LAW ANGELS

# DISPUTE RESOLUTION

## SQE 1 PREP

LAW ANGELS

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# PREFACE

Dispute resolution is the engine of the legal system, governing the process by which rights are enforced, liabilities are determined, and conflicts are settled. It is a practical discipline where procedural rules, strategic thinking, and client advocacy intersect to navigate the path from a client's initial instruction to a final, enforceable judgment. This textbook is designed to be your comprehensive guide through this dynamic area of law, providing a clear and practical pathway from pre-action conduct and issuing proceedings to trial, costs, and enforcement.

Our approach is built on a simple belief: to master dispute resolution, you must understand not just the *Civil Procedure Rules*, but how they operate in practice to manage cases efficiently, ensure fairness, and achieve just outcomes. We have therefore structured this text to do more than present procedural theory. It deconstructs the litigation process, breaking down its core components, from initial client interviews and choosing the right track to making interim applications and presenting evidence at trial, and illustrating how they operate in real-world legal scenarios. You will find a consistent focus on the Overriding Objective, the strategic use of remedies like injunctions, and the critical importance of costs management.

The SQE1 assessment requires a deep and application-based knowledge of civil procedure. This book is tailored to that challenge. We integrate the pivotal rules, practice directions, and case authorities not as isolated facts, but as the essential tools for constructing and managing a case effectively. Clear examples, procedural checklists, and scenario-based problems are woven throughout to transform your understanding from passive reception to active application.

Our goal is to equip you with a formidable and practical command of dispute resolution. Whether you are advising a client on a pre-action protocol, drafting particulars of claim, applying for summary judgment, or navigating the complexities of disclosure and privilege, the following pages will provide the clarity, procedural rigour, and strategic insight you need to succeed.

Welcome to the study of dispute resolution. The process is foundational, and its mastery is indispensable for any aspiring solicitor.

*Law Angels*

# ACKNOWLEDGEMENTS

The development of this textbook was a significant endeavor, and we extend our sincere gratitude to the collective efforts that made this publication possible.

At Law Angels, we are fortunate to be supported by a dedicated team whose commitment to legal education and excellence is the cornerstone of our work. The collaborative spirit, legal expertise, and tireless effort of our entire organization were instrumental in shaping this text from concept to completion.

We also extend our appreciation to the broader legal community. The insightful feedback from our academic and practitioner reviewers greatly enhanced the accuracy and clarity of the material. Their contributions, offered in a spirit of scholarly collaboration, have been invaluable in ensuring this resource meets the rigorous demands of the SQE curriculum.

We are also thankful for the unwavering support from our personal networks, whose understanding provided the foundation that allowed this project to thrive.

It is our privilege at Law Angels to contribute to the education of future solicitors, and we hope this text serves as a reliable guide for the next generation of legal professionals.

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# GLOSSARY OF KEY TERMS

**A**

**Acknowledgment of Service:** A formal notice filed by the defendant to confirm receipt of the claim and intention to respond, extending the deadline for filing a Defence.

**Amendment of Pleadings:** The process of changing or correcting a statement of case (e.g., claim or defence) under CPR Part 17, either with consent or court permission, to ensure all relevant facts are properly before the court.

**Application Notice (Form N244):** The standard form used to request a court order or interim relief before trial.

**Attachment of Earnings Order:** A court order directing an employer to deduct sums from the debtor's wages and pay them to the court for onward transfer to the creditor.

**C**

**Charging Order:** Secures a judgment debt against the debtor's property, effectively creating a legal charge that ensures payment when the property is sold.

**Civil Procedure Rules (CPR):** The procedural framework governing civil litigation in England and Wales, designed to ensure fairness, efficiency, and proportionality in dispute resolution.

**Claim Form (Form N1):** The document that initiates court proceedings, setting out the claimant's cause of action and the remedy sought.

**Counterclaim:** A claim brought by a defendant against the claimant, usually in the same proceedings, alleging the claimant's own breach or liability.

**D**

**Default Judgment:** A judgment automatically entered against a defendant who fails to respond to a claim within the prescribed time.

**Disclosure:** The process by which parties exchange relevant documents to ensure transparency and fairness. It includes standard, specific, and electronic disclosure.

**F**

**Freezing Injunction (Mareva Order):** A court order preventing a party from dissipating or disposing of assets to frustrate a potential judgment.

**H**

**Hearsay Evidence:** A statement made outside court that is presented to prove the truth of its contents. Admissible in civil proceedings under the Civil Evidence Act 1995 with notice and weight safeguards.

**I**

**Interim Application:** A procedural request made to the court before trial, for example, to obtain an injunction or summary judgment.

**J**

**Judgment Creditor / Judgment Debtor:** The winning party entitled to payment under a court order (creditor) and the losing party obliged to pay (debtor).

**O**

**Overriding Objective:** The guiding principle in CPR Part 1 requiring courts and parties to deal with cases justly, proportionately, and efficiently.

**P**

**Part 20 Claim (Contribution or Third Party Claim):** A claim by a defendant against another party, seeking contribution or indemnity if they are found liable to the claimant.

**Prepared Statement:** A written statement setting out a suspect's defence before a police interview, used alongside "no comment" answers to avoid adverse inferences.

**R**

**Request for Further Information:** A formal request under CPR Part 18 used to clarify or add detail to another party's statement of case to narrow the issues in dispute.

**S**

**Sanction:** A penalty imposed by the court for non-compliance with rules, directions, or orders, including striking out, costs orders, or exclusion of evidence.

**Search Order (Anton Piller Order):** A court order allowing entry onto premises to search for and preserve evidence at real risk of destruction.

**Statement of Truth:** A signed declaration confirming that the maker believes the contents of a document (e.g., witness statement or pleading) are true, with contempt of court consequences for falsehood.

**Summary Judgment:** A judgment obtained under *CPR Part 24* where a party has no real prospect of success and there is no compelling reason for a trial.

**T**

**Third Party Debt Order:** An order directing a third party, such as a bank, to pay funds it holds for the debtor directly to the creditor.

**Tomlin Order:** A type of consent order that stays proceedings on agreed settlement terms, recorded privately in a confidential schedule, enforceable without new proceedings.

**W**

**Writ or Warrant of Control:** A court authorisation empowering enforcement agents (bailiffs) to seize and sell the debtor's goods to satisfy a judgment debt.

# 1

# FOUNDATIONS OF DISPUTE RESOLUTION

Disputes are a fact of life, both in personal matters and in business. For a solicitor, a dispute is not merely an argument; it is a situation where a client believes their legal rights have been infringed and they seek a remedy. The role of a solicitor is to provide strategic advice on the best way to resolve that dispute, protecting the client's interests while managing cost, risk, and commercial reality.

The traditional image of dispute resolution is a courtroom battle. However, litigation is only one of several paths available. In modern legal practice, solicitors are expected to be skilled in a range of dispute resolution mechanisms. These are often grouped into two categories: adversarial processes, where a third party imposes a decision, and consensual processes, where the parties seek to reach an agreement.

This chapter introduces the primary methods of dispute resolution: negotiation, mediation, arbitration, and litigation. Understanding the characteristics, advantages, and disadvantages of each is a fundamental skill for any aspiring solicitor. The right choice at the outset can save a client significant time, money, and stress.

## 1.1 Litigation: The Path Through the Public Courts

Litigation is the process of resolving a dispute by taking it to a public court system. A neutral judge, appointed by the state, applies the law to the facts of the case and makes a binding

decision. This process is governed by a detailed set of rules designed to ensure fairness and efficiency, primarily the *Civil Procedure Rules (CPR) 1998*.

### 1.1.1 Core Characteristics of Litigation

#### 1. A Public Process

Court proceedings are generally open to the public. Members of the press or any individual can usually walk into a courtroom and observe a trial. Furthermore, judgments are public documents and are often published online. This transparency ensures justice is seen to be done, but it also means commercial secrets, personal disputes, and negative findings become part of the public record.

**Example**: If a large company sues a former director for fraud, the details of the alleged misconduct, internal company emails, and the final judgment will be accessible to the public, including competitors, shareholders, and journalists.

#### 2. A Formal and Structured Adversarial System

The process is "adversarial." This means the judge acts as an impartial referee. The parties, through their legal representatives, are the adversaries who investigate the facts, develop their legal arguments, and present their competing cases to the judge. The judge's role is to listen to both sides and make a decision based on the evidence and law presented, rather than actively investigating the case themselves. This structure is enforced by the strict rules of the *CPR*.

**Illustration**: Imagine a football match. The judge is the referee. The two solicitors and their barristers are the team captains and players. The referee does not score goals. They ensure the game is played according to the rules and declare a winner at the end.

#### 3. Binding and Enforceable Decisions

The outcome of litigation is a "judgment." This is a formal order of the court that is legally binding on the parties. If the losing party (the judgment debtor) does not voluntarily comply with the judgment (for example, by refusing to pay a sum of money ordered), the winning party (the judgment creditor) can ask the court to use its enforcement powers.

These powers are coercive and include seizing assets, freezing bank accounts, or, in extreme cases, committing the individual to prison for contempt of court.

#### 4. A Right of Appeal

The litigation system is built on a hierarchy of courts. A party who believes the judge made a legal error can, with permission, appeal the decision to a higher court. For example, a decision from the County Court can be appealed to the High Court, and potentially to the Court of Appeal and the Supreme Court. This provides a crucial mechanism for correcting errors and developing a consistent body of law.

### 1.1.2 The Advantages of Litigation

#### 1. The Power of Disclosure

This is one of the most powerful tools in litigation. Under the CPR, each party has a duty to disclose to the other party all documents which are relevant to the case, even if those documents are damaging to their own position. A "document" includes emails, text messages, internal memoranda, and electronic files.

**Example**: In a dispute about a failed software implementation, Company A claims the software was defective. Company B, the software provider, insists it was Company A's poor data that caused the failure. Through disclosure, Company A can compel Company B to hand over all its internal testing reports and emails between its engineers discussing potential bugs. This might reveal evidence Company B was hiding.

#### 2. The Creation of Precedent

Higher court judgments create "binding precedents." This means the legal principles established in those judgments must be followed by lower courts in future, similar cases. This principle, known as *stare decisis*, provides predictability and consistency in the law. Businesses can make decisions knowing how the law is likely to be interpreted.

The Supreme Court is the highest court, and its decisions bind all lower courts. The Court of Appeal binds itself and the courts below it.

### 3. Finality and Authoritative Resolution

A court judgment is a definitive statement on the parties' legal rights and obligations. It finally determines the issue between them (subject to appeal). The state's authority stands behind the judgment, providing a clear and decisive end to the dispute.

### 4. Suitable for All Types of Dispute

The court system is a public service designed to be available for every kind of civil claim, from a simple debt recovery to the most complex multinational commercial fraud. It has the procedures and powers to handle any case, no matter how large, small, or complicated.

## 1.1.3 The Disadvantages of Litigation

### 1. High and Unpredictable Costs

Litigation is expensive. Costs include court fees, solicitors' fees, barristers' fees, expert witness fees, and the cost of copying large volumes of documents. The general rule is that the unsuccessful party will be ordered to pay a large proportion of the successful party's legal costs. This "costs shifting" rule means that losing a case has financial consequences far beyond the value of the claim itself, making litigation a high-risk venture.

**Example**: A company wins a claim for £100,000. Its own legal costs were £80,000. The court may order the losing party to pay the company's £80,000 costs, in addition to the £100,000 claim. The loser's total bill is £180,000 plus their own legal costs.

### 2. Time Consuming

The litigation process can be very slow. The CPR sets out strict timetables, but the complexity of cases, the need for disclosure, and the backlog of court listings mean that it can easily take 12 to 24 months, or even longer, for a case to reach trial.

### 3. Loss of Control

The parties hand over the power to decide their fate to a judge. The judge's decision is based on legal principles, not commercial sense or the parties' personal feelings. The outcome can be a blunt instrument; for example, a judge can only find a contract was

breached and award money, they cannot craft a creative business solution to mend the relationship.

4. **Public Scrutiny and Damage to Reputation**

As a public process, litigation can expose a company's or individual's dirty laundry. The details of a business dispute, allegations of negligence, or evidence of internal incompetence can be reported in the news, damaging reputation, consumer confidence, and share price.

### 1.1.4 Practical Illustration: The Lifecycle of a Simple Litigation

**Scenario**

BuildRite Ltd, a construction company, completes an extension for Mr. and Mrs. Homeowner for £75,000. The homeowners refuse to pay the final £15,000, claiming the roof leaks.

**Pre-action stage**: BuildRite's solicitor sends a formal letter of claim. The homeowners' solicitor responds, denying liability and enclosing a surveyor's report. The parties exchange information but cannot agree.

**Issuing the claim**: BuildRite's solicitor issues a Claim Form in the County Court, paying a court fee. The form states the parties and the amount claimed.

**Service and response**: The Claim Form is sent to the homeowners. They have 14 days to file a Defence, which they do, setting out their arguments about the defective roof.

**Case management**: The court allocates the case to the "Fast Track" (for less complex claims). The judge gives "directions," including a timetable for disclosure of documents (e.g., BuildRite's work records, the homeowners' surveyor report) and exchange of witness statements.

**Trial**: At a one-day trial, the judge hears evidence from BuildRite's project manager and the homeowners' surveyor. The judge also reads the witness statements.

**Judgment**: The judge finds that while the roof does leak, it is a minor issue that would cost £2,000 to repair. The judge orders the homeowners to pay BuildRite £13,000 (£15,000 minus £2,000), plus interest and a contribution to BuildRite's legal costs.

## 1.2 Arbitration: A Private Alternative

Arbitration is a private form of dispute resolution where the parties agree to submit their dispute to one or more impartial individuals (the arbitrators) for a final and binding decision, known as an "award." It is not a court process, but a consensual, contractual one.

### 1.2.1 The Basis of Arbitration: Consent

The foundation of arbitration is the agreement of the parties. This agreement is almost always made in one of two ways:

**Arbitration clause**: A clause within the main commercial contract, stating that any future disputes arising from the contract will be referred to arbitration.

**Submission agreement**: A separate agreement made after a dispute has arisen, agreeing to refer that specific dispute to arbitration.

Without such an agreement, a party cannot be forced into arbitration.

### 1.2.2 Core Characteristics of Arbitration

1. **Privacy and Confidentiality**

   This is often the primary reason for choosing arbitration. The hearings are held in private venues, such as a solicitor's office or a dedicated arbitration centre. The documents, evidence, and the final award are confidential to the parties. This protects trade secrets, business methods, and commercial reputation.

   **Example**: A pharmaceutical company has a dispute with a manufacturing partner about the quality of a new drug ingredient. Arbitration allows them to resolve the highly sensitive technical and commercial issues without revealing their secret formula or production problems to the public or competitors.

**2. Party Autonomy and Flexibility**

The parties have a significant say in how the arbitration is run. They can often choose:

- The number of arbitrators (one or three).
- Who the arbitrators will be, selecting for their specific expertise.
- The legal seat (location) of the arbitration, which determines the applicable arbitration law (e.g., England and Wales).
- The procedural rules (e.g., those of the London Court of International Arbitration - LCIA).
- The timetable and the extent of disclosure.

This flexibility allows the process to be tailored to the specific needs of the dispute.

**3. A Final and Binding Award**

The arbitrator's award is final. The opportunities to appeal an arbitral award to a court are extremely limited under the *Arbitration Act 1996*. An appeal is only possible on a point of English law, and only with the court's permission. This ensures a swift conclusion to the dispute.

**4. The Role of the Arbitrator**

An arbitrator is not a judge. They are typically a highly experienced expert in the field, such as a retired engineer, a QC specializing in shipping law, or a senior accountant. They are appointed and paid for by the parties. Their role is to act impartially, listen to the evidence, and render a decision based on the contract and the law.

### 1.2.3 The Advantages of Arbitration

**1. Expertise of the Decision-Maker**

Parties can choose an arbitrator who understands the technicalities of their industry. A specialist in construction law, for instance, will understand the nuances of a JCT building contract far better than a generalist judge.

**2. International Enforcement**

This is a monumental advantage for cross-border contracts. The *1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards* has been ratified by over 170 countries. It provides a streamlined mechanism for enforcing an arbitral award made in one country (e.g., England) in the courts of any other signatory country (e.g., the USA, China, Germany). Enforcing a court judgment from one country in another is often a much more difficult and uncertain process.

**3. Finality**

The limited grounds for appeal mean that the dispute is resolved more quickly, and the parties can move on without the threat of protracted appeals.

**4. Control and Flexibility**

As mentioned, the parties can design a process that suits their dispute, potentially making it more efficient and cost-effective than the one-size-fits-all court procedure.

### 1.2.4 The Disadvantages of Arbitration

**1. Cost**

While sometimes cheaper, arbitration can be more expensive than court. The parties must pay the arbitrators' fees (which can be very high for top specialists), the fees of any arbitral institution (e.g., the LCIA), and the hire of private hearing rooms. These are costs that do not exist in the public court system.

**2. The "No Appeal" Double-Edged Sword**

The finality that is an advantage can also be a severe disadvantage. If the arbitrator makes a clear error of law or fact, it is very difficult and expensive to challenge it. In court, a clear error can be corrected on appeal.

**3. Limited Disclosure**

The disclosure process in arbitration is usually not as extensive as in court. The arbitrator will only order disclosure of documents that are relevant and material to the outcome of

the case. This can prevent a "fishing expedition" but may also mean a party can hide a "smoking gun" document more easily.

**4. Lack of Coercive Powers**

While arbitrators can make awards, they generally cannot issue orders that require the state's coercive power. For example, an arbitrator cannot grant an interim injunction (e.g., to freeze assets) or order a party to be imprisoned for contempt. To obtain such orders, a party must still apply to a court for assistance, even while the arbitration is ongoing.

### 1.2.5 Practical Illustration: The Lifecycle of an International Arbitration

**Scenario**

TechGlobal Inc (a US company) licenses its software to DataSolve Ltd (a German company). Their contract has an arbitration clause: "Any dispute shall be referred to arbitration in London under the LCIA Rules, by a sole arbitrator."

**Dispute arises**: DataSolve alleges the software is incompatible with its systems and stops paying licence fees. TechGlobal claims the fees are due.

**Commencement**: TechGlobal's lawyers file a "Request for Arbitration" with the LCIA, outlining the claim and proposing a candidate for the sole arbitrator.

**Constitution of the tribunal**: DataSolve responds, and the LCIA appoints the sole arbitrator, a professor of IT law with experience in software licensing.

**Preliminary meeting**: The arbitrator holds a meeting with the parties' lawyers to agree on a procedural timetable, the scope of disclosure, and the date for a final hearing.

**Written submissions and hearing**: The parties exchange detailed written arguments and documents. A hearing is held over three days in a private London conference room. There is no public access.

**The award**: The arbitrator publishes a confidential award, ordering DataSolve to pay the outstanding fees minus a small deduction for a minor defect. The award is final and binding.

**Enforcement**: DataSolve does not pay. Because Germany and the UK are both signatories to the New York Convention, TechGlobal's lawyers can apply to a court in Germany to have the English arbitral award enforced against DataSolve's assets in Germany as if it were a local German court judgment.

### 1.2.6 Comparison at a Glance: Litigation vs. Arbitration

| Feature | Litigation | Arbitration |
|---|---|---|
| **Decision-Maker** | Judge (state-appointed) | Arbitrator(s) (party-appointed expert) |
| **Privacy** | Public hearings and judgments | Private and confidential |
| **Procedure** | Governed by the CPR (inflexible) | Governed by party agreement (flexible) |
| **Cost** | Can be high (court fees, lawyers) | Can be very high (arbitrator/institution fees) |
| **Appeals** | Full right of appeal on law/fact | Very limited rights of appeal |
| **Enforcement (UK)** | Easy within the UK | Easy within the UK under the Arbitration Act |
| **Enforcement (International)** | Difficult and unpredictable | Easy in over 170 countries (NY Convention) |

| | | |
|---|---|---|
| **Best For** | Needing a precedent, public interest, injunctions, full disclosure. | International disputes, technical issues, confidentiality, finality. |

Choosing between litigation and arbitration is a critical strategic decision. A solicitor must weigh factors like the client's need for privacy, the international dimension of the dispute, the importance of a specialist decision-maker, the budget for costs, and the need for a quick, final resolution. There is no single right answer; the best path depends entirely on the client's specific circumstances and commercial objectives. A good solicitor will guide their client through this decision-making process with clear, balanced advice.

## 1.3 Mediation and Conciliation: Characteristics, Advantages, and Disadvantages

Mediation and Conciliation are forms of facilitated negotiation. A neutral third party, the mediator or conciliator, assists the parties in reaching a mutually acceptable settlement. They do not impose a decision.

### Characteristics

1. **Facilitative and non-binding**: The mediator’s role is to help the parties communicate, explore options, and negotiate. Any settlement is entirely voluntary.
2. **Without prejudice**: Everything said in mediation is ‘without prejudice’, meaning it cannot be used as evidence in court if the mediation fails. This encourages open dialogue.
3. **Focus on interests, not just rights**: Mediation looks beyond strict legal positions to the underlying commercial or personal interests of the parties, often leading to creative solutions a court could not order.

**Advantages**

1. **Control**: The parties retain complete control over the outcome. They must both agree to any settlement.
2. **Preserves relationships**: The collaborative nature of mediation can help preserve business or personal relationships, which is often destroyed by adversarial litigation.
3. **Cost-effective and quick**: Mediation is significantly cheaper and faster than going to court.
4. **Flexible outcomes**: The solution is not limited to a payment of money. It could involve an apology, a change in business practice, or an ongoing supply agreement.
5. **High success rate**: A very high percentage of mediations result in a settlement on the day or shortly after.

**Disadvantages**

1. **No guaranteed outcome**: If the parties cannot agree, the mediation fails and the money spent on it is effectively wasted, though it is often a fraction of litigation costs.
2. **Not legally binding until agreement**: The process itself does not produce a binding result. Only a written settlement agreement signed by the parties is enforceable.
3. **Power imbalance**: A skilled mediator can manage this, but there is a risk that a stronger party could bully a weaker one into an unfair settlement.
4. **Not suitable for all disputes**: It is ineffective if one party is entirely unreasonable, needs a legal precedent, or requires the coercive power of the court (e.g., for an injunction).

**Authority**: The courts actively encourage mediation. The *Civil Procedure Rules* state that the court may penalise a party in costs if it unreasonably refuses to engage in Alternative Dispute Resolution (ADR). This was established in the key case of ***Halsey v Milton Keynes General NHS Trust*** [2004] 4 All ER 920.

**Example**: A landlord and tenant are in dispute over the condition of a property at the end of a lease. The landlord claims £20,000 for repairs; the tenant argues the damage was pre-existing. At mediation, they discover the tenant is starting a new business and needs positive references. They agree to a settlement where the tenant pays £10,000 and the landlord provides a glowing reference. This commercial solution satisfies both parties' underlying interests.

## 1.4 Other Methods: Negotiation, Adjudication, and Early Neutral Evaluation

### Negotiation

This is the simplest and most common form of dispute resolution. It involves the parties, usually through their solicitors, communicating directly with each other to try and settle the dispute. It can be done by phone, email, or in meetings. It is quick, cheap, private, and allows the parties to control the outcome. Almost every dispute will involve an attempt at negotiation before formal proceedings are started.

### Adjudication

This is a statutory, quick and informal process used primarily in the construction industry. Under the *Housing Grants, Construction and Regeneration Act 1996*, a party to a construction contract can refer a dispute to an adjudicator who must reach a decision in 28 days. The decision is binding and must be complied with immediately, but it is temporarily binding, meaning it can be re-opened in arbitration or litigation later. It is designed to keep cash flowing in construction projects.

### Early Neutral Evaluation (ENE)

In this process, a neutral evaluator (often a senior barrister or retired judge) gives a non-binding opinion on the likely outcome of the dispute if it were to go to court. This provides the parties with a realistic assessment of the strengths and weaknesses of their case, which often encourages them to settle on terms reflecting the evaluation. Some courts, like the Business and Property Courts, offer a formal ENE service.

## 1.5 Choosing the Appropriate Dispute Resolution Mechanism

For an aspiring solicitor, one of the most valuable skills you can develop is the ability to provide strategic, client-centred advice on dispute resolution. The choice of process is not an academic exercise; it is a critical business decision that can profoundly impact a client's finances, reputation, and future. There is no single "best" method. The optimal path is the one that most effectively aligns with the client's specific commercial objectives, personal circumstances, and appetite for risk. This requires a careful and methodical analysis of the dispute against a checklist of key factors.

### The Relationship Between the Parties

The first question to ask is: "Do the parties need or want to have a relationship after this dispute is resolved?"

- **For ongoing relationships**: In contexts like joint ventures, long-term supply agreements, partnerships, or family businesses, the goal is often to resolve the specific issue without destroying the underlying relationship. Adversarial processes like litigation can burn bridges irrevocably. Here, mediation or direct negotiation is strongly preferable. These processes focus on problem-solving and finding a mutually acceptable compromise, allowing the parties to "save face" and move forward.

  **Example**: Two companies in a 10-year supply chain contract have a dispute over price adjustments. Litigating would poison the well for the remaining eight years. Mediation allows them to vent their frustrations in a controlled setting and agree on a new pricing formula that works for both, preserving their profitable long-term business.

- **For concluded relationships**: If the relationship is already at an end, or the dispute is with a one-off customer, the need to preserve the relationship is minimal. In such cases, the stronger, more decisive remedies of litigation or arbitration may be appropriate.

### The Need for Privacy and Confidentiality

The second critical question is: "How damaging would it be if the details of this dispute became public knowledge?"

- **High sensitivity**: If the dispute involves trade secrets, proprietary technology, sensitive financial information, embarrassing personal details, or allegations that could damage a company's brand, privacy is paramount. Arbitration is the gold standard for confidentiality, with private proceedings and a private award. Mediation is also entirely confidential under the "without prejudice" principle.

  **Example**: A pharmaceutical company discovers a senior executive may have stolen research data. The evidence and the details of the research are highly sensitive. Arbitration allows them to resolve the claim and recover damages without every detail becoming a news story.

- **Low sensitivity or public interest**: If a client needs to publicly clear their name, establish a point of principle, or the dispute is of public importance, the transparency of litigation is an advantage. A public judgment can serve as a powerful vindication.

### Cost and Speed

You must have a frank discussion with the client about their resources. "What is your budget for resolving this, and how quickly do you need a result?"

- **Tight budget/urgent resolution**: Negotiation and mediation are overwhelmingly the fastest and most cost-effective options. They avoid the high costs of preparing for trial, extensive disclosure, and legal arguments. A mediation can often be arranged in a matter of weeks.
- **Substantial budget/complexity accepts delay**: Litigation and arbitration are inherently slower and more expensive. However, it is a common misconception that arbitration is always cheaper than litigation. While often faster, the costs of paying for arbitrators, an institution, and private venues can make it equally or more expensive. A detailed cost-benefit analysis is essential.

### The Need for a Precedent or a Public Judgment

Ask the client: "Is it about the money, or is it about the principle?"

- **Establishing a legal principle**: If a business operates in a legally grey area and needs clarity on a point of law for its future operations, only a published judgment from a court (litigation) can create a binding precedent. This is also true for clients who wish to create a public deterrent against similar claims.
- **Vindication**: A client who has been publicly accused of wrongdoing may need a public judgment from a judge to restore their reputation.
- **Simply resolving the dispute**: If the goal is purely to resolve the specific issue at hand, a private arbitration award or a mediated settlement is sufficient.

### The Complexity and Nature of the Dispute

Consider the subject matter of the dispute. "What is this case really about?"

- **Highly technical issues**: Disputes involving complex engineering, financial derivatives, or specialised IT systems benefit from a decision-maker who understands the industry. Arbitration allows the parties to select an arbitrator who is a recognised expert in that specific field, which can lead to a more informed and commercially sensible decision.
- **Pure legal interpretation**: If the dispute turns on the interpretation of a standard clause in a contract or a well-established point of law, a generalist judge in litigation is perfectly equipped to handle it.
- **Emotional or relationship-based issues**: Disputes with a strong emotional component, such as in partnership or inheritance disputes, are often poorly suited to a binary win/lose court judgment. Mediation is far more effective at addressing the underlying emotional grievances and finding a holistic solution.

