. It is worth quoting the overriding objective in full as it is intended to govern the overall approach of both the parties and the court to litigation.

- 1 These Rules are a procedural code with the overriding objective of enabling the court to deal with cases justly.

- 2 Dealing with a case justly includes, so far as is practicable:
 - 2.1 ensuring that the parties are on an equal footing
 - 2.2 saving expense
 - 2.3 dealing with the case in ways which are proportionate to:
 - 2.3.1 the amount of money involved
 - 2.3.2 the importance of the case
 - 2.3.3 the complexity of the issues, and
 - 2.3.4 the financial position of each party
 - 2.4 ensuring that it is dealt with expeditiously and fairly, and
 - 2.5 allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases.

Given the importance of this overriding objective as far as the courts are concerned it is important that you are aware of its terms in order that decisions can be taken in the light of it.

ISSUING PROCEEDINGS

The first formal step in the proceedings is the preparation of the claim form which is then lodged with the court together with the requisite fee. The court stamps the form with the court seal then either serves it on the defendant or returns it to the claimant's solicitors to arrange for service.

Service is normally done by post but in certain circumstances may be carried out personally by process servers on your behalf. This means that we will arrange for a process server to hand deliver the claim form to the defendant. This will incur an additional

charge and the person dealing with your claim will discuss with you whether personal service is required.

At the same time as the claim form is served, or not more than 14 days later, the particulars of claim must also be filed with the court and served on the defendant. In simple cases the claim form and the particulars of claim will be contained in the same document.

The claim form contains a summary of the claim while the particulars of claim contain the detail. The particulars of claim must be verified by a statement of truth.

The court rules set out certain matters which must be dealt with in the particulars of claim but the basic purpose of the document — and that of the defence — is to set out the facts relied upon so that the court and the parties can identify and define the issues in dispute. Failure to do this may result in an application to the court for further information by the other party, the costs of which are likely to be awarded against the party in default.

STATEMENTS OF TRUTH

A statement of truth is a statement that a party believes that the facts or allegations set out in a document which they put forward are true. It is required in any statement of case, witness statements and expert reports. Any document containing a statement of truth may be used in evidence.

A document with a signed statement of truth which contains false information given deliberately, that is, without an honest belief in its truth, will constitute a contempt of court by the person who provided the information.

Solicitors may sign statements of truth on behalf of clients (except on witness statements) but this is on the understanding that it is done with the client's authority and with the client knowing that the consequences of any false statement will be personal to them. To avoid any misunderstandings in this respect we will normally ask you to sign the statement of truth on documents such as the statement of case.

Where the party is a company or other corporation the statement of truth is required by the rules to be signed by a person holding a senior position in the company or corporation for example, a director or manager. That person must state the office or position he or she holds.

DEFENDING PROCEEDINGS

On receipt of a claim form and particulars of claim the defendant has three basic options:

- admit the claim — in whole or in part
- acknowledge service and file a defence later
- file a defence

Failure to do one of these things is likely to result in the claimant entering judgment in default.

If the claim is admitted then the defendant should complete the appropriate form which will have been served together with the claim form. The defendant can ask for time to pay.

Where the claim is a simple one it may be possible to draft a defence very quickly in which case the defendant should send a copy of the defence to the court and serve it on the claimant within 14 days of service of the claim form.

In more complex cases, or where information needs to be gathered together, the defendant can simply acknowledge service of the defence by returning an acknowledgment of service form within 14 days of service of the claim form.

A full defence must then be filed and served within a further 14 days, that is to say within 28 days of service of the claim form. The parties can agree a further extension of time for service of the defence but this is limited to a further 28 days only. Beyond this period, or if the claimant does not agree an extension of time, then an application must be made to the court and good reasons for the delay will need to be provided.

The defence must be more than a simple denial of the claim. It should deal with all allegations made in the claim form as otherwise the court may decide that such allegations have been admitted. For each allegation the defence should state whether it is admitted, denied or neither admitted nor denied but required to be proved. The reasons for any denial of an allegation must be set out as must the defendant's version of events if it differs from that in the claim form. The defence must be verified by a statement of truth.

Failure to set out a full defence may result in the claimant applying for it to be struck out and judgment awarded or the court may itself decide to strike it out.