### The Need for Coercive Powers

You must analyse: "What does the client need the process to do?"

- **Urgent interim relief**: If a client needs to prevent an imminent action, such as stopping the publication of a defamatory article, preventing a breach of confidence, or freezing assets before they are dissipated, only a court has the power to grant such urgent injunctions. This makes litigation the only viable option at the outset.

**Note**: It is possible to have parallel proceedings. A party could seek an interim injunction from a court to freeze assets, while the underlying dispute is resolved in arbitration.

### International Elements

This is often the deciding factor in commercial disputes. "Where is the other party, and where are their assets?"

- **Cross-border enforcement**: The *1958 New York Convention* provides a remarkably efficient framework for enforcing an arbitral award in over 170 countries. Enforcing an English court judgment in a foreign country can be a slow, expensive, and uncertain process, often requiring a completely new court case in that jurisdiction.

**Example**: An English company has a dispute with a supplier based in Brazil, who has assets only in Brazil. An English court judgment would be difficult to enforce in Brazil. An arbitral award made in London, however, would be enforceable directly through the Brazilian courts under the *New York Conven*tion. This makes arbitration the clear and low-risk choice.

### The Solicitor as a Strategic Advisor

Choosing the right dispute resolution mechanism is not about promoting one process over another. It is about being a diagnostician. You must carefully diagnose the client's situation against these seven factors. Often, the answer will be a blended approach: a robust negotiation stance, followed by an attempt at mediation, with litigation or arbitration held in reserve as a credible threat.

The best solicitors do not just react to disputes; they manage them. They guide their clients towards the most efficient, effective, and commercially sensible path to a resolution. By mastering this strategic decision-making process, you move from being a legal technician to a trusted business advisor. The following flowchart provides a simplified visual guide to this essential analytical process.

## 1.6 Conclusion

The modern solicitor's role is to be a dispute resolution strategist, not just a litigator. A thorough understanding of the full spectrum of options is essential. The best solicitors will guide their clients away from unnecessary conflict and towards the most efficient and effective path to a resolution, always keeping the client's commercial and personal objectives at the forefront of their advice. The following chapters will delve deeper into the details of the litigation process, but it is crucial to remember that issuing a claim form should rarely be the first, and never the only, option considered.

# 2

# PRELIMINARY CONSIDERATIONS AND PRE-ACTION CONDUCT

Before any claim form is issued or any court fee is paid, a solicitor must lay the groundwork for a successful case. This initial stage is arguably the most critical. Mistakes made here can be costly and sometimes fatal to a claim. This chapter guides you through the essential first steps: from the moment a client walks into your office, through understanding the legal foundations of their claim, ensuring it is brought in time, and complying with the required pre-action procedures designed to avoid litigation altogether.

## 2.1 Initial Client Interview and Identifying the Cause of Action

### The Goal of the First Meeting

The initial client interview is not just about gathering facts; it is a strategic exercise. Your primary goals are to:

1. **Understand the client's story**: Get a clear, chronological account of the events.
2. **Identify the client's goal**: What do they really want? Compensation, an apology, the return of property, or to stop a certain behaviour?
3. **Identify the cause of action**: This is the legal basis for the claim. What legal wrong has the client suffered?

### Key Information to Gather

1. **The parties**: Full names and addresses of everyone involved.

2. **The timeline**: Key dates (when the contract was signed, when the accident happened).
3. **The evidence**: What documents exist? (Contracts, emails, invoices, photos). Are there any witnesses?
4. **The loss**: Precisely what has the client lost? (Money, enjoyment, reputation). Quantify the loss where possible.

**Identifying the Cause of Action**

A "cause of action" is a set of facts that allows a person to seek a legal remedy. You must fit the client's story into a recognized legal category. The two most common are:

1. **Breach of contract**: This occurs when one party fails to perform their obligations under a valid contract.

   **Example**: Your client, a café owner, paid a supplier £5,000 for a new coffee machine. The supplier took the money but never delivered the machine. The cause of action is breach of contract.

   What must be proved:

- A contract existed,
- The client performed their obligations,
- The other party breached the contract,
- The client suffered a loss as a result.

2. **Tort (a civil wrong)**: This is a breach of a duty imposed by law, rather than by a contract. Negligence is the most common tort. It occurs when someone fails to take reasonable care, causing loss to another.

   **Example**: A driver runs a red light and hits your client's car, causing injury and vehicle damage. The cause of action is the tort of negligence.

   What must be proved (the "duty of care" triad):

   - The defendant owed the claimant a duty of care (e.g., all road users owe a duty to each other),
   - The defendant breached that duty (by driving carelessly),

- The breach caused the claimant's loss (the accident caused the injuries).

Other causes of action in tort include nuisance, defamation, and trespass.

## 2.2 Limitation Periods: The Core Principles

### The Litigation Stopwatch: Why Time is of the Essence

Imagine a client comes to you with a strong case, clear evidence, and significant losses. You begin work, only to discover that the event happened seven years ago. In most cases, this claim is doomed. It is "statute-barred." This is the power and peril of limitation periods.

A limitation period is a strict time limit set by law, primarily the *Limitation Act 1980*, within which a claimant must begin court proceedings (usually by issuing a Claim Form). If the deadline is missed, the defendant has a complete defence, regardless of how strong the claimant's case otherwise is.

### The Rationale Behind Limitation Periods

The law imposes these deadlines for sound policy reasons:

1. **Evidentiary reliability**: Over time, memories fade, witnesses become unavailable, and documents are lost or destroyed. It is considered unfair to force a defendant to defend a claim based on stale evidence.
2. **Certainty and finality**: Both individuals and businesses need to be able to move on with their affairs, secure in the knowledge that after a certain period, they will not be sued for past events.
3. **Diligence**: The law encourages claimants to pursue their rights promptly.

### The Key Limitation Periods You Must Memorise

The following periods are the bedrock of litigation practice. You should be able to recall them instantly.

| Type of Claim | Basic Limitation Period | Start Date (The clock starts ticking from...) |
|---|---|---|

| | | |
|---|---|---|
| **Simple Contract** | 6 years | The date of the breach of contract. |
| **Tort (e.g., Negligence)** | 6 years | The date the damage occurred. |
| **Personal Injury** | 3 years | The later of: (1) the date of the accident, or (2) the 'Date of Knowledge' (see below). |
| **Defamation** | 1 year | The date of publication. |
| **Recovery of Land** | 12 years | The date the right of action accrued. |

**Understanding the Start Date: The Trigger Point**

Knowing the length of the period is useless if you don't know when it starts.

1. **Contract: the date of breach**: This is usually a clear, single date.

   **Example**: A builder contracts to complete an extension by 1st June 2023. If he fails to complete on that date, the breach occurs on 1st June 2023. The limitation period expires on 1st June 2029.

2. **Tort: the date damage occurred**: This is the date when the claimant first suffered measurable loss.

   **Example**: On 10th May 2023, a negligent surveyor fails to identify dry rot in a house, which the purchaser buys. The dry rot is discovered immediately. The damage occurred on 10th May 2023. The limitation period expires on 10th May 2029.

**The Special Rule for Personal Injury: The "Date of Knowledge"**

The standard 3-year rule from the date of the accident is often straightforward. However, what if the injury manifests itself much later? The *Limitation Act 1980* provides a fairer rule in *ss.11 and 14*.

The 3-year period runs from the later of:

a) The date of the accident; or

b) The "date of knowledge"; this is the date the claimant first knew all of the following:

- That the injury was significant.
- That the injury was attributable in whole or in part to the act or omission which is alleged to constitute negligence, nuisance, or breach of duty.
- The identity of the defendant.

In ***AB v Ministry of Defence*** [2012] UKSC 9, service personnel were exposed to radiation during nuclear tests in the 1950s. They developed cancer and other illnesses decades later.

The Supreme Court held that their "date of knowledge" was not in the 1950s, but much later, when they could reasonably have known that their illnesses were likely caused by the radiation exposure. Therefore, their claims, issued in the 2000s, were not necessarily time-barred.

This case highlights that for diseases with long latency periods (like industrial diseases, asbestos-related illness, or medical negligence where a surgical error is discovered years later), the limitation period may not start until long after the original negligent act.

**What Stops the Clock? The Effect of Acknowledgment and *Part 36* Offers**

The *Limitation Act* provides that the clock can be reset in certain circumstances.

- **Acknowledgment of claim**: If the defendant provides a written, signed acknowledgment of the claimant's claim, this resets the limitation period. A new period begins from the date of the acknowledgment.
- ***Part 36* offers**: Making a *Part 36* offer to settle does not pause or extend the limitation period. This is a common misconception. The clock continues to run, and you must still issue a Claim Form before the deadline to protect your client's position.

**The Court's Discretion: A Limited Escape Hatch**

What if a client comes to you just after the limitation period has expired? All is not necessarily lost, but the situation is perilous. For personal injury claims only, the court has a discretion under *s.33* of the *Limitation Act 1980* to disapply the 3-year time limit if it would be equitable to do so.

The court will consider all the circumstances, including:

- The length of and reasons for the delay.
- The effect of the delay on the evidence.
- The conduct of the defendant.
- The duration of any disability of the claimant.
- The strength of the claim.

This is a difficult test to meet. The longer the delay, the harder it is to convince the court. You should never rely on *s.33* as a backup plan. The primary rule is to issue in time.

Limitation periods are the unforgiving timekeepers of litigation. A sophisticated understanding of them is not just academic; it is a fundamental aspect of professional competence. Missing a deadline is one of the most serious errors a solicitor can make. Vigilance, prompt calculation, and proactive diary management are your essential defences.

## 2.3 Calculating Limitation Periods in Contract and Tort

### The Practical Application: Working with the Calendar

Knowing the theory of limitation periods is one thing; applying it correctly to real-world scenarios is another. This section provides the practical toolkit for calculating these critical deadlines accurately. A miscalculation here is not a minor error; it is professional negligence.

The core principle remains: you must calculate the exact date on which the limitation period expires and ensure the Claim Form is issued at the court on or before that date.

### Calculating the Period in Contract Claims

For a claim in breach of contract, time runs from the date the breach occurred.

The rule is that limitation expires 6 years from the date of the breach.

### Step-by-Step Calculation

1. **Identify the breach date**: What was the specific date the defendant failed to perform their contractual obligation?
2. **Add 6 years**: The period ends on the anniversary of that date.

### Example 1: Failure to Pay a Debt

A contract states that payment for goods is due on 1st October 2023. The payment is not made.

**The breach**: The failure to pay occurs on 1st October 2023.

**Limitation expiry**: The claimant must issue proceedings on or before 1st October 2029.

**Example 2: Defective Services**

A software developer delivers a faulty program to a client on 15th April 2024. The breach of the contractual term to provide satisfactory quality services occurs on this date.

**Limitation expiry**: The client must issue a claim form on or before 15th April 2030.

**Important Nuance; Instalment Contracts**

If a contract involves periodic payments (e.g., a loan with monthly repayments), a separate cause of action arises each time a payment is missed. Limitation runs for each instalment from the date it was due.

**Calculating the Period in Tort Claims (Other than Personal Injury)**

For most tort claims, like negligence causing property damage or pure economic loss, time runs from the date the damage was suffered.

The rule is that limitation expires 6 years from the date on which the cause of action accrued (that is, when the damage occurred).

**Example 1: Negligent Advice (Immediate Loss)**

On 1st March 2024, you rely on a negligent financial report from an accountant and purchase a loss-making company. You suffer the financial loss immediately.

**The damage occurs**: 1st March 2024.

**Limitation expiry**: 1st March 2030.

**Example 2: Negligent Construction**

A builder negligently constructs a wall. It collapses on 10th December 2023, damaging your car.

**The damage occurs**: 10th December 2023.

**Limitation expiry**: 10th December 2029.

### The Critical Distinction: Latent Damage

The scenarios above are clear because the damage is immediately apparent. But what if the damage is hidden? This is known as latent damage. The law provides a special, more claimant-friendly rule for tort claims involving latent damage (other than personal injury) under *s.14A* of the *Limitation Act 1980*.

The latent damage rule applies when a claimant has the later of 6 years from the date the damage occurred; OR 3 years from the "starting date" (the date the claimant knew, or reasonably should have known, certain key facts about the damage).

The "Starting Date" is the earliest date on which the claimant first knew:

- That the damage was significant.
- That the damage was attributable in whole or in part to the act or omission which is alleged to constitute negligence.
- The identity of the defendant.

### Illustration: The Case of the Sinking House

1st June 2015: A surveyor negligently surveys a house, failing to identify faulty foundations.

1st July 2015: The purchaser, Mr. Brown, buys the house relying on the report. The damage (the faulty foundations) exists, but it is latent (hidden). The 6-year clock from the date of damage starts ticking.

1st August 2021: Cracks suddenly appear in the walls. Mr. Brown hires an expert.

1st September 2021: The expert's report confirms the cracks are due to the faulty foundations missed by the surveyor in 2015. This is Mr. Brown's "starting date" for knowledge.

Now, let's calculate the limitation expiry:

**Route 1**: 6 years from damage (1st July 2015) = 1st July 2021. This date has already passed by the time the damage is discovered.

**Route 2**: 3 years from the "starting date" (1st September 2021) = 1st September 2024.

The claimant can use the later date. Therefore, the limitation period expires on 1st September 2024.

The case of ***Pirelli General Cable Works Ltd v Oscar Faber & Partners*** [1983] 2 AC 1 established that in negligence claims involving latent damage to property, time starts running from the date the damage occurred, not when it was discovered. This harsh result is what led Parliament to introduce the Section 14A latent damage provisions, giving claimants a 3-year extension from their date of knowledge.

**Contrasting Contract and Tort: A Worked Example**

Sometimes, a single set of facts can give rise to claims in both contract and tort. The limitation periods may differ.

**Scenario**: On 1st February 2020, a solicitor negligently advises a client during a property transaction, causing the client to lose £100,000. The client discovers the loss and the solicitor's negligence on 1st May 2024.

**Analysis**:

**Breach of Contract Claim**

- The breach (negligent advice) occurred on 1st February 2020.
- Limitation expires 6 years from that date: 1st February 2026.

**Negligence (Tort) Claim**

- The damage occurred on 1st February 2020.
- The 6-year period from the damage date would expire on 1st February 2026.
- However, this is a case of latent damage (the client didn't know about it until later). Therefore, we apply the *s.14A* rule.
- The "starting date" for knowledge is 1st May 2024.
- The 3-year period from the starting date expires on 1st May 2027.

The tort claim, with its latent damage extension, gives the client an extra year to issue proceedings. The claimant would be advised to plead their case in both contract and tort, but they can rely on the longer limitation period offered by the tort claim.

## 2.4 The Purpose and Principles of Practice Direction Pre Action Conduct

### 2.4.1 The Foundation of Modern Civil Litigation

Before the *Civil Procedure Rules* (CPR) came into force in 1999, litigation could be a brutal and surprising affair. A party might receive a claim form out of the blue, with no prior warning, forcing them immediately into a costly and stressful legal battle. The system often encouraged ambush and conflict over resolution and cooperation.

The *Practice Direction on Pre-Action Conduc*t (the PD) exists to change this culture. It is not merely a procedural hoop to jump through. It is the embodiment of the *Overriding Objective* (*CPR Part 1*) applied to the critical period before proceedings begin. Its goal is to foster a constructive approach to disputes that exists outside of the courtroom.

### 2.4.2 The Core Purposes of the Pre Action Conduct Regime

Understanding the "why" behind the rules is crucial for applying them effectively.

**To encourage early settlement**: The primary aim is to resolve the dispute without the need for issuing a claim at all. This saves the parties time, legal costs, and emotional stress. By forcing an early exchange of information, it allows both sides to assess the strength of their position and the merits of the other side's case realistically.

**To support Alternative Dispute Resolution** (ADR): The PD actively encourages parties to consider using methods like mediation or negotiation to settle their dispute. The court expects parties to have genuinely explored these options before resorting to litigation.

**To enable efficient case management if litigation proceeds**: If a claim cannot be settled, the pre-action process ensures that when the claim form is finally issued, both parties and the court understand the real issues in dispute. This allows the court to manage the case effectively from the outset, saving time and costs at later stages.

**To ensure a fair and proportional process**: The rules are designed to put both parties on an equal footing from the start. It prevents a more powerful or better-resourced party from overwhelming the other with a surprise claim.

### 2.4.3 The Governing Principles of Pre Action Conduct

The PD is not just a set of rigid steps; it is guided by fundamental principles that should inform all your pre-action behaviour. These principles are the "spirit" of the law.

**Proportionality**: This is the most important principle. The effort and cost of pre-action conduct must be proportionate to the value, complexity, and importance of the case. For a small debt claim, a simple letter before action and a short response may be sufficient. For a multi-million pound commercial dispute, a more extensive process, including meetings and expert reports, may be proportionate. You must never use the pre-action process as a tactical weapon to intimidate an opponent with disproportionate costs.

**Communication and cooperation**: Parties are expected to act in a cooperative and constructive manner. This means responding to letters and requests promptly and reasonably. It means being open about the documents you hold and the arguments you rely on. A stubborn or obstructive attitude at this stage will be frowned upon by the court.

**Early and full exchange of information**: The goal is to avoid surprises. Each party should provide sufficient information for the other to understand the claim they have to meet and to make an informed decision about settlement. This includes disclosing key documents that support or undermine each party's case.

**Avoiding litigation**: The parties should explore whether the dispute can be resolved without formal proceedings. This explicitly includes considering using an appropriate form of Alternative Dispute Resolution (ADR).

### 2.4.4 The General Steps Under the Practice Direction

Where no specific Pre-Action Protocol applies, the *Practice Direction* sets out a general process that should be followed. This process is built around two key documents: the Letter of Claim and the Letter of Response.

### Stage One: The Letter of Claim

Also known as the Letter Before Action, this is the claimant's formal notification to the defendant that a claim is being made and litigation is being considered. It must be a clear and comprehensive document. A poorly drafted letter can lead to misunderstandings and unnecessary costs.

A well-drafted Letter of Claim should include:

- The claimant's full name and address. A concise summary of the facts and the basis of the claim. For example, "On 1st January 2024, you entered into a contract with our client... The contract required you to... You breached the contract on 1st March 2024 by failing to..."
- The cause of action. For example, "This claim is for breach of contract and/or negligence."
- A summary of the financial loss suffered by the claimant. This should be quantified if possible. For example, "As a result of your breach, our client has suffered a loss of £25,000, calculated as follows..."
- The legal remedy sought. For example, "We claim damages of £25,000."
- A list of the essential documents the claimant relies upon.
- A request for the defendant to disclose any key documents in their possession that are relevant to the issues.
- A suggested timetable for the defendant's response, and a proposal that the parties meet or use ADR to try to settle the matter.

### Stage Two: The Defendant's Response

The defendant should acknowledge the Letter of Claim promptly and then provide a full, written response within a reasonable time. The PD suggests a maximum of 14 days for acknowledgment and 30 days for a full response in a straight forward case, but this can be extended in more complex matters by agreement.

The Letter of Response is equally important. It should:

- State whether the claim is accepted in whole or in part.

- If the claim is denied, the defendant must explain why. They should set out their version of the facts and identify any documents they rely upon.
- State whether they intend to make a counterclaim against the claimant, providing details similar to a Letter of Claim.
- Provide copies of the key documents they rely upon, or state when they will be made available for inspection.
- Respond to the claimant's proposals on ADR and a timetable.

**Example Scenario: A Breach of Contract Claim**

Claimant's Solicitor sends a Letter of Claim to the defendant, "Widgets Ltd," for failing to supply 1000 components as per a contract dated 1st February. The letter details the contract, the breach, the loss of £10,000, and encloses the contract and correspondence. It requests a response within 14 days and suggests a without prejudice meeting.

Defendant's Solicitor acknowledges receipt within 3 days and requests an extension of 14 days to investigate.

After the extension, the Defendant's Solicitor sends a Letter of Response. They admit the contract but deny the breach, claiming that the components were delivered to the claimant's warehouse on the due date, as evidenced by a delivery note. They enclose a copy of the signed delivery note.

**Outcome**: The claimant checks with their warehouse and finds the components were indeed delivered but misplaced. The claim is withdrawn. Litigation was avoided because the pre-action process allowed for the early exchange of key information.

### 2.4.5 The Consequences of Failing to Comply

The court takes compliance with the PD very seriously. If a party fails to comply with the principles or the general process, the court has the power to impose sanctions under *CPR Rule 3.1(4) and 3.9*.

These sanctions can include:

- **Costs penalties**: The party at fault may be ordered to pay the other side's costs, even if they are ultimately successful at trial. They may be deprived of their interest on costs or ordered to pay interest at a higher rate.
- **Stay of proceedings**: The court can put the entire claim on hold (impose a "stay") until the required pre-action steps have been taken.
- **Orders for payment into court**: The court can order the non-compliant party to pay a sum of money into court as security.

The case of ***Daejan Investments Ltd v The Park West Club Ltd*** [2003] EWHC 2872 (TCC) is a stark reminder. The claimant issued proceedings without following the Pre-Action Protocol for Construction and Engineering Disputes. The court stayed the claim and ordered the claimant to pay the defendant's costs of the application, highlighting that the court will not tolerate ignoring these rules.

In summary, the *Practice Direction on Pre-Action Conduct* is the foundation for a modern, efficient, and just civil justice system. It requires solicitors to be not just advocates, but also negotiators, advisors, and managers. Adhering to its principles is not optional; it is a fundamental part of professional practice.

## 2.5 Pre Action Protocols for Specific Claims

### Moving from General Principles to Specific Blueprints

While the Practice Direction on Pre-Action Conduct sets out the general framework, the Pre-Action Protocols provide the detailed, step-by-step blueprint for specific types of disputes. They are a set of "rules within the rules" that dictate exactly what must be done, by when, and in what form, before a claim is issued for a particular category of case.

If a Protocol applies to your claim, you must follow it. The general PD is a fallback for claims where no specific Protocol exists.

### 2.5.1 The Purpose and Rationale for Protocols

Protocols exist for the same overarching reasons as the general PD, but with added benefits:

**Standardisation**: They create a uniform process for common types of claims, which makes the system more predictable and efficient for all users, including the courts.

**Expertise**: They are tailored to the unique features of specific disputes. For example, the Personal Injury Protocol understands the need for medical evidence, while the Professional Negligence Protocol understands the complexity of establishing a breach of duty by a professional.

**Clarity**: They leave very little room for doubt about what is required, reducing tactical arguments about whether the pre-action process has been complied with.

### 2.5.2 A Deep Dive into Key Protocols

#### The Personal Injury Protocol

This is one of the most important and frequently used Protocols. It applies to most personal injury claims, including employers' liability, public liability, and road traffic accidents (with a value under the "small claims" limit, which is currently £5,000 for road traffic accidents and £1,000 for other claims).

#### Key Stages of the Personal Injury Protocol

1. **The Letter of Claim**: This is a detailed document sent to the defendant. It is not a vague letter. It must include:
    - A clear summary of the facts of the accident.
    - A description of the injuries sustained.
    - An outline of any financial losses already incurred (e.g., lost earnings, travel expenses to hospital).
    - An invitation to the defendant to admit liability (in whole or in part) within 21 days.
2. **The investigation period**: The defendant (usually their insurer) has a maximum of three months from the date of acknowledging the Letter of Claim to investigate. At the end of this period, they must provide a substantive response, stating whether they admit or deny liability and giving their reasons. If they deny liability, they must

provide their version of events and disclose any documents they rely on, such as an accident report or witness statements.

3. **Obtaining medical evidence**: If liability is admitted, the claimant's solicitor will obtain a medical report from a suitably qualified expert. This report is crucial as it details the injuries, the treatment required, and the prognosis for recovery. The defendant is given the opportunity to comment on the report and may, in some cases, ask for their own medical examination.
4. **The Schedule of Loss**: The claimant's solicitor then prepares a detailed "Schedule of Loss." This document quantifies the entire claim, including:
    - **General damages**: Compensation for the pain, suffering and loss of amenity caused by the injury. This is often calculated with reference to the *Judicial College Guidelines*.
    - **Special damages**: The specific financial losses, both past and future (e.g., loss of earnings, medical expenses, care costs).
5. **Negotiation and settlement**: Once the Schedule of Loss is sent to the defendant, the parties enter a negotiation period. They are expected to use the information exchanged to try to reach a settlement. This often involves making *Part 36* offers (which we will cover in a later chapter).

**Example of the Protocol in Action: A Slip and Fall Case**

Mr. Adams slips on a wet floor in a supermarket on 1st March. He instructs a solicitor.

On 1st April, his solicitor sends a detailed Letter of Claim to "Supermarket Ltd," describing the accident, his broken arm injury, and initial losses. Supermarket Ltd's insurer acknowledges the letter and has until 1st July to investigate. On 1st July, the insurer admits liability, accepting the floor was wet and no warning sign was present. Mr. Adams is examined by an orthopaedic surgeon on 1st August, who provides a report on his recovery.

On 1st September, Mr. Adams's solicitor sends a Schedule of Loss claiming £15,000 for his injury and £5,000 for lost earnings and expenses. The insurer makes an offer of £18,000. After negotiation, the case settles for £19,500. A claim was resolved without ever issuing a claim form.

### The Professional Negligence Protocol

This Protocol applies to claims against professionals such as solicitors, accountants, financial advisors, architects, and surveyors. These claims are often factually and legally complex.

### Key Features of the Professional Negligence Protocol

1. **The Letter of Claim**: This must be particularly detailed. It must identify:
    - The identity of the client and the professional.
    - The date and terms of the retainer (the professional's engagement).
    - The duty of care owed by the professional.
    - The precise act or omission that is alleged to constitute negligence.
    - How that negligence caused the claimant's loss.
2. **Timetable**: The defendant has 21 days to acknowledge the letter and three months to provide a substantive Letter of Response. This extended time is often necessary due to the complexity of the claims.
3. **The crucial meeting**: The *Protocol* strongly encourages the parties to hold a without prejudice meeting. This is a key difference from other Protocols. The purpose of this meeting is to identify the main issues in dispute and explore the possibility of settlement. The meeting is to also consider using a form of ADR, such as mediation. This face-to-face engagement can be incredibly effective in narrowing the issues or resolving the entire matter, as it allows for a direct and frank discussion that letters and emails cannot replicate.

### Illustration: A Solicitor's Negligence Claim

A client, "TechStart Ltd," claims its former solicitor was negligent in drafting a shareholder agreement, causing the company to lose £200,000.

The Letter of Claim meticulously sets out the instructions given to the solicitor, the flawed clauses in the agreement, and how those flaws led to a dispute with a shareholder and the subsequent financial loss.

The solicitor's firm acknowledges the letter and uses the three-month period to take detailed witness statements from the fee-earner involved and obtain advice from counsel.

The Letter of Response denies negligence, arguing that the clauses were standard and the loss was caused by the shareholder's unreasonable behaviour.

The parties agree to a meeting. At the meeting, the strengths and weaknesses of each case become apparent. Following the meeting, they agree to appoint a mediator. At the mediation, the case settles for £75,000. The Protocol's emphasis on direct engagement facilitated a cost-effective resolution.

### 2.5.3 The Serious Consequences of Non-Compliance with a Protocol

The sanctions for failing to comply with a Protocol are even more significant than for a breach of the general *Practice Direction*. The court will expect a very good reason for any non-compliance.

When deciding what sanctions to impose, the court will consider whether the non-compliance has:

- Wasted costs.
- Compromised the court's ability to manage the case.
- Prejudiced the other party's ability to prepare their case.

The case of ***Kettennan v Hansel Properties Ltd*** [1987] AC 189 (though pre-CPR) established principles that still inform the court's approach. The modern application is that a blatant or unjustified disregard for a Protocol will almost certainly lead to a costs penalty, and potentially more severe sanctions.

For instance, if a claimant in a personal injury case issues proceedings without waiting for the defendant's three-month investigation period to elapse, and without a good reason, the court is likely to stay the proceedings until the Protocol is complied with and order the claimant to pay the costs thrown away.

## 2.6 Conclusion

In conclusion, effective case preparation begins long before proceedings are issued. The initial client interview lays the foundation by clarifying strategy, understanding the client's

objectives, and identifying the appropriate cause of action. Accuracy in identifying the correct parties, particularly where vicarious liability may arise, is essential to avoid procedural pitfalls. Strict limitation periods underscore the importance of timeliness, as failing to act within the statutory window can bar an otherwise valid claim.

Moreover, compliance with the *Pre-Action Conduct rules* and relevant *Pre-Action Protocols* reflects the courts' emphasis on reasonableness, cooperation, and early resolution. Together, these preliminary steps ensure that a claim is both procedurally sound and strategically robust before it ever reaches the courtroom.

# 3

# JURISDICTION, APPLICABLE LAW, AND COMMENCING PENDINGS

Before a solicitor can issue a claim form, several critical preliminary decisions must be made. Two of the most important are: which country's law governs the dispute, and which court has the power to hear it? Making an error in these initial stages can be catastrophic, potentially leading to the claim being struck out or a judgment that is unenforceable. This chapter guides you through these essential first steps, from navigating cross border legal issues to selecting the correct court.

## 3.1 Applicable Law in Cross-Border Disputes

Before a solicitor issues a claim form for a dispute with an international element, a fundamental question must be answered: which country's law will the court use to decide the case? This is known as the "applicable law". The answer is not always English law, even when the case is heard in an English court. Applying the wrong law can lead to a lost case and a professional negligence claim. The rules for determining the applicable law are found in two main sets of regulations, which the UK has retained in its domestic law following its departure from the European Union.

### 3.1.1 The Core Principle: Why Applicable Law Matters

The applicable law governs the substantive rights and obligations of the parties. It determines issues such as:

- Whether a contract has been validly formed.
- How the terms of a contract should be interpreted.
- Whether a breach of contract has occurred.
- What remedies are available for a breach.
- In tort, whether a duty of care existed and whether it was breached.

It is crucial to distinguish the applicable law from procedural law. The procedural rules of the English courts, the *Civil Procedure Rules*, will always govern how the case is run, regardless of the applicable law. However, the substantive rights of the parties are determined by the applicable law.

**Example**:

Imagine a contract between a English manufacturer and an Italian retailer for the sale of custom-made furniture. The contract was negotiated in France and is silent on the governing law. The English manufacturer fails to deliver the goods, and the Italian retailer sues for breach of contract in the English courts.

The procedural law is English *Civil Procedure Rules*. The Italian retailer must issue a Claim Form, serve it correctly, and follow English court timetables.

The applicable law could be English, Italian, or even French law. This law will decide key questions like whether the contract was valid, what the delivery deadlines were, and what compensation the retailer is entitled to.

### 3.1.2 Determining the Applicable Law in Contract: The Rome I Regulation

For contractual obligations, the rules are set out in the *Rome I Regulation*. The regulation provides a clear hierarchy for determining the applicable law.

## 1. The Primary Rule: Party Autonomy

The most important principle under *Rome I* is party autonomy. This means the parties are free to choose the law that will govern their contract. *Article 3* of *Rome I* states that the contract shall be governed by the law chosen by the parties.

The choice must be made expressly or must be clearly demonstrated by the terms of the contract or the circumstances of the case.

The chosen law need not have any connection to the parties or the subject matter of the contract. Parties can choose a neutral law, such as English law in a contract between two Japanese companies.

### Illustration of Express Choice

A software licensing agreement between a company in India and a company in Brazil contains the following clause: "This Agreement and any dispute or claim arising out of or in connection with it shall be governed by and construed in accordance with the law of England and Wales."

This is an express choice of law. If a dispute arises about the interpretation of a license term, the English courts will apply English law to resolve it.

## 2. The Default Rules: When There is No Choice

If the parties have not made a choice, *Article 4* of *Rome I* provides a set of default rules to identify the applicable law. The contract will be governed by the law of the country where the party required to effect the "characteristic performance" of the contract has their habitual residence.

Characteristic performance is the performance for which payment is due. It is the essence of what the contract is about. For a company, habitual residence is its place of central administration. For an individual acting in the course of their business, it is their principal place of business.

**Examples of the Default Rules**

- **Sale of goods contract**: The characteristic performance is the delivery of the goods. Therefore, the applicable law is the law of the habitual residence of the seller.
- **Provision of services contract**: The characteristic performance is the provision of the service. Therefore, the applicable law is the law of the habitual residence of the service provider.
- **Franchise agreement**: The characteristic performance is the provision of the franchise. The applicable law is the law of the habitual residence of the franchisor.

**Illustration**

Using the earlier example of the English manufacturer and Italian retailer with no choice of law clause. This is a contract for the sale of goods. The characteristic performance is the manufacturer's obligation to deliver the furniture. The manufacturer's habitual residence is England. Therefore, under the *Rome I* default rules, the applicable law of the contract is English law.

### 3.1.3 Determining the Applicable Law in Tort: The Rome II Regulation

For non-contractual obligations, such as claims in negligence, nuisance, or defamation, the *Rome II Regulation* applies. The general rule is found in *Article 4*.

**The General Rule: The Law of the Country Where the Damage Occurs**

The general rule is that the law applicable to a tort is the law of the country in which the damage occurs, irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur.

This rule focuses on the direct damage suffered by the claimant, not the initial wrongful act.

**Illustrative Example**:

A tourist from Spain is on holiday in Greece. She buys a bottle of water manufactured by a German company. While still in Greece, she drinks the water and becomes ill due to

contamination. The event giving rise to the damage (the negligent manufacturing) occurred in Germany. However, the damage (the personal injury) occurred in Greece. Therefore, the law applicable to her claim in tort against the German manufacturer is Greek law.

**The Common Habitual Residence Exception**

A key exception to the general rule applies when both the person claimed to be liable (the defendant) and the person sustaining the damage (the claimant) have their habitual residence in the same country at the time the damage occurs. In such a case, the law of that common country shall apply.

**Illustrative Example**:

Two English nationals are on a business trip to the United States. While being driven by his colleague, Mr. Smith, Mr. Jones is injured in a car accident in New York due to Mr. Smith's negligent driving.

The general rule would point to the law of the place where the damage occurred, which is US law (specifically, the law of New York).

However, both the claimant (Mr. Jones) and the defendant (Mr. Smith) have their habitual residence in England at the time of the accident. Therefore, the exception applies, and the applicable law for the negligence claim will be English law.

### 3.1.4 The Overriding Role of Mandatory Rules and Public Policy

Even after the applicable law is determined, the English court retains a residual power to refuse to apply a provision of the applicable foreign law in certain limited circumstances.

**Mandatory Rules**

These are rules of English law which are regarded as so fundamental that they must be applied regardless of the applicable law of the contract or tort. For example, certain provisions of the *UK Consumer Rights Act 2015* may be applied to protect a consumer, even if the contract is governed by a foreign law.

**Public Policy (Ordre Public)**

An English court may refuse to apply a rule of the applicable foreign law if its application would be "manifestly incompatible" with English public policy.

Determining the applicable law is a critical first step in any cross-border dispute. The solicitor must carefully analyse the contract for a choice of law clause. If none exists, they must apply the detailed rules of *Rome I* or *Rome II*. Getting this right ensures that the case is prepared and argued on the correct legal basis from the outset, avoiding wasted costs and securing the best possible outcome for the client.

## 3.2 The Welsh Language in Civil Proceedings

The administration of justice in Wales operates on a bilingual basis, recognising both English and Welsh as official languages of the courts. This reflects the constitutional status of Wales and the fundamental principle that individuals should be able to access the justice system in the language with which they are most comfortable. For a solicitor practising in or dealing with cases in Wales, understanding *Practice Direction 55* is essential.

### 3.2.1 The Legal and Historical Context

The *Welsh Language Act 1993* established the principle that in the administration of justice in Wales, the English and Welsh languages should be treated on a basis of equality. This principle was reinforced and strengthened by the *Welsh Language (Wales) Measure 2011*, which created a new system of Welsh language standards. The judiciary, through the *Civil Procedure Rules*, has given practical effect to these principles in *Practice Direction 55*, which applies to all civil courts in England and Wales but is of particular importance for cases heard in Wales.

### 3.2.2 The General Principle: Equality of Treatment

*Practice Direction 55* sets out a clear and powerful general principle: a party or witness may use the Welsh language in any hearing, or in any document to be filed or lodged in a court, without the need for prior notice. This means that the right to use Welsh is unconditional. A solicitor does not need to apply for permission or justify the decision to use Welsh for their client. The court system has a duty to accommodate this choice.

### 3.2.3 Practical Application in Court Proceedings

The principle of equality applies across all aspects of civil procedure.

1. **Use of Welsh in Hearings**

   Any participant in a hearing, including a party, a witness, a solicitor, or an advocate, may speak in Welsh. The court is responsible for arranging for the simultaneous interpretation of anything said in Welsh into English, and vice versa, for the benefit of those who do not understand the language being spoken.

   The cost of this interpretation is borne by the court, not the parties. This removes any financial disincentive for using the Welsh language. A party who wishes to speak Welsh at a hearing is encouraged, but not required, to give notice to the court. This is simply to allow the court to make the necessary practical arrangements for an interpreter.

2. **Use of Welsh in Documents**

   Any document to be filed with the court may be in Welsh. This includes:

   - The Claim Form and other statements of case.
   - Witness statements and expert reports.
   - Application notices and skeleton arguments.
   - Pre action correspondence that is later filed as an exhibit.

   The court will not require a translation of a document filed in Welsh. If a document is filed in Welsh, the court will arrange for its translation into English if this is necessary for the proceedings. For example, if a judge does not understand Welsh, the court will ensure they receive an English translation.

3. **Court Forms and Correspondence**

   Many court forms are now available bilingually. A party may complete a form in either English or Welsh. Correspondence from the court to a party may also be in either language.

### 3.2.4 The Role of the Solicitor: Key Responsibilities and Considerations

A solicitor acting for a client in a case with a connection to Wales has important professional responsibilities regarding the use of Welsh.

**Advising the Client**

The solicitor must advise their client of the right to use the Welsh language in the proceedings. This advice should be given early, ideally at the pre action stage. The decision on whether to use Welsh is the client's, but the solicitor must ensure the client is making an informed decision, understanding the practical implications.

**Example Scenario**:

A solicitor in Cardiff is instructed by a client who is a native Welsh speaker and who wishes to sue a builder for defective work. The solicitor must advise the client: "You have the right to conduct this entire case through the medium of Welsh. You can give evidence in Welsh, and we can file court documents in Welsh. The court will provide an interpreter for any hearing at no cost to you. The choice is yours."

**Practical Case Management**

If a client chooses to use Welsh, the solicitor must manage the case accordingly. The solicitor will draft and file documents in Welsh.

The solicitor should inform the court as soon as practicable if it is known that Welsh will be used at a hearing, to ensure an interpreter is booked. The solicitor should also ascertain whether witnesses or experts wish to give evidence in Welsh and inform the court.

**Dealing with the Other Side**

What happens if one party uses materials in Welsh and the other party does not understand the language? *Practice Direction 55* addresses this. Where one party files a document in Welsh, any other party in the case may file a translation of that document into English. The cost of this translation is initially borne by the party requesting the translation, but it may be treated as a cost incidental to the proceedings. This means that the cost of translation could potentially be recovered from the other party if the court makes a costs order in their favour at the end of the case.

### 3.2.5 The Bigger Picture: Access to Justice and Professional Competence

The provisions for the Welsh language are not merely a technicality. They are a fundamental matter of access to justice. For many Welsh speakers, communicating in their first language is crucial for fully understanding legal proceedings, giving clear and accurate evidence, and having confidence in the justice system.

For a solicitor, respecting and facilitating the use of Welsh is a core part of providing a professional and client centred service. It demonstrates cultural competence, a commitment to the *SRA's principles* of equality and diversity, and a thorough understanding of the procedural rules that govern modern legal practice in England and Wales. Failure to advise a client of their rights in this regard, or to handle a Welsh language case appropriately, could amount to poor service and a failure to act in the client's best interests.

Whether you intend to practise in Wales or not, an understanding of the bilingual nature of the justice system is important. For a case in Wales, the use of Welsh is a strategic and ethical consideration from the very first client meeting. By integrating these rules into your practice, you ensure that you are providing comprehensive advice and upholding the principle that the courts are accessible to all.

## 3.3 Where to Start Proceedings: An Overview of the Court Structure

Navigating the civil justice system in England and Wales begins with a fundamental choice: which court is the correct venue for your client's claim? This decision is not arbitrary; it is governed by statute and practice directions. Making the correct choice at the outset ensures efficiency, manages costs, and places the case before a judiciary with the appropriate expertise. A mistake can lead to delays, unnecessary cost orders, and the inconvenience of having a case transferred. The structure is primarily two tiered, consisting of the County Court and the High Court, with the Supreme Court at the apex as the final court of appeal.

### 3.3.1 The Architecture of the Civil Courts

The civil court structure is designed as a pyramid to allow for the efficient handling of disputes based on their value and complexity. The vast majority of cases start and finish in the lower tiers, with only a small number of legally significant cases progressing to the highest level.

**The County Court**: This is the foundation of the civil justice system. It is a single court that sits in numerous locations across England and Wales. It is designed to be local, accessible, and to handle the high volume of everyday civil litigation. Its jurisdiction is very wide.

**The High Court**: Situated above the County Court, the High Court deals with cases of higher value, greater complexity, or public importance. It is based at the Royal Courts of Justice in London but has District Registries in major cities across the country, allowing for cases to be heard outside the capital. The High Court is divided into three main divisions: King's Bench, Chancery, and Family, each specializing in different types of law.

**The Court of Appeal (Civil Division)**: This court hears appeals from the County Court and the High Court. It does not hear new evidence or retry cases; it reviews decisions from lower courts to determine if there was a legal error.

**The Supreme Court**: This is the final court of appeal in the UK for civil cases. It hears appeals on arguable points of law of the greatest public importance.

For the practising solicitor, the critical initial decision is between issuing proceedings in the County Court or the High Court.

### 3.3.2 The Principle of Allocation: A Question of Value and Complexity

The allocation of business between the County Court and the High Court is not merely a matter of plaintiff choice. It is guided by the *Civil Procedure Rules* and the *High Court and County Courts Jurisdiction Order 1991*. The overarching principle is that claims should be started in the County Court unless they fall into specific categories that warrant the resources and expertise of the High Court.

The general rule of thumb is that claims with a value of less than £100,000 should be started in the County Court. Conversely, claims with a value of £100,000 or more may be started in

the High Court. However, value is only one factor. The complexity of the facts, the legal issues involved, the public importance of the case, and the need for specialist procedures are all equally important considerations.

A solicitor must justify the choice of court. Issuing a straightforward, low value debt claim in the High Court would be considered an abuse of process and would likely result in a costs penalty, even if the claimant ultimately wins the case. The court has the power to transfer a case between courts on its own initiative if it believes the case has been started in the wrong venue.

### 3.3.3 The Strategic Implications of Court Choice

The choice of court has several practical consequences for the conduct of litigation.

1. **Costs**: The costs regime can differ. Generally, the costs of High Court litigation are higher due to the complexity of cases and the greater involvement of senior advocates. The cost of court fees for issuing a claim is also typically higher in the High Court.
2. **Procedure and judicial expertise**: The High Court, particularly its specialist courts like the Commercial Court or the Technology and Construction Court, offers procedures tailored to complex disputes. The judges are specialists who can manage heavy documentation, technical evidence, and nuanced legal arguments.
3. **Speed**: Counterintuitively, some cases in the High Court's specialist lists can progress more quickly than a complex case stuck in a busy County Court list. The court's active management in specialist tracks can ensure a swift and efficient path to trial.

In summary, understanding the court structure is the first step in litigation strategy. The solicitor must accurately assess the claim's value, subject matter, and complexity to identify the correct forum. This initial analysis protects the client from unnecessary cost and delay and ensures the case is heard in the most appropriate environment for a just resolution.

## 3.4 The County Court

The County Court is the workhorse of the civil justice system in England and Wales. It is the default court for the vast majority of civil claims, providing a local and accessible forum for

individuals and businesses to resolve their disputes. For a solicitor, a thorough understanding of its jurisdiction, procedures, and tracks is essential, as most early career litigation experience will be gained in this court.

### 3.4.1 The Scope of the County Court's Jurisdiction

A common misconception is that the County Court is only for small claims. Following the removal of its financial ceiling in 2014, the County Court now possesses unlimited jurisdiction in most areas of civil law. This means there is no upper financial limit on the value of a claim that can be issued in the County Court. It can handle a claim for £500 as readily as a claim for £50 million. However, while it has the power to hear any claim, the Civil Procedure Rules and the *Jurisdiction Order 1991* provide guidance on where a claim should be started. The general rule, as previously stated, is that claims under £100,000 should be commenced in the County Court.

The County Court's jurisdiction covers a wide range of matters, including but not limited to:

- Contract and tort claims (e.g., debt recovery, professional negligence, personal injury).
- Recovery of land and possession proceedings.Equity matters such as trusts and
- partnerships (up to a value of £350,000).
- Contentious probate proceedings (where the estate does not exceed £30,000).
- Discrimination cases under the *Equality Act 2010*.

### 3.4.2 The Track System: The Engine of Case Management

Once a defence is filed in a County Court claim, the court will allocate the case to one of three case management tracks: Small Claims, Fast Track, or Intermediate Track. A fourth track, the Multi Track, exists for the most complex cases, which are typically handled in the High Court but can also be managed in the County Court. The allocation decision is crucial as it dictates the procedure, timetable, and costs rules that will govern the case.

#### The Small Claims Track

This track is designed for straightforward, low value claims with a simple procedure intended to be accessible to litigants in person.

- **Financial scope**: Generally for claims with a value not exceeding £10,000. There are specific limits for certain claims; for example, personal injury and housing disrepair claims have a £1,000 limit.
- **Procedure**: The process is simplified. The standard procedure is for the court to hold a single, relatively informal hearing. The strict rules of evidence do not apply, and the judge takes an active role in managing the case.
- **Costs**: This is a critical feature. The general rule is that the winning party cannot recover their legal costs from the losing party. There are very limited exceptions, such as a fixed cost for issuing the claim and the costs of any expert evidence for which the court gave permission. This makes the Small Claims Track a high risk environment for incurring unrecoverable legal fees, and solicitors must advise clients accordingly.

**Example**: A consumer sues a builder for £3,000 for poor workmanship on a garden wall. This claim would be allocated to the Small Claims Track. If the consumer hires a solicitor and wins, they are unlikely to recover their solicitor's fees from the builder. The primary reward is the recovery of the £3,000, not the legal costs.

### The Fast Track

The Fast Track is designed for claims that are too valuable or complex for the Small Claims Track but which can still be dealt with justly by a streamlined procedure.

- **Financial scope**: For claims with a value of between £10,000 and £25,000.
- **Procedure**: The court will set a strict, simplified timetable. The key feature is that the trial itself is usually limited to a single day. Oral expert evidence is restricted, and the court will usually direct that expert evidence be given in a written report.
- **Costs**: The costs that the winner can recover from the loser are fixed for each stage of the process. This is known as "fixed costs" and is designed to provide certainty and control litigation costs. The solicitor must provide the client with a costs budget.

**Example**: A company sues a former customer for £18,000 in unpaid invoices. The case involves a simple dispute over whether the goods were delivered. It is allocated to the Fast Track. The court gives directions leading to a one day trial. The company's legal costs will be largely predictable due to the fixed costs regime.

### The Intermediate Track

A more recent introduction, this track is designed for straightforward cases of a higher value that do not require the full flexibility of the Multi Track.

- **Financial scope**: For claims with a value of between £25,000 and £100,000.
- **Procedure**: It applies a more streamlined procedure than the Multi Track, with stricter timetables and an early, fixed trial date or trial window. It is intended for cases that are not legally or factually complex, do not require extensive oral evidence, and can be tried in no more than three days.
- **Costs**: A fixed costs regime also applies to this track, providing cost certainty for the parties.

### The Multi Track

Any case that does not fit into the above tracks will be allocated to the Multi Track. This includes most cases in the County Court with a value over £100,000, and all cases of lower value that are particularly complex.

- **Procedure**: The procedure is flexible and tailored to the specific needs of the case. The judge will actively manage the case, often holding a Case Management Conference to decide on directions regarding disclosure, expert evidence, and the trial timetable. There is no fixed limit on the length of the trial.
- **Costs**: The costs are not fixed. The parties must file and exchange detailed costs budgets, which the court will then manage and approve. The winner can recover their reasonable costs from the loser, subject to detailed assessment if not agreed.

## 3.4.3 The County Court Business Centre

To handle the high volume of money claims, a centralised administrative unit known as the County Court Business Centre (CCBC) operates in Northampton. The CCBC is the default venue for issuing most specified money claims online or via paper forms. It provides an efficient, back office function for the bulk processing of claims, but the cases are still managed and heard in local courts across the country.

### 3.4.4 The Importance of the County Court for the Solicitor

For an aspiring solicitor, the County Court is the primary theatre of litigation. It is where fundamental skills are honed: drafting claims and defences, applying for interim orders, managing disclosure, and conducting trials and applications. Understanding its tracks and procedures is not merely academic; it is the bedrock of practical dispute resolution. Choosing the correct track and navigating its rules effectively is fundamental to providing competent, cost effective advice and achieving the best outcome for the client.

## 3.5 The High Court

The High Court of Justice stands as the senior civil court of first instance in England and Wales, dealing with cases of the highest value, complexity, and public importance. It serves as a vital forum for developing legal precedent and administering justice in serious and specialist matters. Unlike the County Court, which handles the bulk of standard litigation, the High Court's workload consists of cases that require particularly sophisticated judicial management or expertise. It is divided into three distinct administrative divisions, each with its own specialised jurisdiction and body of law.

1. **King's Bench Division (KBD)**

   This is the largest of the three divisions and functions as the modern successor to the historic common law courts. It possesses a very broad jurisdiction, handling a wide range of claims in contract and tort. Typical cases include high value professional negligence claims, serious personal injury and clinical negligence claims, major fraud, libel and slander, and significant breach of contract disputes. A defining feature of the KBD is that it also houses several renowned specialist courts within its umbrella. These include the Commercial Court, which deals with complex business disputes such as those concerning banking, insurance, and international trade; the Admiralty Court, which handles shipping and maritime matters; and the Technology and Construction Court (TCC), which specialises in technically complex disputes involving building, engineering, and information technology.

### 2. Chancery Division

This focuses on business, property, and equitable disputes. Its jurisdiction is rooted in the historical principles of equity, and it deals with matters that often require specialist judicial knowledge. Its core work includes intellectual property law, such as patents, trademarks, and copyright; company law, including shareholder disputes and corporate insolvency; partnerships and trusts; contentious probate; tax matters; and property law, including land disputes and mortgages. The judges of the Chancery Division are typically experts in these complex and often highly technical areas of law, ensuring that cases are decided with a deep understanding of the relevant legal principles.

### 3. The Family Division

This deals with the most complex and sensitive cases involving family relationships and children. Its work is of a profoundly personal and significant nature. Key responsibilities include overseeing complex financial disputes following the breakdown of a marriage or civil partnership, particularly where substantial assets are involved. It also has exclusive jurisdiction in cases concerning children, such as those involving international child abduction, permanent placement orders, and serious medical treatment decisions. Furthermore, the Family Division handles matters relating to marriage and civil partnerships, and it has an inherent jurisdiction to protect vulnerable adults. The work of this division requires a sensitive and careful approach, balancing legal rights with the welfare of children and families.

In summary, the High Court's tripartite structure ensures that the most challenging and significant civil cases are heard by judges with the appropriate level of expertise and in a forum equipped to manage their complexity. For a solicitor, understanding the specific focus of each division is crucial for issuing proceedings in the correct court and providing clients with the specialist advocacy their case demands.

## 3.6 Allocation of Business Between the High Court and County Court

The following table provides a simplified guide to where a claim should be issued.

| Type of Claim | Generally Start In | Reason |
|---|---|---|
| Personal Injury with value less than or equals to £100,000 | County Court | Handles the vast majority of such claims. |
| Personal Injury with value more than £100,000 | High Court (KBD) | Higher value and complexity. |
| Defamation | High Court (KBD) | Complexity and importance to reputation. |
| Most Contract & Tort claims with value less than £100,000 | County Court | Appropriate for the value. |
| Most Contract & Tort claims with value more than or equals to £100,000 | High Court | Presumed complexity and value. |
| Contentious Probate | High Court (Chancery) | Specialist jurisdiction. |
| Mortgage Possession | County Court | Standard procedure for most cases. |

## 3.7 The Jurisdiction of the Specialist Courts

Within the overarching structure of the High Court exist several specialist courts. These are not separate buildings but are distinct lists or courts within the King's Bench and Chancery Divisions, manned by judges who possess specific expertise. For a solicitor, understanding the precise remit of each specialist court is essential. Issuing a claim in the correct specialist court ensures that the case will be managed by a judiciary with deep experience in that area of law, leading to more efficient and informed case handling. The two most prominent

specialist courts for commercial and business disputes are the Commercial Court and the Technology and Construction Court.

### 3.7.1 The Commercial Court

The Commercial Court is a specialist court within the King's Bench Division. Its primary function is to resolve complex business disputes of a commercial nature, often involving significant sums of money and international parties. The judges of the Commercial Court are typically experienced in commercial law and adopt a flexible, robust approach to case management tailored to the needs of business.

#### Jurisdiction and Case Types

The Commercial Court hears a wide range of business disputes. Typical claims include those relating to:

- **Banking and financial services**: Disputes over loan agreements, derivatives, securities, and banking facilities.
- **Insurance and reinsurance**: Disputes concerning the interpretation of policies, coverage, and liability between insurers and reinsurers.
- **International trade**: Cases involving the carriage of goods by sea or air, commodities sales, and agency agreements.
- **Commercial fraud**: Complex claims involving allegations of deceit, conspiracy, and asset tracing.
- **Arbitration**: The court hears applications relating to arbitration, such as challenges to arbitral awards or the enforcement of awards.

#### Distinctive Procedures

The Commercial Court operates under its own guide, which supplements the *Civil Procedure Rules*. Its procedures are designed for efficiency in complex cases.

1. **The Claim Form**: Proceedings are started using a Part 7 Claim Form, which must be marked "Commercial Court" on the top right hand side.

2. **Case Management Conference (CMC)**: A CMC is held early on, where the judge will actively discuss and set a tailored timetable for the case with the legal representatives.
3. **Pre-trial review**: A hearing is held close to the trial date to ensure all preparations are complete.
4. **Flexible evidence**: The court is often more flexible than other courts regarding the admissibility of evidence, such as hearsay, if it is relevant and reliable.

**Example**: A UK commodity broker enters a contract to purchase one million barrels of oil from a Middle Eastern supplier. A dispute arises regarding the quality specification of the oil upon delivery. The contract contains a clause granting English courts jurisdiction. Given the high value, international nature, and specific expertise required in commodities trading, this claim would be appropriately issued in the Commercial Court.

### 3.7.2 The Technology and Construction Court (TCC)

The Technology and Construction Court (TCC) is also part of the King's Bench Division. It specializes in resolving disputes that involve technical or specialized evidence relating to the built environment, technology, and engineering. TCC judges are adept at managing cases that involve complex facts and multiple expert witnesses.

#### Jurisdiction and Case Types

The TCC's jurisdiction covers a broad spectrum of technically oriented disputes, including:

- **Construction and engineering**: Claims by and against builders, engineers, architects, and surveyors concerning defects, delays, and final account disputes.
- **Professional negligence**: Claims against construction professionals like architects and engineers.
- **Energy and utilities**: Disputes concerning power plants, water treatment facilities, and infrastructure projects.
- **Information technology**: Claims concerning the supply, implementation, and failure of software and hardware systems.