Even if an inadequate defence is not struck out the claimant may apply for further information to be supplied, in other words for the court to make an order requiring the defendant to expand upon his defence. The costs of this are likely to be awarded in favour of the claimant.

OFFERS OF SETTLEMENT

The majority of cases do not actually go to trial as the parties come to a settlement between themselves. Settlement can be achieved by straightforward negotiation or as the result of ADR.

An offer to settle a case by either the claimant or the defendant which is not accepted by the other party can have a major effect on the allocation of costs, whether it is made before or after proceedings are issued. An offer to settle can be made in respect of the whole claim or in respect of a specific issue.

A defendant who offers a sum of money must be able to pay that sum within 14 days of it being accepted. If it is not paid within that period the claimant is entitled to enter judgment against the defendant, so any defendant making such an offer must also be prepared to meet it straightaway if necessary.

In order to influence the ultimate award of costs offers must be made in a particular way. The person dealing with your case will

advise you on this. There are detailed rules about time limits for the acceptance of offers and offers cannot be withdrawn within the initial time period, usually 21 days, without the permission of the court. After that point an offer can still be accepted, with certain costs consequences, but it can also be withdrawn at any time until it is formally accepted.

The key cost implications of offers to settle are as follows:

- where a defendant accepts the claimant's offer or the claimant accepts the defendant's offer within the time limit the claimant will generally be entitled to their costs up to the date of the notice of acceptance; if an offer is accepted by either party outside the time limit the claimant will generally be entitled to their costs up to expiry of the time limit and the offeree will have to pay the offeror's costs incurred from that point until the offer was accepted
- where a claimant fails to do better at trial than the defendant's offer then the court will normally order the claimant to pay the defendant's costs incurred since the original time limit for acceptance of the offer expired
- if a claimant's award at trial equals or is better than the claimant's offer to settle, the court can order the defendant to pay interest on money awarded at a rate not exceeding 10% above base rate for all or some of the period plus indemnity costs and interest on these costs

As you can see, an offer to settle can give a large degree of protection to both claimants and defendants. It encourages both parties to have a realistic assessment of the amounts at stake.

Failing to accept an offer can have serious costs consequences. As a result the person dealing with your case will need to discuss any offer received with you in detail and

obtain your instructions within the timescale for acceptance.

ALLOCATION

The court will allocate your case to one of three 'tracks' depending upon the value or complexity of the case. Which track your case is allocated to may have important effects on the way in which the case must be handled. It will also affect the costs that may be recoverable if you are successful or are required to pay if you are unsuccessful.

Small claims track

This will generally be for cases with a value of less than £5,000 (note the lower limits for personal injury and housing disrepair claims). The key points to note are:

- the proceedings will be much less formal and the strict procedure applying in the other tracks is avoided
- it may be possible to deal with the case without a court hearing if both parties agree
- very limited costs are recoverable from the other party

Because of the limited ability to recover costs in the small claims track it may not be economic to instruct us to deal with the matter from start to finish. The most cost effective way to use our expertise may be to obtain our advice prior to issuing the claim (if you are a claimant) or on receipt of a claim (if you are the defendant) and then manage the case on your own with our assistance from time to time as required. Our small claims court guide (see reference above) may be of assistance.

Fast track

The purpose of the fast track is to provide a streamlined procedure to handle cases with a value between £5,000 and £25,000. The key points are:

- the court will give standard directions at the beginning of the case setting a timetable to take the case to trial
- the court will set a trial date which will probably be within 30 weeks
- no more than one day will be allowed for the trial
- expert evidence is likely to be limited and only written expert evidence will normally be allowed at the trial
- only fixed costs will be allowed for the trial itself. This means that regardless of what you pay us and/or a barrister you will only be entitled to recover a fixed sum for the costs of the trial if successful, or pay a fixed sum if unsuccessful. This fixed sum is set by the court and is unlikely to reflect the actual costs of the trial.

Multi-track

This is intended to provide a flexible regime for handling higher value or more complex cases. Higher value means cases with a value greater than £25,000. It may also be the appropriate track if the case requires more than one expert for each party or where it is clear that the trial will take more than one day.

This track does not have the same standard procedure as in the other tracks but is subject to active case management by the court.