- **Environmental damage**: Cases involving land contamination and other environmental issues.

**Distinctive Procedures**

The TCC Guide outlines procedures that cater to technical disputes.

1. **The TCC Claim Form**: Proceedings are started using a Part 7 Claim Form marked "Technology and Construction Court".
2. **Early involvement of the judge**: A TCC judge will be assigned to the case from its outset, providing continuity and early strategic guidance.
3. **Management of experts**: The court places great emphasis on the controlled use of expert evidence. It will often direct that experts from opposing parties meet to identify agreed facts and narrow the issues in dispute, a process that saves considerable time and cost.
4. **Site inspections**: It is common for a TCC judge to conduct a physical visit to a building or site that is the subject of the dispute to better understand the evidence.

**Example**: A hospital authority sues the main contractor for the delayed and defective construction of a new wing. The case will involve detailed evidence from planning experts, architects, and structural engineers about the causes of delay and the nature of the defects. This is a classic TCC matter, as the judge will need to understand complex technical evidence to determine liability and quantum.

### 3.7.3 The Business and Property Courts of England and Wales

The Business and Property Courts (B&PCs) are not a single court but an umbrella organization that brings together several specialist courts and lists, including the Commercial Court and the TCC, under one heading. Established in 2017, the B&PCs are designed to provide a coherent and world leading centre for the resolution of business disputes.

**Structure and Purpose**

The B&PCs sit across both the King's Bench and Chancery Divisions. Their key purpose is to group together the various specialist jurisdictions to simplify the user experience and promote

cross fertilization of judicial expertise. The main specialist courts and lists within the B&PCs include:

- **From the King's Bench Division**: The Commercial Court, the Admiralty Court, and the Technology and Construction Court.
- **From the Chancery Division**: The Patents Court, the Companies Court, the Insolvency and Companies List, the Intellectual Property List, and the Property, Trusts and Probate List.

**Practical Implications for Solicitors**

The creation of the B&PCs means that a solicitor issuing a claim in, for example, the Commercial Court, will now issue it in the "Business and Property Courts of England and Wales, Commercial Court". This unified branding highlights the concentration of expertise available. Furthermore, the B&PCs have established hearing centres in major cities like Birmingham, Bristol, Cardiff, and Manchester, ensuring that high level specialist justice is accessible across the country, not just in London.

## 3.8 Practical Illustration: Choosing the Court

**Scenario 1**: A local builder sues a homeowner for non-payment of £25,000 for a house extension.

**Analysis**: This is a straightforward contract claim with a value below £100,000. It does not involve complex points of law.

**Decision**: The claim should be issued in the County Court.

**Scenario 2**: A UK bank is pursuing a claim for £50 million against a shipping company for fraud relating to a complex international shipping finance agreement.

**Analysis**: The value is very high, the subject matter is complex and commercial, and it likely involves allegations of fraud and international elements.

**Decision**: The claim should be issued in the High Court, specifically in the Commercial Court, which is designed for such disputes.

**Scenario 3**: A software developer is in a dispute with a client over a failed £750,000 IT system implementation. The core issue is whether the failure was due to faulty software or the client's poor infrastructure.

**Analysis**: The value is significant, and the dispute is highly technical, turning on expert evidence about software performance and systems integration.

**Decision**: The claim should be issued in the High Court, specifically in the Technology and Construction Court (TCC).

## 3.9 Conclusion

Determining the applicable law and selecting the correct court are fundamental steps that set the trajectory for the entire litigation process. A solicitor must carefully analyse the contractual and factual matrix of the dispute, its financial value, and its subject matter complexity. Making the correct choices at this stage demonstrates professional competence, ensures procedural efficiency, and protects the client's interests from the very outset. Failure to do so can lead to unnecessary cost, delay, and strategic disadvantage.

# 4

# SERVICE OF PROCEEDINGS AND RESPONDING TO A CLAIM

Issuing a claim at the court office is a major step, but it is not enough to start the litigation clock against the defendant. For the case to truly begin, the defendant must be officially notified. This process is called service. This chapter explains the crucial rules for getting the claim form and other documents to the other side correctly, both within England and Wales and abroad. We will then explore the options available to a defendant who receives a claim, from admitting it to fighting it, and the serious consequences of doing nothing. Finally, we will cover how to end a case early, whether by giving up the claim or recording a settlement.

## 4.1 Service of the Claim Form within the Jurisdiction

### 4.1.1 The Fundamental First Step: Notifying the Defendant

Once a claim form has been issued by the court, it holds the power to formally commence proceedings. However, that power remains dormant until the defendant is made aware of the case against them. The act of delivering the claim form and accompanying documents to the defendant is known as service. This is not a mere administrative task; it is a foundational step that engages the court's authority over the parties. Failure to serve correctly can invalidate the entire proceeding, wasting time and costs and potentially allowing a limitation period to expire. The rules governing service within England and Wales are primarily set out in *Civil Procedure Rules (CPR) Part 6*.

### 4.1.2 The Key Players: Who is Responsible for Service?

The CPR places the responsibility for service squarely on the claimant. While the court can serve the claim form, this is the exception rather than the rule. The claimant, typically through their solicitor, will usually undertake service to maintain control over the process. This control is crucial for timing, especially when navigating the delicate balance between issuing a claim form to meet a limitation deadline and having sufficient time to prepare the Particulars of Claim.

### 4.1.3 The Approved Methods of Service

The rules provide a clear list of permitted methods for serving a claim form on a defendant within England and Wales. Using an unapproved method is invalid, no matter how effectively it might have brought the claim to the defendant's attention.

1. **Personal Service**

   This is the most direct and historically traditional method. It involves physically handing a copy of the claim form to the defendant. The rules specify that if the defendant is an individual, you can leave the document with them personally. If the defendant is a company or other corporation, you can leave it with a person holding a senior position, such as a director, treasurer, company secretary, chief executive, or manager. Personal service provides the highest degree of certainty and proof of delivery.

2. **First Class Post**

   This is a very common and cost effective method. The claim form is sent by first class post to the defendant's address. The correct address is critical. For an individual, this is their usual or last known residence. For a company, this is its registered office address. A quick check on the Companies House website is essential to confirm the correct address.

   If the defendant has provided an address for service, such as their solicitor's business address, then that is the correct address to use.

3. **Document Exchange (DX)**

If the defendant's solicitor has a documented document exchange number, the claim form can be left at that DX box. This is a reliable and efficient method for communication between law firms.

**4. Other Permitted Methods**

This includes leaving the document at a specified place (as contractually agreed between the parties) or, by prior agreement, via fax or email. However, service by email is only valid if the party has explicitly stated in writing that they will accept service by email and has provided the email address.

### 4.1.4 The Certificate of Service: Proving You Did It

After serving the claim form, you must be able to prove that you complied with the rules. This is done by completing and filing a Certificate of Service (Form N215). This is a simple but vital document. It acts as your formal evidence to the court that service has been effected. The certificate must state:

- The date of service.
- The method of service used.
- The address to which the document was sent or delivered.
- If served personally, details of the person it was handed to.

Filing this certificate with the court completes your obligation and creates a formal record. Without it, you may struggle to prove that the defendant was properly served if they later deny receipt.

**Practical Illustration: Serving a Company**

Imagine your client has a claim against "XYZ Manufacturing Ltd." You issue the claim form and now need to serve it. You first check Companies House and find that the registered office of XYZ Manufacturing Ltd is "100 Industrial Park, Birmingham."

You decide to use first class post. You print the claim form and post it in a first class envelope to "The Registered Office, XYZ Manufacturing Ltd, 100 Industrial Park, Birmingham."

The same day, you complete a Certificate of Service stating: "I served the Claim Form on the Defendant by first class post on 1st May 2024, addressed to its registered office at 100 Industrial Park, Birmingham." You file this certificate at the court.

You have now validly served the company. The deemed date of service will be two business days later, which starts the clock for the defendant's response.

### 4.1.5 Common Pitfalls and How to Avoid Them

**Using the wrong address**: Always verify the defendant's address. For individuals, use their usual residence. For companies, always use the registered office from Companies House, not a trading address.

**Using an unapproved method**: Do not serve via social media, WhatsApp, or other informal digital channels unless you have a specific court order permitting it.

**Forgetting the certificate of service**: This is a common administrative error. Make it a habit to complete and file the certificate immediately after service.

Service within the jurisdiction is a strict process that demands attention to detail. By following the prescribed methods and meticulously documenting your actions, you ensure the proceedings are validly commenced and can proceed without unnecessary procedural challenges.

## 4.2 Service of the Claim Form Outside the Jurisdiction: With and Without Permission

The English court's authority does not automatically extend beyond the borders of England and Wales. Therefore, serving a claim form on a defendant located in another country, whether in Scotland, France, or the United States, is a more complex process that requires careful justification. This area of law involves questions of international comity, ensuring that the English court is the appropriate forum for the dispute and that the defendant's rights are respected. The rules for service abroad are strict, and getting them wrong can be fatal to a claim.

### 4.2.1 The Foundational Principle: Establishing Jurisdiction

Before considering how to serve, you must first establish that the English court has the power to hear the case against a foreign defendant. This is known as establishing jurisdiction. The rules differ depending on whether the UK's post-Brexit regime applies or if the defendant is in an EU member state (where the *Lugano Convention* may apply). For most cases, the key is to fit your claim into one of the recognized "gateways" for service out of the jurisdiction.

### 4.2.2 Service Without the Court's Permission

In certain clear-cut situations, you are permitted to serve a claim form abroad without first making an application to the court. This is governed by *CPR 6.33* and *Practice Direction 6B*. The claimant must be able to state that the court has the power to hear the claim under an applicable jurisdictional statute or treaty, and that no part of the claim is for a tort (e.g., negligence) where the damage was sustained within the jurisdiction.

More commonly, service without permission is allowed under *CPR 6.32 and 6.33* where the defendant is within another part of the UK (Scotland or Northern Ireland) or another party to the proceedings has been validly served within the jurisdiction.

The crucial point is that the claimant's solicitor must file a certificate stating the grounds on which they are entitled to serve out of the jurisdiction. This is a professional responsibility that should not be taken lightly.

### 4.2.3 Service With the Court's Permission: The Gateways and the Test

If you cannot serve without permission, you must apply to the court for an order granting permission to serve the claim form outside the jurisdiction. This is a critical and often contested step. Your application must demonstrate that your claim falls within one or more of the specific "gateways" listed in *Practice Direction 6B*.

**Examples of Key Gateways**

- **Gateway 1**: A claim made for a contract that was made within the jurisdiction. For example, a contract signed in London with a US company.

- **Gateway 2**: A claim made for a contract governed by English law. The contract itself may state that it is subject to English law.
- **Gateway 3**: A claim made for a breach of contract committed within the jurisdiction. For instance, failure to pay money due under a contract to a bank account in England.
- **Gateway 4**: A claim made in tort where the damage was sustained within the jurisdiction. For example, a defective product manufactured abroad causes injury to a consumer in England.
- **Gateway 5**: A claim made for a remedy against a person domiciled within the jurisdiction.
- **Gateway 7**: A claim made against a person on whom the claim form has been or will be served and there is a real issue between the claimant and that defendant which it is reasonable for the court to try. This is a useful gateway for multiple defendants.

### The Three Stage Test for Permission

Simply fitting into a gateway is not enough. The court has a discretion and will only grant permission if you satisfy a three stage test established by case law, notably in ***Seaconsar Far East Ltd v Bank Markazi Jomhouri Islami Iran*** [1994] 1 AC 438:

1. The Claimant must show a serious issue to be tried on the merits. This is a low threshold. You do not need to prove your case, only that there is a real and substantial question of fact or law that merits a trial.
2. The Claimant must show a good arguable case that the claim falls within one or more of the gateways. This standard is higher than a mere issue to be tried. It means that your argument that the gateway applies is better than the defendant's argument that it does not.
3. The Claimant must show that England and Wales is the proper place in which to bring the claim. This is known as the *forum conveniens* test. You must convince the court that England is clearly the most appropriate and natural forum for the dispute, considering factors such as where the parties are based, where the evidence is located, the applicable law, and the convenience and expense of holding a trial here.

### 4.2.4 The Application Process for Permission

The application for permission is made without notice to the defendant (ex parte). You must support it with evidence, usually in the form of a witness statement, which:

- Sets out the facts of the case.
- Identifies the relevant gateway(s) and explains why the claim falls within it.
- Confirms that the claimant believes they have a reasonable prospect of success.
- Explains why England is the proper forum.

The court will review your papers. If permission is granted, you will then have to serve the claim form, along with the order giving permission, on the defendant using the method specified by the court, which may involve using international service channels.

### 4.2.5 The Overriding Objective: Ensuring Effective Service

The case of ***Abela v Baadarani*** [2013] UKSC 44 is highly significant. The Supreme Court held that the ultimate question when considering the validity of service, particularly under alternative methods or in foreign contexts, is whether the method used was one that could reasonably be expected to bring the claim form to the attention of the defendant. While the rules must be followed, the court has a discretion to validate service that was technically defective if it was, in substance, effective. This reflects the modern, pragmatic approach of the CPR.

### Practical Consequences and Strategic Considerations

Attempting to serve a claim form outside the jurisdiction is a high-stakes procedural step. If you get it wrong, and serve without permission when it was required, or fail to properly establish the gateway and the proper forum, the service will be invalid. The defendant can apply to set it aside, and the court may dismiss the claim, potentially leaving your client with no recourse if the limitation period has expired.

Therefore, the strategy for serving a foreign defendant should always be:

- **Analyse meticulously**: Determine if you can serve without permission. If in any doubt, err on the side of caution and apply for permission.

- **Build a compelling evidential case**: For a permission application, your witness statement must be thorough and persuasive, addressing all three stages of the test.
- **Consider the practicalities**: Research how service is to be effected in the foreign country, as this may require translation of documents and adherence to that country's legal assistance procedures.

Summarily, service outside the jurisdiction is a complex but essential tool for cross-border litigation. It requires a deep understanding of jurisdictional rules, careful drafting, and a strategic approach to satisfy the court that it is both entitled and appropriate to seize jurisdiction over a foreign defendant.

## 4.3 Deemed Dates of Service and Time Limits

In the practical world, we know that a letter sent by first class post might arrive the next day, or it might take three days. In the world of civil procedure, such uncertainty is unacceptable. The court requires absolute certainty to calculate deadlines fairly for all parties. To achieve this, the *Civil Procedure Rules* (CPR) operate on the basis of "deemed" dates of service. A deemed date is a fixed date prescribed by the rules, regardless of when the document was actually received by the other party. This legal fiction creates a clear and predictable timetable for the entire litigation process.

Understanding deemed dates is not an academic exercise; it is a fundamental practice skill. Miscalculating a deemed date can lead to missing a critical deadline, which can have severe consequences, including your client's claim being struck out or a default judgment being entered against them.

### 4.3.1 The General Rule and the Deemed Service Table

The general principle is that a document is deemed served on a date specified by the rules based on the method of service used. The details are conveniently set out in a table within *CPR 6.14*, but the core concepts can be broken down simply.

For the key documents that start a claim; the Claim Form and the Particulars of Claim, the deemed dates are as follows:

- **Personal service**: The document is deemed served on the day it is physically handed to the defendant. If you hand the claim form to the defendant on a Tuesday, it is deemed served on that Tuesday.
- **First class post, document exchange (DX), or other service which relies on delivery to a physical address**: The document is deemed served on the second business day after it was posted, left with the DX, or deposited. Business days are any day except Saturdays, Sundays, and Bank Holidays.

**Example**:

If you post a Claim Form on a Monday, it is deemed served on Wednesday. If you post it on a Friday, it is deemed served on the following Tuesday (assuming no Bank Holiday).

- **Email, fax, or other electronic means**: The document is deemed served on the first business day after it was transmitted. This rule only applies if the recipient has agreed in writing to accept service by this method.

**Example**: If you email a document (to a solicitor who has agreed to service by email) at 5 PM on a Thursday, it is deemed served on Friday.

### 4.3.2 Why Deemed Dates are Critical: The Cascade of Deadlines

The deemed date of service of the Particulars of Claim is the most important trigger in the early stages of a case. It sets in motion a cascade of strict deadlines for the defendant.

The key deadline is for the filing of the Defence. The basic rule is that a defendant must file a Defence within 14 days of the deemed date of service of the Particulars of Claim.

However, a defendant can extend this deadline by filing an Acknowledgment of Service. If they file an Acknowledgment of Service, the time for filing a Defence is extended to 28 days from the deemed date of service of the Particulars of Claim.

Let us illustrate this with a concrete example:

Day 0 (Monday): The claimant's solicitor posts the Particulars of Claim to the defendant by first class post.

Deemed Date of Service (Wednesday): The Particulars of Claim are deemed served on the second business day after posting.

Deadline for Acknowledgment of Service (Day 14, Wednesday): The defendant has 14 days from the deemed date of service to file an Acknowledgment of Service. This falls on a Wednesday, two weeks later.

Deadline for Defence (Day 28, Wednesday): Because the defendant filed an Acknowledgment of Service, they now have 28 days from the deemed date of service to file their Defence. This falls on a Wednesday, four weeks from the deemed date.

If the defendant had done nothing, the claimant could have applied for a default judgment after the initial 14-day period for filing a Defence had passed.

### 4.3.3 The Rationale Behind the Fiction: Certainty Over Reality

The principle of deemed service was firmly established in the case of ***Kaki v A-G of Hong Kong*** [2018] EWCA Civ 209. The court emphasized that the rules provide certainty and clarity. It does not matter if the defendant was on holiday and did not actually receive the document until a week later; the clock starts ticking from the deemed date. This prevents a party from causing delay by simply avoiding receipt of documents. The system is designed to be objective and predictable.

**Practical Application and a Word of Caution**

For a solicitor, this means you must:

1. Always calculate the deemed date immediately after serving a document.
2. Diarise all resulting deadlines meticulously. Use your firm's central diary system to track the 14-day and 28-day deadlines from the deemed date.
3. Advise your client clearly on these deadlines, especially if they are the defendant.

A common pitfall is assuming the date of actual receipt is what matters. It is not. If you serve a Claim Form by post on the 1st of the month, and the defendant receives it on the 2nd, you must still use the 3rd (the second business day) as your start date for calculating the defendant's response time.

The doctrine of deemed service is a cornerstone of efficient case management. It replaces the chaos of real-world delivery with the order of a legal construct, ensuring that every party in litigation knows exactly where they stand and when they must act.

## 4.4 Service by an Alternative Method

The standard methods of service are designed for straightforward situations. But what happens when a defendant is actively evading service, their whereabouts are unknown, or the prescribed methods are impossible to use? The rigidity of the standard rules could prevent a legitimate claim from being pursued. To address this, the *CPR* provides a safety valve. Under *CPR 6.15*, the court has the power to grant an order permitting service by an "alternative method." This is a discretionary remedy that allows the claimant to use a non-standard method to bring the claim form to the defendant's attention.

### 4.4.1 The Legal Test: Establishing a "Good Reason"

The court will not grant an order for alternative service simply because it is more convenient for the claimant. The claimant must satisfy the court that there is a "good reason" to make such an order. The classic definition of a "good reason" comes from the pre-CPR case of ***Abbey National plc v Arthur*** [2001] EWCA Civ 1722, which remains good law. It established that a good reason exists where the claimant has taken reasonable steps to effect service by the standard methods but has been unable to do so, or where there is a real prospect that the alternative method will be effective.

In practice, the court's inquiry focuses on two key questions:

- Has the claimant made reasonable efforts to serve using the permitted methods?
- Is the proposed alternative method likely to bring the document to the attention of the defendant?

### 4.4.2 The Modern Interpretation: The Overriding Objective and Effectiveness

The modern leading authority on this subject is the Supreme Court decision in ***Abela v Baadarani*** [2013] UKSC 44. This case significantly developed the law by placing a greater

emphasis on the overriding objective. The Supreme Court held that while the historical approach was to see alternative service as an exceptional remedy, the *CPR* requires a more flexible and pragmatic approach.

The court in ***Abela*** stated that the most important factor is whether the proposed method of service is likely to enable the defendant to become aware of the contents of the claim form and the nature of the claims against them. If the method is effective in achieving this goal, this will often be a "good reason" to validate it, even if the claimant has not exhausted all other possible methods of standard service.

### 4.4.3 Contrasting Approaches: The Lesson from Barton

However, the power is not unlimited. The case of ***Barton v Wright Hassall LLP*** [2018] UKSC 12 serves as a crucial warning. In this case, Mr. Barton, a litigant in person, emailed the claim form to the defendant's solicitors. He had not obtained their prior agreement to accept service by email, so this was not a permitted method. He applied to the court to validate this service as an alternative method.

The Supreme Court refused. It held that the fact the solicitors had actually received the email was not, by itself, a "good reason" to validate the service. The court stressed that the rules exist for good reason and must be followed. A party cannot simply choose their own method of service and then ask for it to be validated after the fact, especially when they could have easily used a permitted method. The key distinction from ***Abela*** was that in ***Barton***, the claimant had not encountered any practical difficulty in serving by a permitted method; he had simply chosen the wrong one.

The lesson is clear; the court will help parties who face genuine practical obstacles, but it will not rescue those who simply ignore the rules.

### 4.4.4 Common Scenarios for Alternative Service

Applications for alternative service are typically granted in the following situations:

- **Evasive defendants**: Where the defendant is avoiding personal service at their known address.

- **Unknown addresses**: Where the defendant's current address is unknown, but they can be reached through other means, such as a known email address or social media profile.
- **Service on a third party**: Where it is impracticable to serve the defendant directly, but service on a family member, business associate, or agent is likely to bring the claim to their attention.
- **Service by social media**: In very modern contexts, courts have permitted service via direct message on professional networking sites like LinkedIn where this is a reliable way to contact the defendant.
- **Service by advertisement**: In extreme cases, where no other method is available, the court may order service by an advertisement in a newspaper.

### 4.4.5 The Application Process

To apply for an order for alternative service, the claimant must make an application without notice to the defendant (an ex parte application). The application must be supported by a witness statement that provides clear evidence demonstrating:

- The steps already taken to try to serve by a permitted method.
- Why those steps have failed or are likely to fail.
- Why the proposed alternative method is likely to be effective in bringing the documents to the defendant's attention.
- The proposed alternative method is clearly defined.

If the order is granted, the claimant must then serve the claim form in the manner specified by the court. The date of service will then be determined in accordance with the court's order, which will specify how the date of service is to be calculated.

## 4.5 Responding to a Claim: Admitting, Defending, and Acknowledging Service

Upon being served with a Claim Form and Particulars of Claim, a defendant stands at a procedural crossroads. The choices made at this stage will define the entire future of the case.

Ignoring the claim is not an option; it leads directly to default judgment. The Civil Procedure Rules provide three clear pathways for a defendant: admit the claim, defend it, or acknowledge service to gain more time. Understanding the implications of each option is fundamental to providing competent legal advice.

### 4.5.1 Option 1: Admitting the Claim

If the defendant accepts that they are legally liable for all or part of the claimant's demand, they should file an Admission. This is done using Form N9A. An admission can be for the entire claim or for a specified part of it. This is a pragmatic step that can save significant legal costs and bring the dispute to a swift conclusion.

The process for admission is straightforward. The defendant completes the form, stating what they admit and why. If they admit the whole claim, the claimant can request judgment to be entered. If the defendant admits only part of the claim, the court will decide on the remainder.

A key feature of the admission process is the ability to propose payment terms. A defendant who admits a money claim but cannot pay the full amount immediately can ask the court to order payment by instalments. The court will consider the defendant's financial circumstances, presented in a statement of means on the admission form, to decide on a fair repayment schedule.

**Example**: A claimant sues for a £5,000 debt. The defendant admits the claim but is on a low income. They file an admission form proposing to pay £100 per month. The court can enter judgment on this basis, providing a manageable solution for the defendant while ensuring the claimant receives their money.

### 4.5.2 Option 2: Filing a Defence

If the defendant disputes the claim in its entirety, they must file a Defence. This is a formal, written document that responds to the allegations set out in the Particulars of Claim. Filing a Defence signals the defendant's intention to contest the case and sets the stage for a trial.

The deadline for filing a Defence is crucially important. The general rule is that a Defence must be filed within 14 days of the deemed date of service of the Particulars of Claim. This is a strict deadline. Failure to meet it allows the claimant to seek a default judgment.

A Defence must be more than a simple denial. It should address each allegation in the Particulars of Claim paragraph by paragraph, stating clearly whether it is admitted, denied, or if the defendant requires the claimant to prove it. The Defence should also set out the defendant's own version of events and any positive legal defences they wish to rely on, such as limitation, contributory negligence, or voluntary assumption of risk.

### 4.5.3 Option 3: Acknowledging Service

The Acknowledgment of Service, using Form N9, is a procedural tool that provides the defendant with vital breathing space. It does not indicate whether the defendant admits or denies the claim. Its sole purpose is to notify the court and the claimant that the defendant has received the claim and intends to respond.

The primary benefit of filing an Acknowledgment of Service is that it extends the time for filing a Defence. When a defendant files an Acknowledgment of Service, the deadline for filing the Defence is extended from 14 days to 28 days from the deemed date of service of the Particulars of Claim.

This extension is invaluable. It gives the defendant and their solicitor time to take detailed instructions, investigate the facts, gather evidence, and seek expert advice if necessary, before committing to a formal Defence. It is a standard and recommended step in almost all defended claims.

**Practical scenario**: A company director is served with a complex professional negligence claim. The allegations are serious and require a thorough review of old files and correspondence. Instead of rushing to prepare a Defence within 14 days, the director's solicitor immediately files an Acknowledgment of Service. This grants them an additional two weeks to conduct a proper investigation and draft a robust and well considered Defence.

### 4.5.4 The Consequences of Inaction

The worst thing a defendant can do is nothing. If a defendant fails to file either an Admission, a Defence, or an Acknowledgment of Service within the specified time limit, the claimant is entitled to request a default judgment. This is a judgment in favour of the claimant without a trial and without the court considering the merits of the defendant's case. Setting aside a default judgment is possible but not guaranteed, and it can be a costly and stressful process. Therefore, the first duty of a solicitor for a defendant is to diarise the response deadline and ensure one of these three steps is taken promptly.

The initial response to a claim is a decisive moment. The choice between admission, defence, or acknowledgment will shape the litigation strategy, costs, and potential outcomes. A solicitor must guide their client through these options with a clear understanding of both the procedural rules and the client's best interests.

## 4.6 Filing a Defence and Counterclaim

The Defence is the defendant's formal answer to the claimant's case. It is the foundational document upon which the entire defence will be built. A well drafted Defence clearly defines the issues in dispute, avoids unnecessary cost, and can even promote settlement. A poorly drafted Defence, full of vague denials, frustrates the court and fails to provide the claimant with proper notice of the case they have to meet.

### 4.6.1 The Structure and Content of a Defence

The Defence must follow a logical structure, directly responding to the claimant's Particulars of Claim. The rules require the defendant to set out, in a concise and clear manner:

1. **Response to allegations**: The defendant must go through the Particulars of Claim paragraph by paragraph. For each allegation, the Defence must state whether it is:
    - **Admitted**: The defendant agrees the allegation is true.
    - **Denied**: The defendant contends the allegation is not true. The defendant must state their reasons for the denial and set out their own version of the facts if it differs from the claimant's.

- **Neither admitted nor denied**: The defendant requires the claimant to prove the allegation. This is typically used when the defendant does not have knowledge of a particular fact and cannot properly admit or deny it.

2. **Positive case**: If the defendant's version of events is different from the claimant's, the Defence must set out that positive case. For example, if the claimant alleges a contract was made on the 1st of January, but the defendant says it was made on the 15th of January, the Defence must clearly state this.
3. **Legal defences**: The Defence must raise any specific legal defences on which the defendant relies. These are legal reasons why, even if the claimant's facts are true, the claim should not succeed. Common examples include:
    - **Limitation**: Arguing the claim was brought after the expiry of the relevant limitation period.
    - **Contributory negligence**: In a negligence claim, arguing that the claimant's own carelessness contributed to their loss, which can reduce the damages payable.
    - ***Volenti non fit injuria***: Asserting that the claimant voluntarily accepted the risk of the harm that occurred.
    - **Exclusion or limitation clauses**: Relying on a term in a contract that limits or excludes liability.

### 4.6.2 The Statement of Truth

Like the Particulars of Claim, the Defence must be verified by a Statement of Truth. This is a declaration at the end of the document stating: "I believe the facts stated in this Defence are true." It must be signed by the defendant or their legal representative. The Statement of Truth is crucial. It imposes a duty of honesty on the party and proceedings for contempt of court can be brought against a person who signs a Statement of Truth without an honest belief in the truth of its contents.

### Example of a Defence Paragraph

To illustrate, imagine a claim for damages for a faulty car.

Particulars of Claim, Paragraph 3: "On 1st March 2024, the Defendant sold the Claimant a blue family car, registration AB12 CDE, for £8,000."

Defence, Paragraph 3: "Paragraph 3 is admitted."

Particulars of Claim, Paragraph 4: "At the time of sale, the Defendant orally guaranteed that the car was in perfect mechanical condition and had a full service history."

Defence, Paragraph 4: "Paragraph 4 is denied. It was expressly agreed between the parties that the car was sold 'as seen' and no representations or guarantees as to its condition were made by the Defendant. The Claimant was advised to have the car independently inspected before purchase, which he declined to do."

Particulars of Claim, Paragraph 5: "The car's engine seized on 10th March 2024 due to a pre-existing fault, requiring a replacement engine at a cost of £2,500."

Defence, Paragraph 5: "The Defendant has no knowledge of the events of 10th March 2024 and requires the Claimant to prove them. If, which is denied, the engine did seize, it was not due to any pre-existing fault for which the Defendant is responsible."

### 4.6.3 Filing a Counterclaim

A Counterclaim is a claim brought by the defendant against the claimant. It is not merely a defence; it is a separate cause of action that the defendant chooses to pursue within the same proceedings. It is, in effect, the defendant suing the claimant.

A Counterclaim must be included in the same document as the Defence. The document should be titled "Defence and Counterclaim." The Counterclaim section should be structured just like a Particulars of Claim, setting out the facts, the cause of action, and the loss suffered by the defendant.

**Scenario**: A builder (claimant) sues a homeowner (defendant) for £10,000 in unpaid fees for a kitchen renovation. The homeowner's Defence may argue that the work was defective and incomplete. The homeowner can also file a Counterclaim against the builder for the cost of hiring another contractor to rectify the poor work, claiming £5,000.

When a Counterclaim is filed, the claimant is then required to file a Defence to Counterclaim. This creates a single piece of litigation with two intertwined claims, which the court will manage and, if necessary, try together. This promotes efficiency and ensures all related disputes between the parties are resolved in one go.

The Defence is the defendant's opportunity to tell their side of the story in a formal and structured way. A carefully drafted Defence, which may be coupled with a Counterclaim, sets the parameters of the legal battle and is the first active step in challenging the claimant's case.

## 4.7 Disputing the Court's Jurisdiction

A defendant who believes that the English court should not hear the case has a powerful procedural tool at their disposal: they can challenge the court's jurisdiction. This is not a defence on the merits of the claim. Instead, it is an argument that the English court is not the correct or appropriate forum to decide the dispute. Such challenges are common in international cases but can also arise in domestic disputes, for example where the parties have a contract that specifies disputes must be resolved by arbitration.

The process for challenging jurisdiction is strict and must be followed precisely. It is governed by *CPR Part 11*. A misstep can result in the defendant losing the right to challenge and being deemed to have submitted to the court's authority.

The first critical step is that the defendant must not file a Defence. Filing a Defence constitutes a submission to the jurisdiction, meaning the defendant accepts the court's power to hear the case. Instead, the defendant must take the following two steps within the time limit for filing a Defence.

First, the defendant must file an Acknowledgment of Service (Form N9). When doing so, they must tick the box that indicates they intend to challenge the court's jurisdiction. This action preserves their right to make the challenge without submitting to the court's authority.

Second, within 14 days of filing the Acknowledgment of Service, the defendant must make an application to the court. This application must be supported by evidence, usually in the form of a witness statement, which sets out the grounds for the challenge. The grounds could

include, for example, that the defendant is domiciled in another country, that the contract contains an exclusive jurisdiction clause in favour of a foreign court, or that the parties agreed to arbitration.

The court will then list a hearing to determine the jurisdictional issue. At this hearing, the burden is on the claimant to show that the court has jurisdiction. The defendant will argue that it does not. If the defendant is successful, the court will set aside the claim form and service of it, and the claim will not proceed in England. If the defendant loses, the court will give directions for the filing of a Defence.

The case of ***AES Ust-Kamenogorsk Hydropower Plant JSC v Ust-Kamenogorsk Hydropower Plant JSC*** [2011] EWCA Civ 647 demonstrates the importance of this procedure. The Court of Appeal upheld the principle that where parties have agreed to arbitrate, a party can seek an anti-suit injunction from the English court to restrain the other party from pursuing litigation in a foreign court, even if no arbitration proceedings are ongoing. This reinforces the value of a well-timed jurisdictional challenge to uphold contractual dispute resolution mechanisms.

## 4.8 Default Judgment: Entering and Setting Aside

Default judgment is a mechanism that allows a claimant to obtain a judgment without a trial when a defendant fails to respond to a claim. It is a crucial part of the civil justice system, ensuring that claimants are not prejudiced by a defendant's inactivity. However, because it decides a case without considering the merits, the rules surrounding it are carefully balanced.

A claimant can enter a default judgment if the defendant has failed to file an Acknowledgment of Service or a Defence within the specified time limits. The process for obtaining a default judgment depends on the type of claim.

For a money claim where the amount is specified, the process is usually administrative. The claimant simply files a request for judgment (Form N205) and the court office will enter the judgment. For claims where the amount is not specified, or for non-money claims, the claimant must make an application to the court for judgment to be entered.

There are, however, situations where a claimant cannot obtain a default judgment without the court's permission. These include claims against children or protected parties, claims where the defendant is based outside the jurisdiction, and claims for delivery of goods subject to an agreement regulated by the *Consumer Credit Act*.

The entry of a default judgment is not necessarily the end of the matter. The court has a discretionary power to set aside a default judgment under *CPR 13.3*. The court may set aside a judgment if either of two conditions is met. First, if the defendant has a real prospect of successfully defending the claim. Second, if there is some other good reason why the judgment should be set aside or the defendant should be allowed to defend the claim.

In considering an application, the court will also look at whether the defendant applied to set aside the judgment promptly. The modern approach to such applications is guided by the principles in ***Denton v T H White Ltd*** [2014] EWCA Civ 906, a case concerning relief from sanctions. The court will consider the seriousness of the failure, the reason for the failure, and all the circumstances of the case to deal justly with the application.

For example, if a defendant missed the deadline to file a Defence because their solicitor was ill and they can show a compelling defence to the claim, the court is likely to set the judgment aside. However, if the defendant has no real defence and offers no good reason for the delay, the judgment will likely stand. The court's overarching goal is to decide cases on their merits where possible, but not to rescue parties who have been careless or indifferent to court rules.

## 4.9 Discontinuance and Recording Settlement

Not all claims proceed to a final judgment. Many are concluded early, either because the claimant decides not to continue or because the parties reach an agreement. The *CPR* provides clear mechanisms for these outcomes.

A claimant may decide to discontinue their claim for various reasons. New evidence may have emerged that weakens their case, or the cost of continuing may outweigh the potential benefit. The process for discontinuing a claim is set out in *CPR Part 38*. The claimant does this by serving a Notice of Discontinuance on all other parties and filing a copy with the court. This brings the claim to an end.

However, discontinuance is not cost-free. Unless the parties agree otherwise, the claimant who discontinues is liable to pay the defendant's costs of the proceedings up to the date of discontinuance. This is a default rule based on the principle that the defendant has been put to the expense of defending a claim that has now been abandoned.

A more common and positive conclusion to litigation is a settlement. When parties settle, it is vital that the terms of their agreement are recorded in a legally binding and enforceable way. There are two principal methods for doing this through the court.

The first is a Consent Order. The parties can ask the court to make an order that reflects the terms of their settlement. This might be a simple order that the claim is dismissed, or it might contain more detailed terms.

The second, and often more effective method for complex settlements, is a *Tomlin Order*. This is a specific type of consent order. Its unique feature is that it stays (pauses) the court proceedings while the detailed terms of the settlement are set out in a confidential schedule. The main body of the order is public, but the schedule remains private.

The great advantage of a *Tomlin Order* is its enforceability. If one party breaches the terms of the settlement, the other party does not need to start a new claim for breach of contract. They can simply apply to the court to enforce the terms of the *Tomlin Order*, asking the court to lift the stay and implement the agreed terms. This provides a swift and cost-effective remedy for a breach of settlement.

For instance, in a commercial dispute that settles on confidential terms including a payment plan and a public apology, a *Tomlin Order* is the ideal vehicle. The public record shows only that the case has been stayed. If the paying party then misses a payment, the receiving party can quickly return to court to enforce that obligation without the delay of new proceedings.

These procedural tools for disputing jurisdiction, managing default, and concluding cases provide a flexible framework that supports both the efficient administration of justice and the fair resolution of disputes. Understanding when and how to use them is a key skill for any litigation solicitor.

## 4.10 Conclusion

- Service is the formal process of notifying the defendant of the claim. It must be done correctly using prescribed methods, and deemed dates are used to calculate deadlines.
- Serving a claim form outside the jurisdiction is complex and may require the court's permission based on specific legal "gateways."
- A defendant must respond by admitting, defending, or acknowledging service. Failure to do so can lead to a default judgment.
- A Defence must respond to each allegation and can be accompanied by a Counterclaim.
- A defendant can challenge the court's jurisdiction but must follow the strict CPR Part 11 procedure.
- A default judgment can be set aside if the defendant has a real prospect of a successful defence.

Cases can end early by discontinuance (with cost consequences) or by a recorded settlement, often using a Tomlin Order.

# 5

# DRAFTING AND MANAGING STATEMENTS OF CASE

Statements of case are the blueprints of civil litigation: they define the dispute, set the issues the court must decide, and tell each party the case they must meet. Through documents such as the claim form, particulars of claim, defence, and reply, the pleadings frame liability, causation, and loss, enabling judges to manage proceedings efficiently under the overriding objective.

For example, in a contract dispute where a retailer sues a supplier for late delivery and the supplier pleads force majeure, well-drafted statements of case clearly outline the contract terms, the alleged breach, and the competing explanations, allowing the court to focus only on the real issues in dispute. Clear, factual, and concise pleadings therefore form the foundation of every well-run case, ensuring fairness, efficiency, and procedural discipline throughout litigation.

## 5.1 The Purpose and Function of Statements of Case

Imagine building a house without a blueprint. The result would be chaotic and unstable. Statements of case are the blueprints for litigation. They are the formal documents where the parties set out their case in writing. These documents define the landscape of the legal dispute and create the boundaries within which the case will be fought.

The primary purposes of statements of case are as follows.

First, they identify the issues in dispute. They make clear to the opposing party exactly what case they have to meet. A claimant must state the facts they rely on, and a defendant must state which of those facts they admit, which they deny, and which they cannot admit or deny but require the claimant to prove.

Second, they inform the court. The judge uses the statements of case to understand the nature of the case, the legal arguments involved, and the facts that are agreed and disagreed upon. This allows the judge to manage the case effectively, ensuring it proceeds justly and in accordance with the overriding objective.

Third, they provide a permanent record of the positions taken by the parties at the outset of the claim. This is crucial because a party is generally not allowed to argue a point at trial that they have not raised in their statements of case.

The most common statements of case are the Claim Form, the Particulars of Claim, the Defence, and any Reply. The collective term for these documents is "pleadings". Good pleadings are clear, concise, and confined to the necessary facts. They are not the place for lengthy arguments, evidence, or rhetoric. As stated in the case of ***McPhilemy v Times Newspapers Ltd*** [1999] 3 All ER 775, the courts today encourage a less technical approach to pleadings, focusing on the core issues to save costs and ensure efficiency.

## 5.2 Structure and Content of the Claim Form and Particulars of Claim (Contract & Tort)

Initiating a lawsuit is a formal process with precise requirements. The first two documents, the Claim Form and the Particulars of Claim, work together to commence the action and frame the entire dispute. Understanding their distinct roles and mastering their drafting is a fundamental skill for any solicitor.

### 5.2.1 The Claim Form (Form N1): The Foundation of the Claim

The Claim Form is the official document that starts court proceedings. You can think of it as the cover page or the index for the case. It does not contain the detailed story, but it provides the essential administrative information that gets the case onto the court’s record and informs the defendant that they are being sued.

Issuing the Claim Form is a critical step because it stops the limitation clock. For example, if a claimant is nearing the end of a six-year limitation period for a breach of contract, issuing the Claim Form at court protects their claim, even if the detailed Particulars of Claim are served a few weeks later.

The Claim Form must contain the following key information:

1. **The parties**: The full names and addresses of all claimants and defendants. For a company, this is the registered name and address. Getting this right is crucial. Naming the wrong defendant or using an incorrect title can invalidate the proceedings.
2. **Brief details of the claim**: This is a short, concise statement summarizing the nature of the claim. It does not need to contain all the facts. Examples include:
    - "Breach of contract for the sale of goods dated 1 October 2023."
    - "Negligence arising from a road traffic accident on 15 January 2024."
    - "Payment for goods sold and delivered."
3. **The value**: The claimant must state the value of the claim. If the claim is for a specific sum of money, that amount is written in the box provided. If the amount is unknown, for instance, general damages for pain and suffering in a personal injury case, the claimant will tick the box for "damages to be assessed" and may state an expected value.
4. **The defendant's address for service**: This is the address where all court documents for the defendant should be sent. It is usually the defendant's residential or business address, or the address of their solicitor if they have already instructed one.

The Claim Form is a public document. Once issued, it is the formal record that a case has been started.

### 5.2.2 The Particulars of Claim: The Heart of the Case

If the Claim Form is the cover page, the Particulars of Claim is the first chapter of the story. This is the document where the claimant must set out their full case, including all the factual allegations and the legal basis for their claim against the defendant. It can be included on the Claim Form itself if there is enough space, but it is usually attached as a separate document.

The overriding principles for drafting Particulars of Claim are clarity and conciseness. The document should be structured in numbered paragraphs, with each paragraph containing a single allegation or a related set of facts. The goal is to tell a clear, logical, and compelling story that demonstrates the defendant's legal liability.

The content will vary significantly depending on whether the claim is in contract or tort.

**Drafting Particulars of Claim for a Contract Claim**

To succeed in a claim for breach of contract, a claimant must prove four key elements. The Particulars of Claim must plead each one clearly.

1. **The agreement**: The claimant must plead the facts that show a legally binding contract was formed. This involves identifying:
    - **The parties**: Who made the agreement.
    - **Formation**: How it was made (in writing, orally, or by conduct) and when. If it is a written contract, it should be attached to the Particulars of Claim and referred to as "the Contract".
    - **Consideration**: What was promised by each side (e.g., goods in return for money).
2. **The relevant terms**: The claimant must identify the specific term or terms of the contract that the defendant has broken. These can be:
    - **Express terms**: Terms explicitly agreed by the parties, either in writing or orally.
    - **Implied terms**: Terms not expressly stated but read into the contract by statute (like the *Sale of Goods Act 1979*) or by the courts to reflect the obvious intentions of the parties.
3. **The breach**: The claimant must specify exactly what the defendant did or failed to do that constituted a breach of the terms pleaded. The facts of the breach should be described clearly and with as much detail as possible.
4. **Loss and damage**: The claimant must explain how the defendant's breach caused them to suffer a loss. The details of the financial loss must be specifically set out. A distinction is made between:

- **General damages**: Losses that are not precisely quantifiable, such as compensation for distress or inconvenience.
- **Special damages**: Specific, quantifiable financial losses, such as the cost of repairs, lost profits, or medical expenses. These should be itemized in a schedule.

### Drafting Particulars of Claim for a Tort Claim (Negligence)

A claim in negligence also has essential elements that must be pleaded to establish liability.

1. **Duty of care**: The claimant must plead the facts that give rise to a legal duty of care owed by the defendant to the claimant. In many cases, this is straightforward (e.g., all road users owe a duty to each other) and can be asserted directly.
2. **Breach of duty**: The claimant must allege that the defendant's conduct fell below the standard of a reasonable person, thereby breaching the duty of care. This is done by setting out the specific facts that demonstrate the defendant's failure to take reasonable care. This part is often introduced with the phrase, "The Defendant was negligent in that he/she..." followed by a list of specific failures.
3. **Causation**: The claimant must plead that the defendant's breach of duty legally caused the loss or damage. This is usually a simple statement such as, "As a result of the Defendant's negligence..." followed by a description of the incident.
4. **Loss and damage**: As with a contract claim, the claimant must detail all the losses suffered. In a personal injury case, this will include particulars of the injury, and in a property damage case, the cost of repairs.

### The Statement of Truth

Every Particulars of Claim must end with a Statement of Truth. This is a formal declaration which states: "I believe that the facts stated in these Particulars of Claim are true." It must be signed by the claimant, their litigation friend, or their solicitor.

The Statement of Truth is of the utmost importance. It brings the document to life, converting it from mere allegations into a person's sworn account. A person who signs a Statement of Truth without an honest belief in the truth of the contents may be found in contempt of court, which is a serious offence that can lead to a fine or imprisonment.

## 5.3 Structure and Content of the Defence (Contract & Tort)

The Defence is the defendant's formal and strategic response to the claimant's case. It is the document that shapes the contested issues and defines the battlefield for the rest of the litigation. A well drafted Defence is not merely a denial of the claimant's allegations; it is a coherent and persuasive presentation of the defendant's version of events, grounded in law and fact.

### 5.3.1 The Core Principles of Drafting a Defence

When drafting a Defence, a solicitor must adhere to several key principles mandated by the Civil Procedure Rules.

- **Respond to every allegation**: The defendant must address every individual paragraph of the Particulars of Claim. Failure to do so may be interpreted as an admission of that allegation under *Civil Procedure Rule 16.5*.
- **Clear and specific responses**: For each allegation, the defendant must state clearly whether it is admitted, denied, or whether the defendant requires the claimant to prove it because they neither admit nor deny it. Vague or evasive responses are not acceptable.
- **Reasons for denials**: If an allegation is denied, the defendant must state the reasons for doing so. If the defendant intends to put forward a different version of events from the claimant, they must set out their own version in the Defence.
- **The statement of truth**: The Defence must be verified by a Statement of Truth, just like the Particulars of Claim. This is a critical procedural step that confirms the defendant believes the facts stated in the Defence are true.

### 5.3.2 The Anatomy of a Defence: A Paragraph by Paragraph Response

A Defence should mirror the structure of the Particulars of Claim for clarity. The response to each paragraph should be one of the following:

1. **Admission**: The defendant agrees with the allegation. This removes the issue from dispute, saving time and costs. For example: "Paragraph 1 of the Particulars of Claim is admitted."

2. **Denial**: The defendant disagrees with the allegation and must state why. For example: "Paragraph 4 of the Particulars of Claim is denied. The Defendant did not fail to deliver the goods on the agreed date. The goods were delivered to the claimant's warehouse on 1 March 2024."
3. **Neither admit nor deny**: This is used when the defendant does not have knowledge of a particular fact and cannot reasonably be expected to have such knowledge, thus putting the claimant to strict proof. This is common for allegations about the claimant's own internal actions or losses. For example: "Paragraph 7 of the Particulars of Claim is not admitted. The Defendant requires the Claimant to prove that it incurred the alleged loss of profit."

It is professionally negligent to deny an allegation that is plainly true, such as the defendant's own name or address. Such tactics undermine credibility and may lead to cost penalties.

### 5.3.3 Drafting a Defence to a Contract Claim

Using the example of a claim for payment for goods sold, a Defence might be structured as follows.

**The Claimant's Allegation (from Particulars of Claim)**

"[3] It was an express term of the contract that the goods would be of satisfactory quality.

[4] The Defendant breached the contract by failing to pay the invoice sum of £15,000.

[5] By reason of the breach, the Claimant has suffered loss and damage."

**The Defendant's Potential Defence**

"[3] Paragraph 3 of the Particulars of Claim is admitted.

[4] Paragraph 4 is denied. The Defendant was not obliged to pay the sum of £15,000 because the goods delivered were defective and not of satisfactory quality, contrary to the term admitted above. The Defendant rejected the goods on 15 January 2024.

[5] Paragraph 5 is denied. In the premises, the Claimant has suffered no loss caused by the Defendant. Further, the Defendant has itself suffered loss and damage due to the Claimant's breach of contract, namely the cost of sourcing alternative goods at a higher price."

This Defence admits the contract and its term but denies the breach, providing a clear and legally sound reason: the claimant breached first by providing defective goods. This is a complete defence to the claim for payment.

### 5.3.4 Drafting a Defence to a Tort Claim (Negligence)

In a negligence claim, such as a road traffic accident, the Defence must engage with the core elements of the tort.

**The Claimant's Allegation (from Particulars of Claim)**

"[2] The Defendant owed the Claimant a duty of care to drive safely.

[3] The Defendant breached that duty by driving at an excessive speed.

[4] The collision was caused by the Defendant's breach of duty.

[5] The Claimant suffered injury, loss and damage."

**The Defendant's Potential Defence**

"[2] Paragraph 2 of the Particulars of Claim is admitted.

[3] Paragraph 3 is denied. The Defendant was not driving at an excessive speed. The Defendant was driving at approximately 25 miles per hour in a 30 mile per hour zone. The accident was caused solely by the negligence of the Claimant.

***Particulars of negligence***

The Claimant was negligent in that he:

(a) Suddenly pulled out of a side road without looking.

(b) Failed to give way to the Defendant who was on the main road.

(c) Drove without due care and attention.

[4] Paragraph 4 is denied. In the premises, the Defendant is not liable for the collision.

[5] Paragraph 5 is not admitted. The Claimant is put to strict proof of the alleged injuries, loss and damage."

This Defence admits the duty of care but denies the breach and causation, instead alleging that the claimant was wholly responsible (known as a defence of "contributory negligence" can also be used if both were partly at fault).

### 5.3.5 The Consequences of an Inadequate Defence

A poorly drafted Defence that fails to comply with the rules can have serious consequences. The claimant can apply to the court to strike out the Defence if it discloses no reasonable grounds for defending the claim. Furthermore, if a Defence is vague or fails to properly set out the defendant's case, the claimant can serve a Request for Further Information under Part 18, forcing the defendant to clarify its position, which can lead to delay and additional costs for the defendant.

## 5.4 The Reply and *Part 20* Claims (Counterclaims, Contribution & Third Party Claims)

Once the Defence is served, the landscape of the dispute is set. However, the pleadings stage may continue with a Reply from the claimant, and often becomes more complex with the introduction of *Part 20* Claims, which are claims brought between existing or new parties within the same action.

### 5.4.1 The Reply

A Reply is a statement of case served by the claimant in response to the Defence. It is not always required. If the claimant does not file a Reply, it is generally assumed that they deny any new facts raised in the Defence.

A Reply should be used sparingly and only for two main purposes:

1. To address any new facts raised in the Defence that the claimant could not have dealt with in the Particulars of Claim.
2. To state, if applicable, that the claimant intends to rely on the doctrine of "set off", where a debt owed by the claimant to the defendant is used to reduce or extinguish the defendant's claim.

A Reply must not simply repeat the Particulars of Claim. It is a response to new matters, not a reiteration of old ones. It must be verified by a Statement of Truth.

**Example of a reply**: In the contract case above, the Defendant's Defence alleged that the goods were defective. The Claimant, in its Reply, might state:

"1. The Claimant joins issue with the Defendant on its Defence.

2. As to the allegation that the goods were defective, the Claimant states that the Defendant inspected the goods upon delivery and signed a note confirming they were satisfactory. The Claimant will refer to this note at trial.

3. Further, the Defendant's claim for the cost of alternative goods is denied. The Defendant did not inform the Claimant of the alleged defects and gave no opportunity for the Claimant to inspect or replace the goods."

### 5.4.2 *Part 20* Claims

*Part 20* of the *Civil Procedure Rules* provides the mechanism for bringing additional claims within existing proceedings. The primary goal is to resolve all connected disputes in a single action, promoting efficiency and avoiding multiple, costly lawsuits over the same subject matter. There are three main types of *Part 20* claims.

#### Counterclaims

A counterclaim is a claim brought by a defendant against the claimant. It is not merely a defence; it is a separate, active claim for relief. For example, while the defendant defends the claim for non-payment, they can counterclaim for damages they have suffered due to the claimant's breach.

- **Procedure**: A counterclaim is usually included in the same document as the Defence, under a separate heading. It must be drafted with the same level of detail as a Particulars of Claim, containing a clear statement of facts, the legal basis for the claim, and a detailed breakdown of the losses claimed.
- **Response**: The claimant must then file a Defence to Counterclaim. If they fail to do so, the defendant can obtain judgment in default on the counterclaim.

**Illustration of a Counterclaim**:

In our building contract example, the defendant homeowner is being sued for the outstanding £15,000. In her Defence, she denies liability. In her Counterclaim, she would state: "COUNTERCLAIM

The Defendant repeats her Defence herein.

The Claimant was in repudiatory breach of the building contract by using substandard materials, causing the wall to collapse.

By reason of the Claimant's breach, the Defendant has suffered loss and damage.

***Particulars of loss***

Cost of demolishing the defective wall: £2,000

Cost of rebuilding the wall by a different contractor: £13,000

**Total**: £15,000

The Defendant is entitled to set off the sum of £15,000 against any sum found due to the Claimant."

**Claims for Contribution**

A claim for contribution is made under the *Civil Liability (Contribution) Act 1978*. It is used when a defendant who is facing a claim believes that another party is liable for the same damage, either wholly or in part. This is common in multi party accidents or construction disputes.

- **Procedure**: The defendant issues a *Part 20* Notice against the other party (known as the *Part 20* defendant), claiming a contribution towards any liability they may have to the claimant.

**Example**: A pedestrian (C) is hit by a car and sues the driver (D1). D1 believes the accident was also the fault of a second driver (D2). D1 can issue a Part 20 claim against D2, claiming that if D1 is found liable to C, D2 must contribute to the damages paid to C, proportionate to D2's share of the blame.

### Third Party Claims

A third party claim is a claim by a defendant against a new party who is not already involved in the litigation. The defendant claims that if they are found liable to the claimant, the third party is liable to indemnify them (fully reimburse them) for that liability.

- **Procedure**: The defendant applies to the court for permission to issue and serve a Third Party Notice. The accompanying documents must clearly explain the basis on which the defendant claims an indemnity or contribution from the third party.

**Example**: A homeowner (C) sues a main contractor (D) for a defective roof. The main contractor believes the fault lies entirely with the roofing subcontractor (TP). The main contractor can issue a third party claim against the subcontractor, claiming that if the main contractor is liable to the homeowner, the subcontractor must fully indemnify the main contractor for that loss, including any legal costs.

### The Strategic Importance of *Part 20* Claims

For a solicitor, advising on *Part 20* claims is a crucial part of litigation strategy. It allows a defendant to pass on liability and avoid being solely responsible for a loss that was not entirely their fault. It ensures that all responsible parties are before the court, which leads to a more just and comprehensive resolution. Failure to consider a *Part 20* claim can lead to a client having to pursue a separate, costly lawsuit later, or worse, being left to bear a loss that should rightly have been passed on to another.

In conclusion, the Defence, Reply, and *Part 20* claims form the complete picture of the pleadings stage. They transform a two party dispute into a multi-dimensional legal process that properly allocates responsibility and ensures that justice is achieved in a single, efficient proceeding. Mastering their use is essential for any solicitor seeking to protect their client's interests effectively.