The Allocation Questionnaire

When a defence has been filed the court will send out an allocation questionnaire to all parties.

Among other things the questionnaire seeks information with regard to the following points:

- the willingness of the parties to try ADR. Either party may request a one month stay of the proceedings to enable ADR to be explored or the court can choose to order such a stay

to encourage the parties to explore ADR

- what court track the parties believe the case should be on
- whether pre-action protocols apply and have been complied with
- the views of the parties on the complexity of the law, facts and evidence relating to the case. This includes the number of witnesses likely to be involved, what expert evidence may be required, the value of any counterclaim and the potential involvement of third parties
- the likely cost of the action to the parties (the parties are required to state the predicted costs of taking the matter to trial)

It can be seen that the key issues in a case need to be identified at an early stage and if an allocation hearing is held the person dealing with your case will almost certainly need to attend in person.

Allocation is part of the modern process of active case management by the court. The parties to an action, particularly in the fast track, have only a limited ability to dictate the pace and direction of the litigation. This is designed to limit the ability of any party to employ delaying tactics or procedural matters to gain an unfair advantage. In support of its case management role the court has wide powers to make orders of its own accord to direct the progress of any case.

INTERIM HEARINGS

These are hearings during the course of the proceedings which deal with administrative matters. Court rules now require many of these hearings to be conducted by conference telephone call to save costs.

As can be seen from the summary at the end of this guide there are a number of steps between issuing proceedings and trial and compliance with the timetable for these steps is monitored and controlled by the court. An interim hearing may be required, for example,

if one party is in default of court directions and the other party applies to the court for an order forcing them to comply.

These hearings will normally take place before a District Judge (in the County Court) or a Master (in the High Court). Generally the hearings will be decided on written and not oral evidence. That is to say, the parties or witnesses will not attend to give oral evidence.

The written evidence used will normally consist of relevant documents and a written summary of the facts relied on, supported by a statement of truth.

A party who is successful in an application will normally be awarded the costs of that application. Such costs will usually be assessed at the hearing itself and must be paid within 14 days. Failure to pay such costs could result in the stay of the action or enforcement procedures being taken by the other party.

These are some of the main types of interim hearings or applications:

Summary judgment

Summary judgment is available to both claimants and defendants. Where either party feels that the other does not have a valid claim or defence they can apply to the court for the claim or defence to be struck out and for judgment to be entered in their favour.

The applicant must prove to the court's satisfaction that the other party has 'no reasonable prospect of success' and that 'there is no other reason why the case or issue should be dealt with at trial'.

Summary judgment can be applied for in relation to the whole of the claim or defence or in relation to specific issues only. The court can make an order striking out the claim or defence and giving judgment to the claimant or the defendant or it can make a conditional order. A typical conditional order might be for the claimant or defendant to have to pay a sum of money into court before being allowed to continue the action.

Case management conferences

These are a key part of the court's active case management role.

At a case management conference the court will review the steps taken so far, give directions about the future conduct of the case and ensure that all matters which can be agreed are explored and recorded. The topics the court will consider are:

- whether the claimant and defendant have made their case clear
- whether any amendments are required to any statement of case
- what disclosure of documents is required
- what expert evidence is needed
- what factual evidence should be disclosed
- what further information is required from any party or their experts
- whether the trial should be split — for example, should there first be a trial as to whether the defendant is liable and only if the answer is yes, a trial of how much the defendant is liable for.

Specific disclosure

Generally the parties will be required to give standard disclosure (see below). However, there may be occasions when one party believes that the other party has further documents which ought to be disclosed.

In such a case that party can apply to the court for an order requiring the other party to confirm whether documents of a certain type or within a certain class exist or requiring the party to make a search for such documents. Whether the court will make such an order depends upon all the circumstances of the case but the court will pay particular regard to the principles contained in the overriding objective.

Requests for information

The court can order any party to clarify any matter which is in dispute in the proceedings or to give additional information in relation to any matter. Any party can apply to the court for such an order but usually after they have made a formal request to the other party giving sufficient time to obtain the information. Such an application is most likely where a statement of case fails to set out properly the claim or defence or a particular part of it. Failure to comply with an order to supply further information may result in the claim or defence, or that part of it which the request related to, being struck out by the court.