## 5.5 Requests for Further Information (*Part 18* Requests)

The process of litigation is one of clarification and refinement. Often, after the exchange of initial statements of case, one party may find that the other party's case is vague, lacking in essential detail, or ambiguous. In such situations, a Request for Further Information under *Part 18* of the *Civil Procedure Rules* is the essential tool to obtain the necessary clarity. This procedure, formerly known as a 'request for further and better particulars', is a fundamental part of defining the real issues in dispute.

### 5.5.1 The Purpose and Strategic Value of a *Part 18* Request

The primary purpose of a *Part 18* Request is to allow one party to ask another to clarify or provide additional information about a matter which is already in dispute, as set out in their statements of case. The goal is to help the requesting party understand the case they have to meet, to prepare their own case properly, and to assist in the fair and efficient management of the litigation.

The strategic benefits are significant. A well drafted Request can:

- Force the other side to commit to a specific factual narrative, preventing them from shifting their case at a later stage.
- Identify weaknesses in the opponent's case by compelling them to provide details they may not have.
- Narrow the issues in dispute, which can save time and costs at trial.
- Avoid the need for a costly interim application by resolving ambiguities through a simple written process.

- It is crucial to understand that a Part 18 Request is not a tool for cross examination or a ‘fishing expedition’ to discover new claims. The questions must be confined to matters which are reasonably necessary and proportionate to the issues already pleaded.

### 5.5.2 The Procedure for Making a Request

The process for a Request for Further Information is straightforward but must be followed meticulously.

1. **Drafting the request**: The request must be set out in a separate document, clearly numbered. Each question should be concise and directly related to a specific part of the opponent’s statement of case. It is good practice to preface each question with a reference to the relevant paragraph of the Particulars of Claim or Defence that it relates to.
2. **Service**: The request is served on the other party; it is not filed at court at this stage. The receiving party must respond within 14 days.
3. **The response**: The responding party must answer each question in writing, providing the information requested. If they object to a question, they must state their reasons for the objection. Valid reasons for objection include that the request is disproportionate, seeks evidence rather than clarification, or is not necessary for understanding the case.
4. **Failure to respond**: If the other party fails to respond adequately or at all, the requesting party can apply to the court for an order compelling a response. The court will then decide whether the questions are proper and must be answered.

**Practical Examples of *Part 18* Requests**

Consider a claim for breach of contract where the Particulars of Claim are poorly drafted.

Vague pleading: The Particulars of Claim state: "The Defendant was negligent."

**Appropriate Part 18 Request**: "Please provide Further Information regarding paragraph 3 of the Particulars of Claim. Specifically, state each and every particular of negligence alleged

against the Defendant, including the facts and matters relied upon in support of each particular."

Consider a personal injury claim where the loss of earnings is claimed.

Insufficient detail: The Particulars of Claim state: "The Claimant has suffered loss of earnings."

**Appropriate Part 18 Request**: "Please provide Further Information regarding the Claimant's loss of earnings as pleaded in paragraph 5 of the Particulars of Claim. Specifically, please state:

(a) The Claimant's gross and net monthly earnings at the time of the accident.

(b) The period for which earnings were lost.

(c) The total amount of the loss claimed."

The response to these requests would be binding on the responding party, forming part of their pleaded case.

## 5.6 Amending Statements of Case

Litigation is a dynamic process. As a case progresses, new information often comes to light through disclosure of documents or the exchange of expert evidence. A legal argument may be refined, or a simple drafting error may be discovered. The *Civil Procedure Rules* recognise this reality and provide a flexible mechanism for parties to amend their statements of case. However, this flexibility is balanced against the need for finality and the prejudice that amendments can cause to the other party.

### 5.6.1 The Right to Amend and the Need for Permission

The rules on amendment are found in *Part 17* of the *Civil Procedure Rules*. A party’s ability to amend depends on the stage of the proceedings.

- **Without permission**: A party may amend its statement of case once at any time before it is served. After service, it may still be amended once, provided the other party gives their written consent.
- **With permission**: If permission is required (for instance, if a party wishes to amend a second time or if the other party does not consent), a formal application must be made to the court. This involves completing an Application Notice (Form N244) and supporting it with evidence, usually in the form of a witness statement. This statement should explain the reasons for the amendment, the nature of the change, and why it is necessary.

### 5.6.2 The Court's Discretion and the Governing Principles

When considering an application to amend, the court has a wide discretion. The judge will be guided by the overriding objective to deal with the case justly and at proportionate cost. The key question is whether the amendment is necessary for the court to resolve the true issues between the parties.

The court will typically grant permission if the amendment has a real prospect of success and causes no significant prejudice to the other party that cannot be compensated by a costs order. Prejudice in this context means something more than having to face an amended case; it refers to a party being unfairly disadvantaged, for example, if a key witness has become unavailable or evidence has been lost due to the delay in making the amendment.

The timing of the application is critical. An amendment proposed early in the proceedings is likely to be viewed more favourably than one made on the eve of trial or during the trial itself. A late amendment can disrupt the trial timetable and cause significant wasted costs, and the court will be much more cautious in granting it.

### 5.6.3 The Practical Process of Amending

The process of drafting an amendment is precise. The party seeking to amend must produce a copy of the proposed amended statement of case that clearly shows the changes.

The standard practice is to show the original text struck through and the new text underlined or in colour. This allows the court and the other party to see the exact nature of the changes at a glance.

The amended document must be verified by a new Statement of Truth. This is non-negotiable. An amended pleading without a new Statement of Truth is invalid.

**Illustrative Scenario: Amending a Claim**

Imagine a claimant, Mr. Jones, who sues his former business partner, Mr. Smith, for the repayment of a £50,000 loan. The original Particulars of Claim plead that the money was paid under an oral agreement on 1st June.

During the disclosure process, Mr. Jones's solicitor finds an email from Mr. Smith that says, "I acknowledge the loan and will repay it from the sale proceeds of the business." This email is dated 15th June. The solicitor would rightly seek to amend the Particulars of Claim to plead this crucial piece of evidence. The amendment would add a new paragraph:

"Further, and in the alternative, the Defendant acknowledged the debt in writing by an email dated 15 June 2023. A copy of the email is attached."

This amendment strengthens the claimant's case by providing written evidence and is highly likely to be permitted by the court, even if Mr. Smith does not consent. The court would probably order that the claimant pays the costs of and caused by the amendment, as it was necessitated by the claimant's own initial failure to plead the full case.

### 5.6.4 The Consequences of Failing to Amend

A party is generally not allowed to rely at trial on any allegation or argument that has not been included in their statements of case. Therefore, if a party fails to seek permission to amend to include a new point, they risk being prevented from raising it at all. This can be a fatal blow to a case. The duty to keep statements of case under review and to amend them when necessary is a continuing professional obligation for a solicitor.

## 5.7 Conclusion

Drafting and managing statements of case is a core skill for any litigator. These documents set the agenda for the entire case. Well drafted pleadings are precise, clear, and comprehensive, forcing the other side to respond to your case and providing the judge with a clear roadmap of the dispute. Mastering the rules and conventions of pleadings is fundamental to effective and professional legal practice in dispute resolution.

# 6

# INTERIM APPLICATIONS AND INJUNCTIONS

Litigation is not a single event but a process that unfolds over time. Between issuing a claim and reaching a trial, parties often need the court to make decisions to manage the case, resolve specific issues early, or provide immediate protection. These requests are known as interim applications.

This chapter explores the most important of these applications. You will learn how to ask the court for a ruling that there is no real case to answer, for an early payment on a claim, and for powerful orders that can freeze assets or preserve evidence before a trial even begins. Mastering these procedures is essential for effective litigation strategy.

## 6.1 The Procedure for Making an Interim Application

An interim application is a formal request made to the court for a decision on a specific issue before the final trial. Think of litigation as a journey from the start of a case to its conclusion at trial. Interim applications are the tools the court uses to manage that journey, resolve disputes that arise along the way, and sometimes bring the journey to an early end if one party has no legitimate right to be on the road. These applications are the procedural engine that keeps a case moving forward efficiently and fairly.

Applications can cover a vast range of issues. A party might apply to the court to force the other side to disclose a crucial document, to extend a deadline, to strike out a statement of case that discloses no reasonable grounds, or for the more powerful remedies discussed later

in this chapter. Understanding how to make an application correctly is a fundamental skill for any litigator.

### 6.1.1 The Application Notice: The Formal Request

The process begins with an Application Notice, using Form N244. This form is the foundation of your request. It is not merely an administrative document; it is your first and best opportunity to persuade the court. Completing it clearly and thoroughly is essential.

The Application Notice must contain three key pieces of information:

1. What order you are asking the court to make. You must be precise. For example, "An order that the Defendant provide inspection of the documents listed in their disclosure list by 4pm on 30th November 2024."
2. Why you are seeking the order. This is a concise statement of your reasons. You should refer to the relevant legal rules and the practical justification. For example, "The Defendant has failed to comply with the court's order for standard disclosure dated 1st October 2024, and without these documents the Claimant cannot properly prepare its case for trial."
3. The legal power that allows the court to make the order. You must state the specific rule or practice direction that gives the court the authority to grant what you are asking for. For example, "This application is made under CPR 31.21 in relation to inspection of documents."

### 6.1.2 The Evidence in Support: Building Your Case

An application is almost always supported by evidence. This is typically provided in a Witness Statement made by the client, the solicitor, or another person with knowledge of the facts. This statement must tell the story of why the application is necessary.

The Witness Statement must:

- Set out the relevant facts in a clear and logical order.
- Refer to any documents that are important, attaching them as exhibits.

- Be signed with a Statement of Truth. This is a declaration that the person making the statement believes the facts within it are true. A false statement verified by a Statement of Truth can lead to proceedings for contempt of court.

The evidence must be focused and relevant. The court is not interested in every detail of the case, only those facts that are directly relevant to the issue the application is dealing with.

### 6.1.3 Notice, Urgency, and the Duty of Candour

The general rule is that you must provide the other party with at least three clear business days' notice of the hearing date. This is a fundamental principle of fairness; it gives your opponent a chance to prepare their own evidence and arguments in response.

However, there are situations where giving notice would defeat the very purpose of the application. If you are seeking a freezing injunction because you believe a defendant is about to transfer all their money out of the country, telling them in advance would be pointless. In such cases, you can make an application "without notice" (formerly called *ex parte*).

Making a without notice application places a heavy burden on the applicant and their solicitor. You have a duty of "full and frank disclosure." This means you must draw the court's attention to all relevant facts, even those that are unhelpful to your case or that support the other side's position. You must not mislead the court by presenting only one side of the story.

The case of ***R (Lawer) v Restormel Borough Council*** [2007] EWHC 2299 (Admin) reinforces this principle. The court held that a failure to provide full and frank disclosure is a serious matter that can lead to the discharge of any order obtained, even if the original application was otherwise justified. The duty is a core component of a solicitor's ethical obligations to the court.

### 6.1.4 The Hearing and the Outcome

At the hearing, the advocates for each party will present their arguments, referring to their application notices, evidence, and the relevant law. The judge, usually a Master or District Judge, will often give a decision immediately, or "*ex tempore*," with brief reasons. For more

complex applications, the judge may "reserve" judgment, meaning they will take time to consider and provide a written judgment later.

The court has wide powers when deciding an application. It can grant the order requested, refuse it, or make a different order that it considers appropriate. Crucially, the court will almost always make an order about the costs of the application. The general principle is that the unsuccessful party will be ordered to pay the successful party's costs of the application. This is a significant factor to consider, as making an unnecessary or weak application can prove costly for your client.

## 6.2 Summary Judgment: Purpose, Procedure, and Test

Summary judgment is a procedure that allows the court to decide a claim or a specific issue within a claim without the need for a full trial. Its purpose is to save time, effort, and cost for the parties and the court by weeding out cases that have no real chance of success. It is a tool for efficiency and for ensuring that a party is not forced to defend a claim that is legally or factually hopeless.

A claimant can apply for summary judgment if they believe the defendant has no real defence. A defendant can apply for summary judgment if they believe the claimant's case has no real merit, even if all the facts alleged by the claimant are assumed to be true. The procedure is governed by *CPR Part 24*.

### 6.2.1 The Summary Judgment Procedure

The applicant must file an Application Notice (Form N244) clearly stating that it is an application for summary judgment and identifying the claim or issue which it is asked should be disposed of summarily.

The application must be supported by evidence. This will usually be a witness statement that sets out the reasons why the other party's case has no real prospect of success. This might involve pointing to a clear legal flaw in their argument or demonstrating that their stated evidence is contradicted by incontrovertible documents.

The respondent (the party opposing the application) will have the opportunity to file evidence in response, aiming to show that their case does indeed have a real prospect of success. The court will then hold a hearing where both sides can make legal arguments.

### 6.2.2 The Legal Test: "No Real Prospect of Success"

The central test for summary judgment is set out in *CPR 24.2*. The court must be satisfied that the respondent "has no real prospect of succeeding" on the claim or issue, and "there is no other compelling reason why the case or issue should be disposed of at a trial."

The phrase "no real prospect of succeeding" has been interpreted by the courts many times. It means that the respondent's case must carry some degree of conviction and be more than merely arguable. It is not enough for a case to be merely "hopeful"; it must have a realistic, as opposed to a fanciful, chance of success.

The landmark case of ***Swain v Hillman*** [2001] 1 All ER 91 established that the words "no real prospect of succeeding" are simple English and should not be glossed with additional language. The court's job is to see whether there is a realistic, as opposed to a fanciful, prospect of success.

A more detailed and practical guidance was provided in ***Easyair Ltd v Opal Telecom Ltd*** [2009] EWHC 339 (Ch). The court set out several key principles that should guide the court's approach:

1. The court must consider whether the respondent has a "realistic" as opposed to a "fanciful" prospect of success.
2. A "realistic" claim is one that carries some degree of conviction. This means it is more than merely arguable.
3. The court should not conduct a "mini trial" at the summary judgment stage. This means the court should avoid deciding complex questions of fact that require the testing of evidence through cross examination.
4. However, this does not mean the court must take all statements in a witness statement at face value if they are contradicted by contemporaneous documentary evidence.

5. The court should take into account that evidence may become available at a later stage, for example through disclosure of documents or from cross examination at trial.

**Practical Application and Examples**

**Example 1** (Claimant applies): A claimant sues for an unpaid debt of £50,000, providing a signed contract and invoices. The defendant files a defence stating only that "the services were not satisfactory." The defendant provides no details of what was unsatisfactory, no evidence of any complaint, and no counterclaim. The claimant applies for summary judgment. The court is likely to grant it. The defence is a vague assertion with no supporting evidence and does not disclose a case with a real prospect of success.

**Example 2** (Defendant applies): A claimant brings a claim for professional negligence against a solicitor, alleging that poor advice given in 2015 caused a loss. The defendant applies for summary judgment on the basis that the claim was issued in 2024, which is outside the primary 6 year limitation period. The claimant's argument for why the limitation period should be extended is weak and unsupported by evidence. The defendant is likely to succeed in their application, as the claimant has no real prospect of overcoming the limitation defence.

It is crucial to remember that summary judgment is a discretionary remedy. Even if the court finds that a party has no real prospect of success, it can still refuse to grant summary judgment if there is a "compelling reason" for a trial. This might include cases where the application requires the court to decide a point of law of public importance, or where the facts are so complex that they can only properly be untangled at a full trial.

The procedure for interim applications is the gateway to managing and progressing litigation, while summary judgment is a powerful tool for ensuring that only claims and defences with a legitimate basis proceed to a costly and time consuming trial. Mastering both is essential for effective and efficient legal practice.

## 6.3 Interim Payments: Purpose, Procedure, and Test

An interim payment is a court order requiring a defendant to make a payment on account of any damages, debt, or other sum that they are likely to be ordered to pay at the final trial. Its

purpose is practical and often crucial for claimants. Litigation can be a lengthy process, and a claimant may face significant financial hardship while waiting for a final judgment. This is particularly true in personal injury cases where the claimant has ongoing medical bills or has lost their income. An interim payment helps to level the playing field by providing the claimant with some funds to cover pressing needs without having to wait for the case to conclude.

### 6.3.1 Interim Payment Procedure

The procedure for obtaining an interim payment is set out in *CPR Part 25*. The claimant must make a formal application using an Application Notice supported by evidence. This evidence is typically a witness statement that outlines the merits of the claim and the need for the payment. The application should specify the amount sought and justify why that sum is a reasonable proportion of the likely final award.

### 6.3.2 The Legal Test for an Interim Payment

The court's power to order an interim payment is not unlimited. It is a discretionary power, and the court will only make an order if it is satisfied that one of the conditions in *CPR 25.7* is met. The most commonly used conditions are:

1. That the defendant has admitted liability to pay the money. For example, in a debt claim, if the defendant admits they owe the money but disputes the exact amount, the court can order an interim payment of the admitted sum.

2. That the claimant has already obtained a judgment against the defendant for damages to be assessed. This means liability has been decided, but the amount of compensation is still to be determined.

3. That, if the claim went to trial, the claimant would obtain judgment for a substantial amount of money against the defendant from whom the interim payment is sought.

The third condition is the most frequent basis for applications. The key question is: how sure does the court need to be? The test is that the court must be satisfied that the claimant is "likely" to win. This has been interpreted to mean "more likely than not." It is a higher hurdle

than the "serious issue to be tried" test for injunctions, but it does not require absolute certainty.

Furthermore, the court must be able to quantify a reasonable amount. It will not order the payment of the full claimed amount, as the final figure is for the trial judge. The court will make a conservative assessment, taking into account any possible defences, such as contributory negligence, or any set offs or counterclaims that might reduce the final sum payable.

The case of ***Test Holdings (Clifton) Ltd v Metropolitan & Provincial Holdings Ltd*** [1969] 3 All ER 668 helped establish the principles, emphasizing that the purpose is to give the claimant an advance on the sum he is almost certain to recover. A more modern application of the test can be seen in personal injury litigation, where courts frequently order interim payments to fund rehabilitation and care.

**Example Scenario**:

A claimant is severely injured in a road traffic accident. Liability is strongly disputed by the defendant's insurer. The claimant applies for an interim payment of £50,000 to adapt his home to accommodate his wheelchair and to pay for private physiotherapy. The claimant's evidence includes a compelling expert report confirming the need for these measures and a schedule of loss valuing the full claim at over £1 million.

The court will consider: Is the claimant likely to succeed at trial? The evidence of the expert report and the nature of the accident may lead the court to conclude that yes, the claimant is more likely than not to establish liability. If so, the court will then decide if £50,000 is a reasonable interim sum. Given the total value of the claim and the specific, justified needs, the court is likely to grant the order. This provides the claimant with vital funds without prejudging the final outcome of the case.

## 6.4 Interim Injunctions: Purpose and the American Cyanamid Principles

An interim injunction is a temporary court order that obliges a party to do something or, more commonly, to refrain from doing something. Its purpose is to hold the ring, to preserve the existing state of affairs until the court can hold a full trial to determine the parties' legal rights finally. Without this power, a defendant could simply continue the harmful activity throughout the litigation, rendering a final judgment in the claimant's favour useless. For instance, an injunction can stop a newspaper from publishing a confidential document, prevent a former employee from using trade secrets, or halt construction on a disputed piece of land.

The grant of an injunction is a serious matter. It restricts what a party can do before their rights have been definitively established. Therefore, the court follows a well-established framework to ensure fairness.

### The American Cyanamid Principles

The modern law on interim injunctions is dominated by the House of Lords decision in ***American Cyanamid Co v Ethicon Ltd*** [1975] AC 396. This case set out a structured series of questions for the court to consider. It moved the law away from a test that required the claimant to show a prima facie case, towards a more flexible balance of convenience test.

The court must consider the following stages:

Stage 1: Is there a serious question to be tried?

This is the initial threshold. The claimant does not have to prove they will win at trial. They only need to show that their claim is not frivolous or vexatious; that there is a real, substantial question of fact or law that merits investigation at a trial. This is a relatively low hurdle to cross.

Stage 2: Are damages an adequate remedy?

The court then asks a crucial question: if the claimant wins at trial, could they be adequately compensated by an award of money? If the answer is yes, then an injunction will usually be

refused. The court's reasoning is that the claimant can be made whole with money later, so there is no need to restrict the defendant's freedom now.

However, if the harm is of a nature that cannot be properly quantified in money, then damages are not an adequate remedy. Examples include:

- Loss of reputation due to defamation.
- Breach of confidentiality (once a secret is out, it cannot be taken back).
- Irreparable harm to a unique asset, like land.
- Environmental damage.

**Stage 3: The Balance of Convenience**

If damages would not be an adequate remedy for the claimant, the court moves to the heart of the test: the balance of convenience. This involves asking which party would suffer the greater irremediable harm if the injunction were granted or refused.

The court will weigh all the circumstances, including:

- The prejudice to the claimant if the injunction is refused and the defendant's activity continues.
- The prejudice to the defendant if the injunction is granted and it later turns out to have been wrong.
- The strength of each party's case.
- The public interest, if relevant.

A critical component of this balance is the cross undertaking in damages. When the court grants an interim injunction, it will almost always require the claimant to give a cross undertaking. This is a promise to the court to compensate the defendant for any loss they suffer if it is later determined at trial that the injunction should not have been granted. This acts as a safety net for the defendant, ensuring that the claimant, who is seeking a powerful remedy without having proved their case, bears the risk if they are wrong.

**Illustrative Example**:

A business owner applies for an injunction to stop a former key employee from starting work for a direct competitor, alleging the employee will inevitably use their confidential client database. The court's analysis would be:

1. Serious question? Yes, the misuse of confidential information is a recognised legal wrong.
2. Adequacy of damages? For the business, probably not. The loss of clients and confidential relationships is hard to quantify. For the employee, if the injunction is granted, loss of a job and income is a clear financial loss, but it *is* quantifiable.
3. Balance of convenience? This weighs heavily in favour of the business. The harm to them (loss of clients) is irremediable, while the harm to the employee (lost wages) is quantifiable and can be covered by the claimant's cross undertaking in damages. Therefore, the injunction is likely to be granted to preserve the status quo until trial.

## 6.5 Freezing Injunctions and Search Orders

Freezing injunctions and search orders are two of the most powerful and draconian remedies available from the civil courts. They are granted only in exceptional circumstances where there is a demonstrated risk that the normal litigation process will be rendered ineffective by the actions of the other party. Due to their severe nature, the application process is strict and the courts have built in significant safeguards to protect the rights of the respondent.

### 6.5.1 Freezing Injunctions

A freezing injunction, formerly known as a Mareva injunction, is a court order that restrains a party from disposing of or dealing with their assets. Its purpose is not to give the claimant security over the assets, but to prevent the defendant from deliberately dissipating their assets to avoid satisfying a future judgment. It stops a defendant from making themselves "judgment proof" by, for example, transferring money overseas or selling property.

The test for obtaining a freezing injunction is stringent. The applicant must show:

1. A good arguable case on the merits of the underlying substantive claim. This is a higher threshold than a "serious issue to be tried" but lower than proof on the balance of probabilities.
2. That the defendant has assets within the jurisdiction or, in the case of a worldwide freezing order, assets anywhere in the world.
3. A real risk that the defendant will dissipate or remove those assets before judgment can be enforced. This is the core of the application. The risk must be established by solid evidence, such as past conduct showing dishonesty, the nature of the assets (e.g., easily moved cash), or the defendant's domicile being in an unstable jurisdiction.

Because the element of surprise is often critical, freezing orders are almost always made without notice to the defendant. This places an extremely high duty of full and frank disclosure on the applicant. The applicant must identify all relevant facts, including those that are unhelpful to their case. The order will typically include an exception allowing the defendant to spend a reasonable sum on ordinary living expenses and legal fees. A cross undertaking in damages from the applicant is mandatory.

### 6.5.2 Search Orders

A search order, formerly known as an Anton Piller order, permits the applicant's representatives to enter the respondent's premises to search for, inspect, and preserve evidence which is at a real risk of being destroyed or hidden. It is used in cases of alleged intellectual property theft, fraud, or counterfeiting where crucial evidence is likely to be concealed.

The conditions for granting a search order are even stricter than for a freezing injunction due to its highly invasive nature. The applicant must demonstrate:

1. An extremely strong prima facie case.
2. That the potential or actual damage to the applicant is very serious.
3. Clear and convincing evidence that the respondent has in their possession incriminating documents or items.

4. A real possibility that the respondent may destroy such material if given advance notice.

The case of ***Anton Piller KG v Manufacturing Processes Ltd*** [1976] Ch 55 established this remedy. To prevent abuse, the order contains numerous safeguards. The search must be supervised by an independent supervising solicitor, who is not from the applicant's firm and who must explain the order to the respondent. The search can only take place on a weekday during normal business hours, and the respondent must be given a reasonable opportunity to take legal advice. The applicant is not entitled to "fish" for evidence; they can only search for the categories of items specified in the order.

Freezing Injunctions and Search Orders are exceptional remedies with high thresholds, designed to prevent the dissipation of assets or the destruction of evidence. They require full and frank disclosure and contain built in safeguards.

## 6.6 Conclusion

Interim applications serve as essential tools for controlling the pace and fairness of litigation, allowing the court to resolve urgent or procedural issues before trial. Whether through summary judgment to eliminate hopeless claims, interim payments to ensure fairness to a deserving claimant, or injunctions to preserve assets and evidence, these mechanisms balance justice with efficiency. The law imposes strict procedural safeguards; such as full and frank disclosure in without-notice applications, to prevent abuse and ensure transparency. Together, these remedies embody the court’s commitment to fairness, practicality, and the just management of cases pending full trial.

# 7

# CASE MANAGEMENT AND THE OVERRIDING OBJECTIVE

Modern civil litigation runs on active, judicially-led case management anchored by the CPR's Overriding Objective: dealing with cases justly and at proportionate cost. Everything; timetables, disclosure scope, expert use, trial length, and even recoverable costs, flows from that principle. The court expects parties to cooperate, keep cases proportionate to their value and complexity, and use the appropriate track (Small Claims, Fast, Intermediate, or Multi-Track) so resources match what is genuinely at stake.

This chapter explains how allocation, directions, and Costs & Case Management Conferences (CMCCs) shape the procedural roadmap and budget of a case, and why missed steps now carry real consequences. We outline typical directions by track, show how budgeting caps future cost recovery, and set out the sanction regime and Denton relief test that enforce discipline. The aim is practical: help you plan proactively, avoid breaches, and manage litigation efficiently while advancing your client's case on the merits.

## 7.1 The Overriding Objective (*CPR Part 1*)

The *Civil Procedure Rules* (*CPR*) are not just a set of instructions; they are guided by a fundamental principle that governs every single action taken by the court and the parties. This principle is called the Overriding Objective, found in *Part 1* of the *CPR*. It is the golden rule of civil litigation.

The Overriding Objective is to enable the court to deal with cases justly and at proportionate cost.

Dealing with a case justly includes, so far as is practicable:

- Ensuring the parties are on an equal footing.
- Saving expense.
- Dealing with the case in ways which are proportionate to the amount of money involved, the importance of the case, the complexity of the issues, and the financial position of each party.
- Ensuring it is dealt with expeditiously and fairly.
- Allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases.

In simple terms, this means that the court's main job is to ensure that cases are resolved fairly, without unnecessary delay or expense. The parties and their solicitors have a duty to help the court further this objective. This is a positive duty. You cannot sit back and use procedural tricks to win a case. You must actively help the court to manage the case efficiently.

**Example**: Imagine a claim for £5,000. It would be disproportionate and against the Overriding Objective to spend £50,000 on legal fees, instruct three expert witnesses, and have a ten day trial. The court would intervene to ensure the case is handled in a simpler, cheaper way.

The Overriding Objective is the lens through which the court views every application, every delay, and every mistake. When in doubt about how to proceed, a solicitor should always ask: "What does the Overriding Objective require me to do here?"

## 7.2 Track Allocation: Small Claims, Fast Track, and Intermediate/Multi-Track

Imagine a hospital emergency room. Patients are not treated in the order they arrive. Instead, a triage nurse assesses each case to direct resources where they are most needed. A patient with a minor cut is treated quickly and simply. A patient with a serious heart condition is sent

for intensive care. The civil justice system operates on a very similar principle, known as track allocation.