Pre-trial reviews

The purpose of a pre-trial review is to give the parties an opportunity to settle before the full costs of a trial are incurred and, where settlement is not possible, to prepare an agenda for the trial.

A pre-trial review may not be required in simpler cases. When such a review is held the trial advocate and somebody with authority to settle the case should normally attend.

DISCLOSURE

Disclosure means stating whether a document exists or has existed. This is done by the parties exchanging lists of relevant documents which are in their control. 'Control' means the documents are in a party's physical possession or a party has the right to such possession or the right to take copies.

'Document' is given a very wide definition and means anything in which information of any description is recorded. Thus for example it includes e-mails, tapes, disks or other mechanical methods of recording data as well as paper documents, and it is important that documents in these formats are preserved, e.g. by suspension of standard destruction policies, if litigation is a possibility.

If a document is disclosed then the other party has the right to inspect it except where

the document is no longer in your control or if there is some right or duty to withhold inspection.

The normal type of disclosure is standard disclosure, which means that the parties have to disclose only the documents on which they will rely, those which adversely affect their case and those which support or adversely affect another party's case. The court can, either of its own accord or following an application by the parties, limit or expand this duty.

The parties are required to make a reasonable search for documents of the type which are required to be disclosed. The extent of the search required will depend upon the number of documents involved, the nature and complexity of the proceedings, the ease and expense of retrieval and the significance of any document likely to be located.

Each party must sign a disclosure statement detailing the extent of any searches made to locate documents, certifying that the party understands the disclosure duty and confirming that the duty has been complied with. We will ask you to sign the disclosure statement.

The duty of disclosure continues until the proceedings are concluded and relevant documents coming into your control during the course of the proceedings must be disclosed.

The duty does not cover documents that are privileged, which means they should be disclosed but the other side is not entitled to see them. There are various types of documents which are privileged, for example correspondence between you and us regarding the case. The person handling your case will advise you on whether a document is privileged or not.

The disclosure obligation is an important one and in order to comply fully you should ensure that all documents (in whatever format) relevant to the issues in dispute are preserved and delivered to us. The decision as to whether any particular document should be disclosed should be made by us having regard to the legal issues in the case.

WITNESS STATEMENTS

In a trial a fact that needs to be proved by the evidence of a witness will mean that person giving oral evidence in public. Witness statements are written statements signed by a person which contain the evidence he or she will give orally. They must contain a statement that the evidence is true.

Normally, statements for all the witnesses who are going to be called to give evidence must be exchanged between the parties and filed with the court before trial. All witnesses should therefore be identified at an early stage and it may be useful to obtain an outline statement of their evidence at the earliest opportunity which can be expanded later if necessary.

If you wish to call someone to give evidence but they refuse to provide a witness statement then it is possible to serve on the other side a summary of the questions which will be asked of the witness and serve a notice on that witness requiring him or her to attend the trial.

As far as possible, witness statements should be in the words of the person making the statement. They should contain all the evidence which it is intended a witness is going to give. It is possible to apply for permission for a witness to expand upon their witness statement at trial but it is entirely up to the court's discretion whether to allow this.

Failure to comply with orders for exchange of witness statements can mean that the court will not allow the witnesses to give evidence at the trial. We will normally need to interview all witnesses and then draft the witness statements in their own words as far as possible. It may be that this will need to be done within a fairly short timescale. Therefore it is important to clarify at an early stage whether witnesses are willing and able to assist.

EXPERTS

The court rules require that expert evidence is restricted to that which is reasonably required to resolve the proceedings. Expert

evidence will only be allowed either by way of a written report or, if the court gives permission, orally.

In order to apply for permission it will be necessary at an early stage — preferably prior to commencing proceedings if you are the claimant — to know the identity of any expert proposed to be used and have a clear idea of the purpose of their evidence.

In some cases the court will not allow each side to appoint their own expert but will insist that a single expert is instructed on behalf of both parties. Each party will send their own instructions to the expert which will be disclosed to the other party. Each party then has the right to submit written questions to the expert.

The court rules make it clear that the duty of any expert is to help the court on matters within their expertise. This duty overrides any obligation to the person from whom they have received instructions or by whom they are paid. The substance of any instructions given to an expert must be set out in his report.