Track allocation is the process by which the court assigns every defended case to one of four procedural pathways. This is a cornerstone of the *Civil Procedure Rules* and the *Overriding Objective*. It ensures that a case receives a level of judicial management, resources, and procedure that is proportionate to its value, complexity, and importance. The goal is to ensure that the cost and time spent on the litigation are in a reasonable relationship to what is at stake.

The court will decide the track, but the parties must provide the information needed to make that decision. This usually happens after the defendant has filed their Defence. The court will review the documents and issue a Notice of Proposed Allocation, which includes an Allocation Questionnaire. The parties must complete this questionnaire, providing details on the value of the claim, the number of witnesses, the need for expert evidence, and their estimated costs. The judge will then make the final allocation decision.

Let us examine each of the four tracks in detail.

### 7.2.1 The Small Claims Track

The Small Claims Track is designed for low value, straightforward cases where the legal issues are simple. It is intended to be a user friendly, accessible, and inexpensive forum, particularly for litigants in person individuals who represent themselves without a lawyer.

**Financial scope**: The general financial limit for the Small Claims Track is £10,000. However, there are important exceptions. For personal injury claims and housing disrepair claims, the limit is £1,000. For claims by tenants against landlords for the return of a tenancy deposit, the limit is higher, at £10,000.

**Typical cases**: This track is suitable for a wide range of common disputes, including:

- Consumer disputes over faulty goods or poor services (e.g., a defective mobile phone or a bad holiday).

- Minor road traffic accident claims where liability is admitted and the only dispute is over the value of the damage.
- Claims for the recovery of minor debts.
- Disputes between landlords and tenants over minor repairs or small sums of money.

**Key features and procedure**: The procedure on the Small Claims Track is simplified and informal.

- The hearing is often less formal than a traditional trial. It may take place in the judge's chambers (a private room) rather than a full courtroom.
- The strict rules of evidence do not apply. This means the judge has more flexibility in what evidence they will accept.
- The costs that can be recovered by the winning party are extremely limited. This is the most significant feature. A winner cannot recover their legal representative's fees from the loser. They can only recover certain fixed costs, such as the court issue fee, any court hearing fees, and a very small sum for legal advice. This makes it economically unviable to instruct a solicitor to conduct a Small Claim, as the client would have to pay their own solicitor's fees even if they win.

**Example Illustration**:

Mr. Jones buys a television from an online retailer for £800. The television stops working after two weeks. The retailer refuses to repair or replace it. Mr. Jones issues a claim for £800. This is a classic Small Claim. The value is under £10,000, the legal issues are straightforward consumer rights, and it would be disproportionate for either side to spend thousands of pounds on legal fees. Mr. Jones would likely represent himself at a short, informal hearing.

### 7.2.2 The Fast Track

The Fast Track is designed for straightforward cases that need a more structured process than the Small Claims Track but are not so complex as to require the flexible and costly approach of the Multi Track.

**Financial scope**: The Fast Track is generally for claims with a value of more than £10,000 but not more than £25,000.

**Typical cases**: This track handles a high volume of common litigation, such as:

- Road traffic accident personal injury claims.
- More valuable consumer or contract disputes.
- Employer's liability claims (e.g., for an injury at work).
- Straightforward property disputes.

**Key features and procedure**: The key word for the Fast Track is "discipline". The court imposes a strict, tight timetable to ensure the case progresses quickly to trial.

- The standard direction is that the case will come to trial within 30 weeks of the allocation notice.
- The trial itself is usually limited to a single day.
- The oral evidence from expert witnesses is restricted. The court will usually direct that expert evidence is given in a single joint report, meaning the parties share one neutral expert.
- A system of fixed costs applies. This means the amount of legal costs the winner can recover from the loser is predetermined and capped for each stage of the litigation. This provides cost certainty for the parties and ensures proportionality.

### 7.2.3 The Intermediate Track

The Intermediate Track is a newer addition to the system, designed to bridge the gap between the Fast Track and the Multi Track for cases that are of a higher value but still relatively straightforward.

**Financial scope**: This track is for claims with a value of more than £25,000 but not more than £100,000.

**Typical cases**: It is intended for claims that are not legally or factually complex, do not require extensive oral evidence, and can be tried in no more than three days. Examples include:

- Debt recovery actions for significant sums.
- Breach of contract claims where the issues are not overly complicated.
- Certain property damage claims.

**Key features and procedure**: The Intermediate Track applies a more streamlined procedure than the Multi Track.

- It features a set of standard directions and a strict timetable.
- It aims for a early, fixed trial date or a narrow trial window.
- Like the Fast Track, it operates under a fixed costs regime, which is a key factor in controlling legal expenses for these mid-range claims.

### 7.2.4 The Multi Track

The Multi Track is the default pathway for all cases that do not fit into the other tracks due to their high value, complexity, or public importance. It offers a flexible, bespoke procedure tailored to the specific needs of the case.

**Financial scope**: Generally, for any claim with a value over £100,000. However, a claim of a lower value can be allocated to the Multi Track if it involves complex issues of law or fact, a large number of parties, or important points of public interest.

**Typical cases**: This track handles the most serious and complicated litigation, such as:

- Major commercial and business disputes.
- Serious professional negligence claims (e.g., against solicitors, accountants, or surveyors).
- Complex clinical negligence claims.
- High value personal injury claims (e.g., severe brain or spinal injuries).
- Contentious insolvency and company law disputes.

**Key features and procedure**: The hallmark of the Multi Track is judicial flexibility and active case management.

- There is no standard timetable or trial length. The judge will craft directions that are specific to the case.
- The case will be actively managed by a judge, often through a Case Management Conference (CMC).
- The parties are required to prepare and exchange Costs Budgets, which the court will review and approve to ensure future costs are proportionate.
- There are no fixed costs. The winner can recover their reasonable costs from the loser, but these are subject to detailed assessment if not agreed.

**Example Illustration**:

A manufacturing company brings a claim for £5 million against a machinery supplier, alleging that a faulty production line caused massive business interruption losses. The case will involve complex expert evidence from engineers and accountants, disclosure of thousands of documents, and a trial estimated to last three weeks. This is a clear Multi Track case. Its high value and complexity demand the flexible, heavily managed, and resource intensive approach that only the Multi Track can provide.

Correct track allocation is vital. It sets the entire procedural and cost framework for the litigation. For a solicitor, advising a client on the likely track is an essential part of setting expectations regarding timing, procedure, and, most importantly, the potential legal costs they may incur or have to pay.

## 7.3 Case Management Directions for each Track

Once a case is allocated to a track, the court does not simply leave the parties to their own devices until the trial date. The judge will actively manage the case by issuing a set of "directions". These are formal orders that create a timetable and specify the essential steps the parties must take to prepare the case for trial. Think of directions as the court's customised recipe for litigation; they provide the ingredients, the method, and the timing needed to produce a finished case ready for a judge to decide.

The nature and detail of these directions vary significantly depending on the track, reflecting the principle of proportionality.

### 7.3.1 Directions in the Small Claims Track

The procedure for Small Claims is designed to be simple and quick. The directions are often standardised and straightforward. The court will typically order:

1. **Standard disclosure**: The parties must send each other copies of all the documents they plan to rely on at the final hearing. This is a more limited duty than in other tracks.
2. **Exchange of evidence**: The court will set a date by which the parties must simultaneously send each other and the court all other evidence, such as:
    - Copies of any expert's reports (though permission for an expert is rarely given in a Small Claim).
    - Any other documents (e.g., photographs, receipts).
    - Written witness statements from themselves and any witnesses.
3. **The final hearing**: The court will fix a date for the final hearing. This is not always a formal trial. It is often an informal hearing where the judge will listen to both sides, look at the documents, and ask questions to get to the heart of the dispute.

The entire process is contained within a short timetable, often just a few months, and the parties are expected to comply without the need for further court intervention.

### 7.3.2 Directions in the Fast Track and Intermediate Track

The Fast and Intermediate Tracks involve more structured discipline. The court's directions will impose a strict timetable to ensure the case progresses swiftly to a fixed trial date. Typical directions will include:

1. **Disclosure**: A specific date by which the parties must complete "standard disclosure". This means each party must serve on the other a list of documents which are relevant to the case, including those which are harmful to their own position.
2. **Exchange of witness statements**: A date for the simultaneous exchange of written, signed statements from all factual witnesses. These statements stand as the witness's evidence in chief at trial.

3. **Expert evidence**: If the court has given permission for expert evidence, the directions will be specific. The court will often order the instruction of a "Single Joint Expert" (SJE), meaning the parties must agree on and jointly instruct one neutral expert to avoid a costly "battle of the experts". The directions will set dates for instructing the expert and for the service of their report.
4. **The trial**: The court will list the case for a trial on a specific date or within a specific window. For the Fast Track, the trial is strictly limited to one day. For the Intermediate Track, it is typically no more than three days.

The rigidity of this timetable is key. It provides certainty but leaves little room for delay. A party who fails to meet a deadline risks severe sanctions.

### 7.3.3 Directions in the Multi Track

The Multi Track is characterised by its flexibility. The directions are not standard; they are tailored to the specific needs of the case. This tailoring often happens at a Case Management Conference (CMC). The judge will make bespoke orders which may include:

1. **Specific disclosure orders**: Instead of standard disclosure, the judge may order a more focused or wider search for documents, depending on what is proportionate.
2. **Staged exchange of evidence**: The directions may provide for a sequential, rather than simultaneous, exchange of witness statements or expert reports.
3. **Complex expert evidence**: In technically complex cases, the court may permit each party to instruct their own expert. The directions will then typically include an order for:
    - The simultaneous exchange of expert reports.
    - A "Discussion between Experts", where the experts for each party meet to identify the agreed and disputed issues and produce a joint statement for the court. This is a crucial cost saving measure.
    - The service of a joint statement following that discussion.

4. **A pre-trial review (PTR)**: The directions will often include an order for a hearing a few weeks before the trial. At the PTR, the judge checks that all directions have been complied with, finalises the trial timetable, and deals with any last minute issues.
5. **The trial timetable**: The order will confirm the trial date and its estimated length, which could be several days or weeks.

**Example Illustration**:

In a complex commercial dispute about a failed joint venture, the judge's directions on the Multi Track might look like this:

By 4pm on 1 March: The claimant serves a list of specific documents for disclosure by the defendant.

By 4pm on 1 April: The parties complete disclosure.

By 4pm on 1 May: Simultaneous exchange of witness statements.

By 4pm on 1 June: Simultaneous exchange of expert accountancy reports on quantum (loss).

By 4pm on 1 July: The accountancy experts meet and produce a joint statement.

17 October: Pre Trial Review.

5 November (5 days reserved): Trial.

## 7.4 Costs and Case Management Conferences (CMCCs)

For cases on the Multi Track, the primary forum for setting these bespoke directions is the Costs and Case Management Conference, or CMCC. This is a crucial hearing, typically held early in the life of a case, where the judge and the lawyers for each party meet to plan the future of the litigation. It is a strategic pivot point.

The "CMCC" has two distinct but interconnected parts: Case Management and Costs Management.

### 7.4.1 The Case Management Conference (CMC) Element

During this part of the hearing, the judge will actively engage with the advocates to understand the case and decide how it should be managed. The judge will:

1. **Review the issues**: Identify the key legal and factual questions in dispute.
2. **Determine the necessary steps**: Decide what procedures are needed to resolve those issues fairly and efficiently. This includes making the directions on disclosure, witness evidence, and expert evidence as discussed above.
3. **Set the timetable**: Finalise the dates for each step leading up to the trial.
4. **Fix the trial date**: Set a firm trial date or a specific window for the trial.

The parties are expected to cooperate before the CMC. They must discuss and attempt to agree a draft set of proposed directions to put before the judge, which saves time and costs.

### 7.4.2 The Costs Management Element

This is often the most consequential part of the CMCC. It is governed by a process known as "Costs Management". The purpose is to ensure that the costs incurred by the parties are proportionate to the value and complexity of the case.

The process works as follows:

1. **Preparing the costs budget**: Each party's solicitor must prepare a detailed document called a "Precedent H". This is a Costs Budget. It is an estimate of the total legal costs the party expects to incur from that point forward, broken down into phases such as:
    - Disclosure.
    - Witness Statements.
    - Expert Reports.
    - Trial Preparation
    - The Trial itself.

2. **Exchanging and discussing budgets**: The parties exchange their budgets and must discuss them with each other before the CMCC. They must try to agree on the figures for each phase, or at least identify the areas of disagreement.

3. **Judicial approval**: At the CMCC, the judge will review the budgets. The judge does not decide what the solicitor should charge their own client. Instead, the judge decides the amount of costs that the winning party would be able to recover from the losing party at the end of the case. The judge will "approve" a budget for each party, often making reductions to phases deemed disproportionate.

**The Consequences of Costs Management**

Once a budget is approved, it is very difficult for a winning party to recover more than the budgeted amount from their opponent, even if their actual costs were higher. This is known as the "budget cap". This creates a powerful incentive for solicitors to plan carefully and manage their work efficiently within the approved budget.

**Example Illustration**:

In a £500,000 professional negligence claim, the claimant's solicitor files a Costs Budget totalling £200,000. The defendant's budget is £180,000. At the CMCC, the judge reviews the figures. The judge agrees that the case is complex but decides that the estimated cost for the disclosure phase is too high. The judge reduces the claimant's approved budget for that phase from £60,000 to £45,000 and the defendant's from £55,000 to £40,000.

The solicitors for both parties must now find a way to conduct the disclosure process within these new financial constraints. If the claimant wins at trial, they will not be able to recover more than £45,000 from the defendant for the disclosure phase, even if they actually spent £60,000.

In conclusion, directions provide the roadmap for litigation, while the CMCC is the meeting where that roadmap is drawn and the travel budget is set. For a solicitor, mastering the strategic preparation for a CMCC and the skillful drafting of budgets and proposed directions is an essential skill for effective, professional, and cost effective litigation in the Multi Track.

## 7.5 Sanctions for Non-Compliance with Rules and Orders

In any system built on rules and orders, there must be consequences for breaking them. The civil justice system is no different. A sanction is a penalty imposed by the court on a party who fails to comply with a rule, a practice direction, or a court order.

The purpose of sanctions is not purely punitive. They serve three key functions aligned with the Overriding Objective:

1. To ensure that court orders are taken seriously and that litigation is conducted efficiently.
2. To punish a party for their failure, which may have wasted court resources and increased the other side's costs.
3. To act as a deterrent to other litigants who might be tempted to ignore the court's directions.

Sanctions can be, and often are, severe. They are designed to have a real impact. The most common sanctions include:

1. **Striking out**: The court can order that all or part of a party's statement of case be struck out. This is the ultimate sanction. If a claim is struck out, the claimant's case is dismissed. If a defence is struck out, the defendant can no longer defend the claim, and the claimant can enter judgment. This often decides the entire case.
2. **Exclusion of evidence**: The court may order that a party cannot rely on a particular piece of evidence. For example, if a witness statement or an expert's report is served late, the court may refuse to allow that witness to give evidence at trial. Without key evidence, a party's case may collapse.
3. **Costs orders**: The court can order the party in default to pay the other side's costs that were wasted as a result of the failure. This can be an order to pay costs immediately (an "interim costs order").

4. **Payment into court**: The court may order the party in default to pay a sum of money into court as a condition of being allowed to continue with their case. This acts as security.

The modern approach to sanctions was crystallised in the landmark case of ***Mitchell v News Group Newspapers Ltd*** [2013] EWCA Civ 1537. The claimant's lawyers in this case failed to file a Costs Budget on time. The court imposed a draconian sanction, limiting the claimant's recoverable costs to only court fees, a fraction of their actual legal costs. The Court of Appeal upheld this decision, sending a powerful message to the legal profession that the courts would adopt a "zero tolerance" approach to non-compliance, especially where it affected the efficient conduct of litigation.

This case established that for breaches which are "serious or significant", the default position should be to impose a sanction unless the defaulting party can show a good reason for it. This marked a dramatic shift towards a stricter culture of compliance.

## 7.6 Relief from Sanctions (The *Denton* Test)

The strict regime established by the ***Mitchell*** case caused considerable concern. There were fears that it was being applied too rigidly, allowing parties to win cases on trivial procedural technicalities rather than the merits of the dispute. In response, the Court of Appeal clarified the law in the seminal case of ***Denton v TH White Ltd*** [2014] EWCA Civ 906. This case established a three-stage test that courts must apply when a party applies for "relief from sanctions" that is, when they ask the court to set aside or vary a sanction.

The ***Denton*** *Test* is now the definitive authority. When a party applies for relief from a sanction, the court will consider the following three stages.

**Stage 1**: Identify and Assess the Seriousness and Significance of the Breach.

The court must first determine whether the breach was "serious or significant".

A trivial breach is one which "no time at all" has been wasted by the other party, which has not disrupted the proceedings, and which has not otherwise affected the administration of justice. For a trivial breach, relief from sanctions will usually be granted. For example, serving

a bundle of documents one day late where it causes no disruption to the other party or the court's timetable.

A serious or significant breach is one which is more than trivial. This includes missing a deadline by a substantial margin, failing to comply with an "unless order" (an order which states "unless you do this, your claim/defence will be struck out"), or any breach which disrupts the litigation timetable. For example, failing to serve witness statements four weeks after the court ordered deadline, causing the trial date to be jeopardised.

**Stage 2**: Consider the Reason for the Breach.

If the breach is serious or significant, the court will then look at why it happened.

A good reason might be a sudden and serious illness of the solicitor handling the case, or an unexpected and critical IT failure. The bar for a "good reason" is high.

Poor reasons that will not help an application include: being too busy, pressure of work, administrative oversight, or a mistake by a junior member of staff. The court expects firms to have robust systems in place to avoid such errors.

**Stage 3**: Evaluate All the Circumstances of the Case.

This is the most important stage. The court will take a step back and look at the case as a whole. It will consider all relevant circumstances, but will give particular weight to two factors:

- The need for litigation to be conducted efficiently and at proportionate cost (the Overriding Objective).
- The importance of enforcing court rules and orders.

At this stage, the court will perform a balancing act. It will weigh the interests of the defaulting party in having their case heard against the interests of the other party and the wider public interest in the efficient administration of justice. The court will consider:

- The effect of the breach on the other party.
- The history of the litigation and whether the defaulting party has previously breached orders.

- Whether the trial date can still be met.
- The overall merits of the defaulting party's case.

**Practical Illustration of the Denton Test**:

Imagine a defendant fails to serve its expert's report by the court's deadline. The claimant applies for a sanction, and the court orders that the defendant cannot rely on the report. The defendant then applies for relief from sanctions.

**Stage 1**: The breach is serious and significant. The expert evidence is crucial to the defence, and the late service has disrupted the trial timetable.

**Stage 2**: The defendant's solicitor states the delay was due to an oversight because a key fee earner was on holiday. The court finds this is a poor reason.

**Stage 3**: The court considers all the circumstances. The trial is in six months, so there is time to remedy the breach. However, the defendant has a history of minor delays. The court must balance the defendant's right to a fair trial (which requires them to present their evidence) against the need to enforce rules. If the court decides that granting relief would reward a culture of non-compliance and undermine the rules, it may refuse the application. The defendant would then go to trial without any expert evidence, which would likely be fatal to its case.

The lessons from ***Mitchell*** and ***Denton*** are clear. The court will be strict in enforcing rules and orders. Solicitors must:

1. Treat all court deadlines as unbreakable.
2. Have effective systems in place to monitor compliance.
3. If a breach occurs, act immediately to remedy it and apply for relief from sanctions promptly.
4. When applying for relief, carefully address each stage of the Denton Test in the evidence.

The ***Denton*** *Test* provides a pathway to relief, but it is a narrow one. The best strategy is always to avoid the need for it altogether through diligent and professional case management.

## 7.7 Conclusion

Case management is the engine of modern civil litigation. The court is no longer a passive umpire; it is an active manager. The Overriding Objective is its guiding principle. For the aspiring solicitor, understanding this proactive system is non-negotiable. You must be organised, comply with deadlines, and always be prepared to demonstrate to the court that you are helping to further the Overriding Objective. Mastering case management is not just about avoiding sanctions; it is about providing efficient, effective, and professional service to your client.

# 8

# DISCLOSURE AND PRIVILEGE

Building a strong legal case depends on evidence. Unlike in some legal systems, English civil procedure does not rely on a wide-ranging investigation by the court. Instead, it places a duty on the parties to reveal the relevant evidence they hold to each other. This process is known as disclosure. It is one of the most important and potentially demanding stages of litigation. This chapter explains the rules and principles governing disclosure, from the standard process to specific court orders. Furthermore, we will explore the vital concept of legal privilege, which protects certain confidential communications from being disclosed, and the without prejudice rule, which promotes settlement negotiations. Understanding both what you must show and what you can rightfully hide is essential for effective and compliant legal practice.

## 8.1 The Concept of Standard Disclosure

Standard disclosure is a fundamental and compulsory stage in the litigation process. It is the primary method by which the parties in a case exchange relevant information and evidence with one another. The core principle behind this process is to ensure fairness and transparency. It prevents what is known as "trial by ambush," where one party surprises the other with crucial evidence at trial, leaving no time for a proper response. By revealing the key documents early, both sides can understand the true strengths and weaknesses of their case and the opponent's case, which often encourages settlement and always helps the court to decide the case justly based on all the relevant facts.

The duty of standard disclosure is outlined in *Part 31* of the *Civil Procedure Rules* (*CPR*). It requires each party to disclose documents on which they rely, and crucially, documents which

adversely affect their own case or support another party's case. This second part is the most significant aspect of the duty. It means you are legally obligated to reveal documents that are harmful to your own position, even if the other side does not know they exist. This is a positive duty to search for and disclose such material.

A "document" is defined very broadly for the purpose of disclosure. It goes far beyond paper records. It includes any material upon which information is recorded. This encompasses emails, text messages, instant messages, digital photographs, voicemails, social media posts, databases, spreadsheets, and metadata. Essentially, if information is stored in any retrievable format, it is likely to be considered a document.

The duty extends only to documents which are or have been in a party's "control." This concept is also widely interpreted. A party has control of a document if:

- It is in their physical possession. For example, a paper file in their office.
- They have a right to possess it. For example, a document held by their agent.
- They have a right to inspect or take copies of it. For example, a document held by a third party like a bank or accountant to which they have a right of access.

The process of standard disclosure is typically a two-stage process. First, each party must make a reasonable search for documents that fall within the criteria. What is "reasonable" depends on the circumstances of the case, including the number of documents, the nature of the case, and the cost of retrieval. The parties must describe the extent of their search in a Disclosure Report.

Second, each party produces a list of documents (Form N265) that they are disclosing. This list is served on the other party. The list will identify the documents and also state if any documents are no longer in the party's control or if they are claiming a right to withhold inspection of a document, for example, because it is privileged.

**Illustrative Example**:

Imagine a dispute between a business, "TechSolutions Ltd," and a former employee, Ms. Jones. TechSolutions claims Ms. Jones breached her contract by taking confidential client lists to a new job.

Documents TechSolutions must disclose:

- The employment contract (a document it relies on).
- The confidential client list (a document it relies on).
- An internal email from a manager stating, "I told Ms. Jones she could use the client data for her new role to help with the transition." (This is a document that adversely affects its own case as it suggests permission was given).

Documents Ms. Jones must disclose:

- Her new employment contract (a document she may rely on to show her new role is different).
- An email she sent to a friend saying, "I know I shouldn't have taken the files, but I needed a head start." (This is a document that adversely affects her own case and supports TechSolutions' case).

Failure to comply with the duty of standard disclosure can have severe consequences. The court can impose sanctions, including ordering the party to pay costs, striking out parts of their statement of case, or even entering judgment against them.

## 8.2 Duties of Disclosure and the Disclosure Report

The duty of disclosure represents one of the most significant and ongoing obligations a party has in litigation. It is not a single event that occurs when a list of documents is served. Rather, it is a continuous duty that persists until the proceedings are finally concluded. This means that if a relevant document comes into your control at any point after you have provided your initial disclosure list, perhaps during the preparation of witness statements or even shortly before trial, you must immediately notify all other parties of its existence. Failure to do so can be considered a serious breach of procedural rules and may lead to severe sanctions from the court.

A fundamental aspect of fulfilling this duty is conducting a reasonable and proportionate search for documents. The court does not expect a party to undertake an exhaustive, limitless, or ruinously expensive search. What constitutes a "reasonable search" is determined by

considering several factors outlined in the *Civil Procedure Rules*. These factors include the number of documents involved, the nature and complexity of the proceedings, the ease and expense of document retrieval, and the significance of any document likely to be located during the search. The goal is to achieve a balance between the importance of revealing relevant evidence and the practicalities and costs of doing so.

To formalize this process and provide the court with a clear understanding of the steps taken, the parties are required to prepare and file a Disclosure Report. This document is a critical component of modern case management and must be prepared jointly by the parties and filed with the court before the first Case Management Conference (CMC).

The Disclosure Report serves several important functions. It forces the parties to consider the scope of disclosure early in the process. It provides the judge managing the case with the necessary information to make an informed and proportionate order regarding disclosure. It also promotes cooperation between the parties and can help to narrow the issues in dispute.

The report requires detailed information, including:

1. A brief description of what documents exist, or may exist, that are relevant to the issues in the case.
2. The locations where these documents are stored, such as physical filing cabinets, specific electronic servers, cloud storage accounts, or mobile devices.
3. An estimate of the potential costs of conducting the proposed disclosure.
4. Details of how the search for documents will be conducted, including which custodians (the people holding the documents) will be approached and what keyword searches or other methodologies will be used for electronic documents.
5. A statement confirming that the signatory understands the party's duty of disclosure.
6. A proposal for the scope of disclosure, discussing whether standard disclosure is appropriate or if a more tailored model would be more proportionate.

The consequences of failing to comply with these duties can be severe. If a party fails to conduct a reasonable search, files an inadequate Disclosure Report, or fails to disclose a relevant document that later comes to light, the court has wide ranging powers to impose sanctions. These sanctions can include ordering the party to carry out a further search, costs

penalties, striking out part or all of a statement of case, or drawing adverse inferences at trial. In the case of Dentons v Vishny [2023], the court emphasized that the duty of disclosure is a cornerstone of litigation and a deliberate failure to disclose a damaging document could lead to a claim for serious professional misconduct against the solicitor involved.

## 8.3 Orders for Specific Disclosure and Inspection

The process of standard disclosure does not always operate perfectly. One party may believe that the other has failed to properly fulfil their duties. They may suspect that a relevant document exists that has not been disclosed, or that the search conducted was not reasonable. In such situations, the aggrieved party can apply to the court for an order for specific disclosure.

An order for specific disclosure is a court order requiring a party to take one or more of the following steps:

1. Disclose documents or classes of documents specified in the order.
2. Carry out a specified search for documents and disclose the documents located as a result of that search.
3. Explain, in a witness statement, what has happened to documents that were once within their control but are no longer.

The applicant, the party making the request, must be specific about what they are asking for. A vague application stating that the other side has not disclosed enough will be dismissed. The applicant should identify, as precisely as possible, the document or category of documents they seek, and explain why they believe these documents exist, are relevant, and are likely to be in the control of the other party.

The legal test the court will apply is whether the order is "necessary in order to dispose fairly of the claim or to save costs." The court will balance the applicant's need for the document against the burden and cost imposed on the disclosing party to find and produce it.

**Example Scenario**:

In a commercial dispute about a failed joint venture, Company A's disclosure is sparse. Company B knows that the project used a specific online collaboration platform, like Microsoft Teams or Slack, for all major communications. Company A's disclosure list only includes formal emails and makes no mention of any messages from this platform.

Company B can apply to the court for an order for specific disclosure. The application would specify: "An order that Company A conduct a search of its [named collaboration platform] workspace for the project 'Project Alpha' for all messages and shared files created between [date] and [date], and disclose any relevant documents located." Company B would support this with evidence explaining the central role this platform played in the project, making it inconceivable that no relevant documents exist there.