Normally we will not take on responsibility for payment of expert's fees and will require you to deal with this directly, although we will usually prepare the instructions setting out what the expert is required to do.

COUNSEL

While we will manage and direct your case as it goes to trial, on occasions it may be in your interests to instruct a barrister (counsel) to assist with the case.

The sort of things counsel may be instructed to do on your behalf are:

- the drafting of certain formal documents
- advising on legal matters where the barrister has particular expertise. This advice can be in writing or in conference. Advice given in conference is provided at a meeting between the barrister, solicitor and client

- undertaking the advocacy at the trial, that is to say asking questions of the witnesses, presenting legal submissions and oral and written evidence to the court

THE TRIAL

This is the final hearing of a claim (subject to any appeal).

If a matter is on the small claims or fast track then a date for the trial will be fixed early on in the proceedings and all parties will need to work towards this date. In the fast track a 'trial period' will normally be set, not exceeding three weeks, within which the trial will take place. The court should give the parties at least 21 days' notice of the actual trial date.

In the multi-track the date may not be fixed until much later in the proceedings when the issues in the case and likely length of the trial become clearer.

As far as possible the trial will be fixed by the court for the convenience of the parties, witnesses and lawyers but this may not always be possible. We cannot actually choose a date but before fixing a date or a trial period the court will normally ask the parties for a list of dates to avoid.

Once a trial date has been fixed the court may be reluctant to allow an adjournment, even if both parties request one, in the absence of exceptional reasons. If an adjournment is granted on the request of one party then any costs wasted as a result of the adjournment will normally be awarded against that party.

At the trial the judge will hear the evidence of first the claimant and then the defendant and will hear legal submissions from both parties. The detailed procedure in court will be explained to you by the person handling your case.

At the conclusion of the trial the judge will give his judgment although in some cases it will be reserved. That is to say, the judgment will be delivered to the parties in writing at a

later date or there may be a further short hearing when the judgment is read out.

If the judgment is for a sum of money then it is normally payable within 14 days.

If you are dissatisfied with the outcome of the trial then you should discuss with the person handling your case the possibility of making an appeal but it should be noted that the grounds on which an appeal can be made are limited. It is not sufficient that you disagree with the decision of the judge; it is necessary to show that there are specific grounds for reversing the judge's findings. These grounds must normally relate to points of law or procedure rather than decisions of fact by the judge or the exercise of judicial discretion.

COSTS

A successful party to a litigation action will normally be awarded their costs. In broad terms this means that the court will order the unsuccessful party to pay the costs of the successful party as well as their own costs. We cannot stress too much the importance of considering this aspect fully before you embark on litigation and of reviewing costs on a regular basis during the course of the case.

If the parties are unable to agree the amount of these costs then there is a separate procedure under which the court will assess them and make a further order in this regard.

Costs are normally awarded on the standard basis which means that the court will award those costs which were reasonably incurred and which were reasonable and proportionate in amount. Doubts as to reasonableness will be decided in favour of the paying party.

The court may sometimes order costs to be payable on an indemnity basis. It might do this, for example, if the party paying the costs has pursued a particular issue unreasonably or has forced the other party to incur unnecessary costs. On this basis of assessment there is no test of proportionality and the costs will be allowed unless they are unreasonable. This basis is obviously more favourable to the successful party.

Within these broad principles the court has great flexibility to make orders with regard to costs. In addition, the following points should be noted:

- the conduct of each party before and after the issue of proceedings will be considered. Points which the court will take note of include whether it was reasonable for a party to pursue or defend a particular issue, the way in which the claim has been handled and whether or not a claim has been exaggerated
- the conduct of the parties is relevant both to whether or not the court will award costs in one party's favour and also to the amount of the costs that will be awarded
- costs should be proportionate to the amounts or issues involved in the claim
- the court will not allow costs which have been unreasonably incurred or are unreasonable in amount
- our bill will still be payable in full regardless of any order for costs made against an opponent (unless agreed otherwise in writing with us)
- even if you are completely successful in your claim your opponent may not be ordered to pay or be capable of paying the full amount of your costs
- if your opponent is in receipt of state funding then you may not recover costs even if entirely successful
- in certain cases the costs which are recoverable are fixed by the court
- if your claim is in the fast track then there is a limit on the costs which you can recover for the trial itself regardless of what you actually spend
- costs recoverable in the small claims track are very limited and it is not

generally possible to recover the costs of legal representation

In addition, as mentioned above, the costs of an interim hearing are generally assessed at the hearing itself and are payable within 14 days of the order.

ENFORCEMENT

Obtaining a judgment against somebody does not automatically mean that they will be willing or able to pay or comply.

Set out below are some of the methods by which a judgment for a sum of money can be enforced. The person who is handling your case will advise you on which method is suitable for you.

Orders to obtain information from judgment debtors

These are not strictly a method of enforcement but a method of obtaining further information. The person against whom the judgment is made (or, if the judgment is against a company, an officer of the company) can be ordered to attend before the court to give evidence under oath about their/the company's financial circumstances. If the person against whom the order is made fails to attend court, refuses to take the oath or refuses to answer any question, a judge can order that, unless they attend court on another date and answer the questions, they will be arrested.

Warrant of execution/writ of fieri

An order can be obtained from the court which directs a bailiff (in the County Court) or a high court enforcement officer (in the High Court) to determine what goods of a debtor are available to be taken and if necessary seize them and sell them at auction. The proceeds of sale (less costs) will then be sent to you.

Charging orders

A charging order is similar to a mortgage. If the debtor has a house then the court can order that a charging order be registered against it and this will then rank behind any

earlier mortgages but in front of any later ones. If the debtor sells the house then the amount of the charging order will have to be paid out of the proceeds of the sale. In certain circumstances the court will allow the holder of a charging order to apply for an order requiring the debtor to sell the property in question.

The value of a charging order is very much dependent upon whether there is any 'equity' in the property after any pre-existing mortgages are taken into account.

Third party debt orders

If a third party (including a bank or building society) owes money to your debtor then a claim can be brought against that third party to recover your debt directly from them. Generally this requires a fairly detailed knowledge of the debtor's circumstances.

Attachment of earnings orders

If your debtor is employed and you are able to obtain details of their employment it may be possible to obtain an order requiring payment of the debt from their salary over a specified period.

Bankruptcy

On being declared a bankrupt an individual's assets and liabilities are examined and, subject to certain exceptions, any surplus assets are distributed by a Trustee in Bankruptcy to all creditors. The effectiveness of this means of enforcement is very much dependent upon the nature of the defendant's assets and liabilities and in particular the number and type of other creditors. This is something which needs to be considered in some depth before such proceedings are embarked upon.

CONTACTING A SOLICITOR

If you would like to discuss bringing a claim, or defending a claim made against you or your business, please click here peter.ashford@crippslaw.com.

GLOSSARY OF TERMS

| | |
|----------------------------|---|
| ADR | alternative dispute resolution — alternatives to litigation (for example mediation or arbitration) |
| Advocate | the lawyer attending a hearing or trial to put forward the party's case |
| Allocation | the process by which the court decides whether a case is a small claim, fast track or multi track case |
| Allocation questionnaire | a document that must be completed by both parties' legal advisers after a defence has been served; the information supplied forms the basis of the court's decision with regard to allocation |
| Case management | the pro-active management of the case by the court. Directions will be made to suit the circumstances of the particular case |
| Case management conference | an interim hearing at which the court will decide how the case should proceed and will give directions. |
| Claimant | the person bringing a legal claim |
| Claim form | the formal document which starts a claim and sets out the basic nature of the claim |
| Costs | legal and other costs incurred by a party in pursuing or defending a claim generally or a particular issue in relation to that claim. These are normally ordered to be paid by the "loser" of any claim to the "winner". See the section entitled Costs for further details |
| Counsel | a barrister |
| County Court | the appropriate court for claims worth less than £25,000 (or personal injury claims less than £50,000) |
| CPR | Civil Procedure Rules - the court rules that govern litigation |
| Defence | the document containing a detailed description of the response to and rebuttal of the claim |
| Defendant | the person defending a legal claim |
| Directions | orders made by the court setting out how the case should proceed and setting a timetable for administrative matters |
| Disbursements | expenses incurred by a party's lawyer on their client's behalf |
| Disclosure | the process by which each party reveals to the other the documents they have that are relevant to the case |
| District Judge | the Judge who will deal with most interim applications in the County Court |
| Enforcement proceedings | the methods of enforcing a judgment or order |
| Fast track | the track to which most claims valued at between £5,000 and £25,000 will be allocated |
| File/Filed | deliver[ed] to the court |
| High Court | the court which is appropriate for claims worth more than £25,000 (£50,000 if they are personal injury claims) or claims of a particular complexity or general importance |
| Indemnity costs | a basis for assessing costs by the court which is more favourable to the receiving party than the standard basis |
| Interim hearing | a hearing during the course of an action other than the trial itself which normally deals with administrative matters |
| Issuing/Issued | the process of [having] formally starting proceedings by delivering a claim form to the court, paying the requisite fee and obtaining the court stamp |
| Judgment | the court's decision following a hearing or trial |
| Judgment in default | Judgment given by the court because the claim was not acknowledged or because no defence was put in |
| List of documents | the formal document complying with disclosure requirements |
| Litigation | the process of pursuing a claim by formal legal proceedings |
| Master | equivalent to a District Judge but in the High Court in London |

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| Multi-track | the track to which complex claims and those with a value greater than £25,000 will normally be allocated |
| Order | a decision of the court requiring a party to take some action. Failure to comply with a court order can result in serious penalties |
| Overriding objective | the basic statement of principle underlying the CPR |
| Particulars of claim | the document containing a detailed description of the claim |
| Pre-action protocols/Practice Direction on Pre-Action Conduct | steps which the court requires the parties to take before proceedings are issued. Failure to comply with pre-action protocols or the practice direction can result in costs penalties being imposed by the court |
| Privileged documents | documents such as letters between a client and his lawyer which should not be shown to the court or disclosed to the other side |
| Proceedings | another way of generally describing a legal claim or action which has been issued and is being dealt with by the court |
| Service | formal delivery of a document to a party |
| Settling a claim | agreeing to a binding compromise of the dispute to avoid the need for proceedings or to bring proceedings to an end before trial |
| Small claims | claims for less than £5,000 |
| Specialist proceedings | commercial actions dealt with by the Companies Court, Commercial Court, Technology and Construction Court or other special court. Separate rules apply in these cases which will need to be discussed with the person who is handling your case |
| Standard basis | the normal basis on which the court will assess what costs are payable by one party to the other |
| Statement of case | the formal document in which each party sets out their case |
| Statement of truth | a statement made by the party or his lawyer in a statement of case, witness statement and other documents confirming the truth of the contents of such documents. We will normally ask you to sign these rather than signing them on your behalf |
| Stay | a temporary halt on proceedings |
| Struck out | deleted from a document or, when referring to a claim or defence itself, declared to have no validity or effect |
| Summary judgment | an application to the court for judgment to be given to either party without a full trial on the grounds that the other party has no real prospect of success and that there is no other reason why the case or issue should be dealt with at trial |
| Trial | the final hearing of a matter |
| Without prejudice | applied to statements or discussions between the parties before or after commencement of proceedings which are in the course of genuine negotiations to reach settlement of a disputed matter. Such communications will be privileged and should not be shown to the court. Where such communications are “without prejudice save as to costs” then they may be shown to the court at the end of the matter when the question of costs is addressed |
| Witness statement | a written version of the oral evidence which a person is intending to give at trial |

A SUMMARY OF THE LITIGATION PROCESS

Fast track and multi-track

Pre-action protocols/practice direction

procedure which should be followed before issuing proceedings

Negotiations/offers of settlement

both claimant and defendant may make offers which have costs effects

Alternative dispute resolution

alternatives to litigation

Issue proceedings

the claimant formally sets out the claim

Defence/counterclaim

the defendant responds to the claim / makes their own claim

Reply/defence to counterclaim

the claimant responds to the defence and/or counterclaim

Allocation to court track

the court determines which rules will apply to the claim

Case management conference

the court decides a timetable for the progress of the claim

Disclosure

each party discloses to the other documents which relate to the claim

Exchange witness statements

the parties exchange written statements of their witnesses' evidence

Exchange expert reports

the parties exchange reports of any experts they wish to rely on

Pre-trial review

the court checks if the matter is ready for trial

Trial

the final hearing of the matter

Assessment of costs

the court will assess what costs each party must pay the other