Once a document has been properly disclosed in a list, the other party generally has a right to inspect it. This means they can request to see the original document or be provided with a copy. However, this right is not absolute. A party can refuse to allow inspection on limited grounds, the most important of which is that the document is privileged from inspection, for example because it is a confidential communication with a lawyer. Other grounds include that it would be disproportionate to allow inspection, or that the document no longer exists.

If a party wishes to challenge a claim to privilege, they can apply to the court for an order that the other party produce the document for the court to examine. The court will then look at the document privately and decide whether the claim for privilege has been properly made.

The case of ***Earles v Barclays Bank Plc*** [2009] EWCA Civ 211 illustrates the court's approach. The claimant sought specific disclosure of documents she believed existed. The court ordered the bank to file a witness statement explaining the searches it had undertaken. Upon reviewing the statement, the court was satisfied that a reasonable search had been conducted and refused to order any further disclosure. This shows that the court will not order a "fishing expedition," but will intervene where there is credible evidence that the disclosure process has been inadequate.

The duties of disclosure require a proactive and continuous approach, documented in a Disclosure Report. Where this process fails, the mechanism of specific disclosure provides a

vital tool to ensure that the principle of full and fair exchange of evidence is upheld, allowing the court to intervene and compel a party to comply with their fundamental obligations.

## 8.4 Pre Action Disclosure and Disclosure against Non-Parties

The disclosure process generally occurs after litigation has formally commenced. However, there are specific and important circumstances where a party may obtain disclosure of documents before issuing proceedings, or may require documents from someone who is not a party to the case at all. These procedures are exceptional and require meeting a high legal threshold.

Pre action disclosure, governed by *CPR 31.16*, allows a potential claimant to seek documents from a potential defendant before a claim form is issued. The policy behind this rule is to encourage early settlement and to ensure that claims are only pursued when they have proper merit. To succeed in an application for pre action disclosure, the applicant must satisfy the court of several conditions.

First, the applicant and the respondent are likely to be parties to subsequent proceedings if litigation cannot be avoided. This means the court must be convinced that a claim is genuinely contemplated and that the parties are the correct ones to be involved.

Second, the documents sought must be directly relevant to the issues that would arise in those anticipated proceedings. The request cannot be a speculative "fishing expedition" to see if a claim exists. The applicant must have a clear idea of the nature of the claim and how the documents would be relevant to it.

Third, and most importantly, pre action disclosure must be desirable to dispose fairly of the anticipated proceedings, to assist the dispute to be resolved without proceedings, or to save costs. The court will carry out a balancing exercise, weighing the benefit of having the documents early against the cost and intrusion imposed on the respondent.

**Illustrative Example**:

A manufacturing company, "Widget Co," receives a letter before action from a customer, "Acme Ltd," alleging that a batch of components supplied was defective and caused a

production line shutdown. Widget Co believes the defect was due to faulty raw materials supplied to them by "Metal Corp." Before issuing a claim against Metal Corp, Widget Co can apply for pre action disclosure of Metal Corp's quality control certificates and internal test reports for the relevant batch of raw materials. These documents are directly relevant to the potential claim, and having them would allow Widget Co to properly assess the strength of its case against Metal Corp, potentially enabling settlement and avoiding unnecessary litigation.

Disclosure against a non-party is governed by *CPR 31.17*. This is an even more intrusive power, as it compels someone who is not involved in the dispute to produce documents. The test for such an order is similarly strict.

The applicant must show that the documents are likely to support their case or adversely affect the case of another party. The documents must also be of sufficient importance that their disclosure is necessary to dispose fairly of the claim or to save costs. Furthermore, the court must be satisfied that it would be just and proportionate to make the order, considering the inconvenience and cost to the non-party.

**Example Scenario**:

In a serious personal injury claim following a multi vehicle road traffic accident, the claimant wishes to obtain the accident report and witness statements taken by the police. The police are a non-party. The claimant can apply for an order against the Chief Constable for disclosure of these documents. They are highly likely to support or adversely affect a party's case, and they are necessary for a fair determination of liability, as they contain independent evidence of how the accident occurred.

The case of ***Black v Sumitomo Corporation*** [2001] EWCA Civ 1819 is a leading authority on non-party disclosure. The Court of Appeal emphasized that the jurisdiction is exceptional and should not be used to cause undue burden to third parties. The applicant must precisely identify the documents and demonstrate their materiality to the issues in the case. This ensures that non-parties are protected from becoming embroiled in litigation that does not concern them.

## 8.5 Electronic Disclosure (e-Disclosure)

In the contemporary legal landscape, the vast majority of documents created are electronic. This shift from paper to digital data has transformed the process of disclosure, giving rise to the practice of electronic disclosure, or e disclosure. E-disclosure presents unique challenges due to the sheer volume of data, its dynamic nature, and the technical complexity involved in its preservation, collection, and review.

The fundamental principles of disclosure apply equally to electronic documents. However, the scale requires a more sophisticated and managed approach to ensure the process remains proportionate and cost effective. Electronic documents include emails and their attachments, documents stored on network drives, data on laptops and mobile devices, instant messages, social media content, and metadata. Metadata is information about the document, such as its creation date, author, and edit history, which can itself be crucial evidence.

The process of e disclosure is often described by reference to an electronic disclosure reference model, which outlines key stages. These stages include the preservation of potentially relevant data to prevent its deletion or alteration, the identification of relevant sources and custodians, the collection of data from those sources, its processing to reduce volume, and the review of the remaining material for relevance and privilege.

A central concept in managing e disclosure is proportionality. The court will not expect a party to undertake a review of every piece of electronic data it holds at an astronomical cost. The parties are expected to cooperate in developing a sensible and proportionate strategy. This is typically detailed in a document called an Electronic Documents Questionnaire, which the parties may be required to complete and discuss.

*Practice Direction 31B* provides specific guidance for the disclosure of electronic documents. It encourages the parties to discuss several key issues at an early stage, including:

- The categories of electronic documents within their control.
- The computer systems and storage devices they hold.
- The methods they will use to preserve the data.

- The potential tools for searching the data, such as keyword searches, concept searches, or email threading.
- The estimated costs of the proposed steps.

The case of ***Pyrrho Investments Ltd v MWB Property Ltd*** [2016] EWHC 256 (Ch) was a landmark in endorsing the use of technology in the disclosure process. The court approved the use of predictive coding, a form of artificial intelligence, to review a very large volume of electronic documents. The court held that where a technology assisted review process was a reasonable and proportionate means of conducting disclosure, and where the parties agreed to its use, it should be approved. This decision reflects the judiciary's recognition that traditional manual review is often impractical for large datasets and that technology provides a viable and efficient alternative.

**Practical Illustration**:

In a commercial dispute between two large financial institutions, each party holds many terabytes of data, comprising millions of emails and other electronic records. A manual review would be impossible. The parties, through their solicitors and IT experts, agree on a proportionate strategy. They identify the key custodians and date ranges. They then use a combination of keyword searches and technology assisted review to identify a manageable subset of documents for a detailed privilege and relevance review. This process, while still complex and costly, ensures that disclosure is conducted effectively and in a manner proportionate to the value and complexity of the case.

## 8.6 Legal Advice Privilege and Litigation Privilege

Legal Professional Privilege is a fundamental principle of English law, often described as a basic human right. It is a right that belongs to the client, not the solicitor, and it protects certain confidential communications from being disclosed to the other side or the court. It is an absolute privilege, meaning that if it applies, the document does not have to be disclosed, even if it is highly relevant to the case. There are two main types of legal professional privilege: Legal Advice Privilege and Litigation Privilege. While they share the same core objective of confidentiality, they have different scopes and requirements.

### 8.6.1 Legal Advice Privilege

Legal Advice Privilege protects confidential communications between a lawyer and their client which come into existence for the dominant purpose of giving or receiving legal advice. This protection exists regardless of whether litigation is anticipated or not. It is designed to ensure that a client can be completely open and honest with their lawyer, providing all the facts, however damaging, so that the lawyer can give the most accurate and effective legal advice possible.

The key elements are:

1. **A communication**: This can be written (letters, emails) or oral (the content of a meeting or phone call, as recorded in a solicitor's attendance note).
2. **Between a lawyer and a client**: This seems straightforward, but the definition of "client" is crucial and can be narrow, especially in a corporate context.
3. **Confidential**: The communication must be intended to be confidential.
4. **For the dominant purpose of seeking or giving legal advice**: The main reason for the communication must be to obtain or provide legal advice, as opposed to, for example, commercial or strategic advice.

The most challenging aspect in practice is often identifying who the "client" is. This was the central issue in the landmark case of ***Three Rivers District Council and Others v Governor and Company of the Bank of England (No 5)*** [2003] EWCA Civ 474. Following the collapse of the Bank of Credit and Commerce International (BCCI), the Bank of England set up an inquiry. The Bank of England created a specific unit, the Bingham Inquiry Unit (BIU), to deal with the inquiry and to communicate with the Bank's lawyers. Other employees of the Bank were not involved in this legal process.

When litigation ensued, the other parties sought disclosure of communications between the Bank's employees and the BIU. The Court of Appeal held that only communications between the lawyers and the individuals within the BIU were privileged. Communications between the lawyers and other employees of the Bank of England were not protected by legal advice privilege because those employees were not considered the "client" for the purpose of

obtaining legal advice. This case established a narrow definition of "client" in a corporate context, often limited to those employees specifically tasked with instructing the lawyers.

**Example of Legal Advice Privilege**:

The Managing Director of a company emails the company's in house lawyer stating, "We are considering terminating our contract with Supplier X. I am concerned that if we do, they might sue us for breach of contract. Please advise me on our legal position and the potential risks." The lawyer's reply, providing a legal analysis of the contract, is protected by legal advice privilege. The communication is confidential, between a lawyer and a client, and its dominant purpose is to give and receive legal advice. This email would not have to be disclosed in any subsequent litigation with Supplier X.

### 8.6.2 Litigation Privilege

Litigation Privilege is broader in scope than Legal Advice Privilege. It protects confidential communications between a lawyer and their client, or between either of them and a third party, which are made for the dominant purpose of use in actual, pending, or reasonably contemplated litigation.

The key elements are:

1. Litigation must be actual, pending, or reasonably contemplated. It is not enough that litigation is a mere possibility. There must be a real likelihood of litigation.
2. The communication can be between:
    - Lawyer and client.
    - Lawyer and a third party (e.g., a potential witness, an expert).
    - Client and a third party.
3. The communication must be made for the dominant purpose of that litigation. This is the critical test. The "dominant purpose" test was established in the case of ***Waugh v British Railways Board*** [1980] AC 521. A railway employee was killed in an accident. The British Railways Board prepared a report that included witness statements and a diagram. The report was prepared for two purposes: (1) to recommend safety improvements, and (2) for submission to the Board's solicitors for

anticipated litigation. The House of Lords held that the report was not privileged. The purpose of improving safety was just as important as the litigation purpose; therefore, litigation was not the dominant purpose. The report had to be disclosed to the widow in her personal injury claim.

**Example of Litigation Privilege**:

Following a factory accident, the company's solicitor reasonably anticipates a claim from an injured employee. The solicitor instructs an independent engineer to investigate the accident and produce a report on the cause. The solicitor's letter of instruction to the engineer and the engineer's subsequent report are protected by litigation privilege. The dominant purpose for creating these documents is for use in the anticipated litigation. Similarly, if the company's Health and Safety Manager interviews a witness to get a statement for the solicitor, a note of that interview would also be privileged.

**Key Differences and Practical Implications**

| Feature | Legal Advice Privilege | Litigation Privilege |
|---|---|---|
| **When it applies** | At any time, litigation not required. | Only when litigation is actual, pending, or reasonably contemplated. |
| **Who it covers** | Only communications between lawyer and client. | Communications between lawyer/client and third parties. |
| **Purpose Test** | Dominant purpose of giving/receiving legal advice. | Dominant purpose of use in litigation. |
| **Scope** | Narrower (due to the "client" definition). | Broader. |

**Practical Advice for Solicitors**

1. **Identify the purpose**: Always consider the primary reason for creating a document. If it is not for legal advice or litigation, it may not be privileged.

2. **Mark documents appropriately**: Clearly mark sensitive communications as "Privileged and Confidential" and "Legally Advised." While this does not automatically make them privileged, it helps to assert and identify the claim.
3. **Be cautious with third parties**: Remember that communications with third parties are only protected if litigation privilege applies. Pre litigation reports made for mixed purposes (e.g., operational and legal) are risky.
4. **Define the "client"**: In corporate matters, carefully identify which individuals are authorised to seek legal advice on behalf of the company to ensure those communications are protected.

Legal Advice Privilege and Litigation Privilege are essential tools for ensuring clients can prepare their cases confidentially. Understanding the distinction between them is critical for any solicitor. Failing to apply the correct privilege can lead to a catastrophic loss of confidentiality, forcing the disclosure of highly sensitive and damaging material to the opposition. A thorough grasp of the tests from ***Three Rivers*** and ***Waugh*** is therefore not just academic; it is a core component of competent and ethical legal practice.

## 8.7 'Without Prejudice' Communications

The without prejudice rule is a separate principle that promotes settlement. It protects communications made in a genuine attempt to settle an existing dispute from being put before the court as evidence. The public policy justification is that parties should be encouraged to speak freely and make concessions in settlement discussions without fear that their words will be used against them if the negotiations fail.

For the rule to apply:

- There must be a genuine dispute.
- The communication must be a genuine attempt to settle that dispute.
- The communication must be marked "without prejudice" or make it clear that it is intended to be part of a negotiation.

**Example**: A claimant’s solicitor writes to the defendant’s solicitor: "Without prejudice, my client is willing to settle this matter for £75,000." If the case proceeds to trial, this letter cannot be shown to the judge as an admission that the claim is only worth £75,000.

There are exceptions to the rule. For instance, without prejudice communications can be admitted to show that a settlement was actually reached, or to explain a delay in the proceedings. The case of ***Unilever plc v The Procter & Gamble Co*** [2000] 1 WLR 2436 confirmed that the rule should be applied broadly to encourage settlement.

## 8.8 Waiver of Privilege

Privilege belongs to the client, not the solicitor. It is the client's right to assert it, and it is the client who can waive it, meaning they can give up the right to confidentiality.

Waiver can be express or implied. If a client voluntarily discloses the substance of legal advice to the court or to the other side, they will be taken to have waived privilege in that advice. This is because it is considered unfair to "cherry pick" by revealing favourable parts of legal advice without allowing the other side to see the full context.

**Example**: In a trial, a company director gives evidence stating: "We went ahead with the transaction because our lawyers advised us it was lawful." By referring to the content of the legal advice in court, the company has waived privilege in that specific advice. The other party can now require the company to disclose the lawyer's full advice on the lawfulness of the transaction.

The case of ***Breeze v John Stacey & Sons Ltd*** [1999] EWCA Civ 1831 illustrates that waiver can be inadvertent. A document was accidentally included in a disclosed bundle. The court held that privilege had been waived because the other party had seen it, stressing the need for extreme care when preparing bundles for disclosure or trial.

## 8.9 Conclusion

Disclosure ensures transparency and fairness by allowing each party access to the documents that support or challenge their case. The process must be proportionate, with parties conducting reasonable searches and preparing detailed Disclosure Reports. Courts may order Specific Disclosure or even disclosure from non-parties where justice requires it, and with the rise of digital evidence, careful management of electronic disclosure has become essential to prevent unnecessary cost and delay.

Equally vital are the protections offered by privilege and the without prejudice rule. Legal Advice Privilege safeguards confidential lawyer–client communications, while Litigation Privilege extends to documents created for the dominant purpose of litigation. The without prejudice principle protects candid settlement discussions, encouraging early resolution of disputes. However, privilege is not absolute for careless disclosure can amount to waiver. Effective case management therefore requires not only transparency in disclosure but also vigilance in preserving confidentiality.

# 9

# EVIDENCE FOR TRIAL

The law of evidence ensures that a court's decision rests on information that is relevant, reliable, and fair. A solicitor must understand the core principles of relevance, hearsay, and admissibility to decide what evidence can be used and how to challenge what cannot. Alongside these are the rules on burden and standard of proof; knowing who must prove what, and to what degree of certainty. From the outset, case strategy should be guided by these foundations to build a coherent, admissible case.

This chapter outlines the practical skills needed to apply those rules: drafting and testing witness statements, managing expert evidence under *CPR 35*, and distinguishing between fact and opinion. It also explains how courts control expert testimony and assess credibility. Together, these principles form the foundation of effective advocacy; ensuring that only sound, probative evidence shapes the final judgment.

## 9.1 The Rules of Evidence: Relevance, Hearsay, and Admissibility

Imagine a trial as a process of building a house. You cannot use any material you find; you must use materials that are strong, reliable, and fit for purpose. The law of evidence provides the quality control standards for the materials you can use to build your case. It is a set of rules designed to ensure that the court's decision is based only on information that is trustworthy, fair, and useful. For a solicitor, mastering these rules is not just about knowing what evidence to present; it is about knowing how to object to the other side's evidence when it does not meet these standards. The three most fundamental concepts are relevance, hearsay, and admissibility.

### 9.1.1 Relevance: The First and Most Important Gatekeeper

The first and most basic question for any piece of evidence is this: is it relevant? Evidence is considered relevant if it has a logical tendency to make a fact that is important to the case more or less probable than it would be without that evidence. In simpler terms, does this piece of information help the judge answer one of the key questions in the lawsuit? If it does not, it is irrelevant and will be excluded. The court's time is precious, and it should not be wasted on information that does not help resolve the dispute.

The concept of relevance was famously explained by the legal scholar *Sir James Fitzjames Stephen*, who said that evidence is relevant if it is "connected with the facts in issue in such a way as to render the existence or non-existence of those facts probable."

**Practical Examples of Relevance:**

- **Relevant evidence**: In a claim for breach of a contract to sell a specific car, an email from the seller to the buyer stating, "I have sold the car to someone else for a higher price," is highly relevant. It directly makes it more probable that the seller breached the contract with the buyer.
- **Irrelevant evidence**: In the same case, a letter from the seller's doctor discussing the seller's history of back pain is irrelevant. The seller's health has no logical connection to whether they breached the contract for the sale of the car.

It is important to note that relevance is not the same as importance. A piece of evidence can be relevant even if it is a small point. The key is its logical connection to the facts in issue. A solicitor must constantly evaluate every document and every proposed piece of testimony through the lens of relevance.

### 9.1.2 Hearsay: The Problem of Second-Hand Information

Hearsay is one of the most complex and frequently encountered rules of evidence. At its core, hearsay is a out of court statement which is being repeated in court by someone else, for the purpose of proving that what was stated is true. The central reason for restricting hearsay is that the original maker of the statement is not in court to be cross examined on its accuracy, truthfulness, or the circumstances in which it was made.

The classic definition comes from the case of ***Subramaniam v Public Prosecutor*** [1956] 1 W.L.R. 965: "Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to prove the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made."

**Why is Hearsay Problematic?**

Imagine a witness, Jane, testifies in court: "My friend Tom, who is not here, told me he saw the defendant sign the contract." If Jane says this to prove that the defendant did sign the contract, this is hearsay. The court has a problem:

- The defendant's barrister cannot cross examine Tom to ask: "Are you sure it was the defendant? What were the lighting conditions? Were you wearing your glasses? Are you lying because you dislike the defendant?"
- The court is being asked to accept Tom's assertion without testing its reliability. This is considered fundamentally unfair.

**The Modern Rule: *The Civil Evidence Act 1995***

The strict common law rule against hearsay has been significantly relaxed in civil proceedings by the *Civil Evidence Act 1995*. Under this Act, hearsay evidence is generally admissible. However, this does not mean it is always powerful. The Act includes important safeguards:

1. **Notice**: A party who intends to rely on hearsay evidence must give notice to the other parties. This allows the other side to investigate the reliability of the evidence and, if necessary, to apply to the court to call the original maker of the statement as a witness.

2. **Weight**: The court will assess how much weight to give to the hearsay evidence. The fact that it is hearsay is one of the factors the court will consider. If the evidence is crucial and the original maker is available but not called, the court may give it very little weight.

**Examples of Hearsay and its Exceptions**:

- **Inadmissible hearsay (at common law)**: A witness says, "My boss told me the company was insolvent," to prove that the company was indeed insolvent. This is hearsay. The boss should be called as a witness to be cross examined on the company's financial state.
- **Admissible hearsay (under the *1995 Act*)**: In a debt recovery case, the claimant serves a witness statement from their accounts manager that says, "The previous accounts manager, who has now retired, told me that the defendant had failed to pay the last three invoices." The claimant gives formal notice that they are relying on this hearsay. The court will allow this evidence, but the defendant will argue that it should be given little weight because the previous manager is not available for cross examination.
- **Not hearsay at all**: A witness says, "I heard the defendant shout 'I know this fire will destroy the evidence!'" This statement is not being used to prove that a fire will destroy evidence, but to prove that the defendant said those words, which is relevant to show their guilty state of mind. This is admissible as a statement of a "state of mind".

### 9.1.3 Admissibility: The Final Decision of the Court

Admissibility is the court's ultimate power to control the evidence presented before it. Even if evidence is relevant and is not hearsay (or is admissible hearsay), the judge has the discretion to exclude it. This power exists to ensure the trial is fair and to serve the Overriding Objective.

A judge may exclude evidence for several reasons:

- **Privilege**: As discussed in Chapter 8, certain communications, such as those between a solicitor and client, are privileged and cannot be used as evidence.
- **Illegally or unfairly obtained evidence**: The court may exclude evidence if it was obtained by illegal means, such as by trespass or theft. The court will balance the public interest in deterring misconduct against the public interest in having all relevant evidence available.
- **Prejudice outweighing probative value**: This is a crucial discretion. Evidence may be excluded if its "probative value" (its power to prove a fact) is substantially

outweighed by its "prejudicial effect" (its potential to unfairly bias the judge against a party).

**Example of Exclusion for Prejudice**:

In a case about a minor traffic accident, the defendant wishes to introduce evidence that the claimant was convicted of a serious, unrelated fraud ten years ago. While this is technically "relevant" to the claimant's credibility, its probative value on the question of who caused the traffic accident is very low. Its prejudicial effect, however, is very high, as it might lead the judge to subconsciously think, "This claimant is a dishonest person, so he must be lying about the accident." The judge would likely exclude this evidence to ensure a fair trial.

## 9.2 The Burden and Standard of Proof

These two concepts are the engine of the trial. They determine who has to prove the case, and how convincing their evidence needs to be. Getting these concepts wrong is like a footballer not knowing which goal to score in; no matter how much you run, you will not win.

### 9.2.1 The Burden of Proof: "He Who Asserts Must Prove"

The burden of proof, also known as the legal burden, is the obligation to prove a particular fact in issue. The foundational principle in civil law is encapsulated in the Latin maxim: *affirmanti non neganti incumbit probation*, "the burden of proof lies upon him who affirms, not him who denies." In plain English, this means "he who asserts must prove."

This means that the party who makes a legal claim or raises a specific defence has the responsibility to prove the facts that support that claim or defence.

**Application in a Civil Case**

1. **The claimant's burden**: The claimant bears the initial and primary burden of proof. They must prove all the facts necessary to establish their cause of action.
    - **In a contract case**: The claimant must prove: 1) that a contract existed, 2) the terms of that contract, 3) that the defendant breached those terms, and 4) that the claimant suffered loss as a result.

- **In a negligence case**: The claimant must prove: 1) that the defendant owed them a duty of care, 2) that the defendant breached that duty (was negligent), 3) that the breach caused the claimant's loss, and 4) the nature and extent of that loss.

2. **The defendant's burden**: If the defendant raises a specific defence, the legal burden shifts to them to prove that defence. For example, if the defendant alleges contributory negligence (that the claimant was partly to blame for their own loss), the defendant must prove it. Also, if the defendant raises the defence of limitation (that the claim was brought too late), the defendant must prove the date the cause of action accrued.

**Practical Illustration**:

In a claim for unfair dismissal, the employee (claimant) has the burden of proving that they were dismissed. Once this is proven, the burden shifts to the employer (defendant) to show the reason for the dismissal and that it was a potentially fair reason (e.g., misconduct or redundancy). The burden then shifts back to the employee to show that the employer acted unreasonably in treating that reason as sufficient.

### 9.2.2 The Standard of Proof: "More Likely Than Not"

The standard of proof answers the question: "To what degree of certainty must this fact be proven?" In civil cases, the standard is on the balance of probabilities. This means that the court must be satisfied that it is more likely than not that the event occurred. It is often described as being just over 50% sure.

The leading authority on this standard is the case of ***Miller v Minister of Pensions*** [1947] 2 All E.R. 372. *Lord Denning* provided a classic explanation:

"It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: 'We think it more probable than not,' the burden is discharged, but if the probabilities are equal, it is not."

This is a lower standard than in criminal cases, where the prosecution must prove its case "beyond reasonable doubt". The different standards reflect the different stakes involved; civil

cases typically concern the allocation of money or rights, while criminal cases concern the liberty of the individual.

**Applying the Standard in Practice**:

**Scenario**: A claimant alleges that a verbal contract was formed during a phone call. The defendant denies it. There are no witnesses and no recording of the call.

**The judge's task**: The judge must listen to the evidence from both parties and decide whose account is more credible. The judge does not need to be 100% certain that the claimant is telling the truth. The judge only needs to be satisfied that it is 51% likely that the phone call happened as the claimant described. If the judge finds the claimant's story more convincing, even by a small margin, the claimant has discharged the burden of proof and the fact is established.

**A Note on Serious Allegations**

There has been debate about whether a higher standard should apply to very serious allegations within civil cases, such as fraud. The House of Lords in ***Re B (Children)*** [2008] UKHL 35 clarified that the standard remains the balance of probabilities, even for serious allegations. However, the inherent improbability of an event (e.g., "a respected surgeon deliberately harmed a patient") is a factor the judge will consider.

In such cases, stronger evidence will be needed to satisfy the judge that the improbable event is, on the balance of probabilities, what actually occurred. As *Lady Hale* stated, "The more serious the allegation, the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability."

The rules of evidence and the principles of burden and standard of proof are the framework within which a solicitor must build the case. The strategy from the very first client meeting should be guided by these questions:

1. What are the facts I need to prove to win? (Identifying the legal burden)
2. What evidence do I have that is relevant and admissible to prove those facts?

3. Is any of my evidence vulnerable to a hearsay challenge, and if so, have I given proper notice?

4. Is my evidence strong enough to convince a judge that my version of events is "more likely than not" the true one?

A deep and practical understanding of these fundamentals is what separates a competent legal advisor from a skilled courtroom advocate

## 9.3 Witness Evidence: Witness Statements and Affidavits

The heart of most trials is the testimony of witnesses. They are the ones who can bring the documents to life and describe the events that led to the dispute. In modern civil litigation, the evidence of factual witnesses is primarily provided through a written witness statement. This document stands as the core of their testimony. Understanding how to draft, challenge, and use witness statements is a fundamental skill for any solicitor.

### 9.3.1 The Purpose and Central Role of the Witness Statement

Before the introduction of the *Civil Procedure Rules*, trials were often unpredictable. Witnesses would give their evidence in chief, their main story, orally from the witness box. This meant that the other side would hear it for the first time at trial, making it difficult to prepare an effective cross examination and often leading to trials being adjourned halfway through.

The modern system requires parties to exchange witness statements before the trial. This serves several crucial purposes aligned with the *Overriding Objective*:

1. **To save time and costs**: It allows the parties to know the details of the opposing case well in advance. This promotes settlement, as each side can assess the strength of the other's evidence. At trial, it saves time because the witness's evidence in chief is their statement, which they simply confirm to be true.

2. **To prevent ambush**: It ensures a fair process where no party is taken by surprise at trial by unexpected testimony.

3. **To focus the issues**: By seeing the witness statements, the parties and the court can identify which facts are agreed and which are truly in dispute, narrowing the issues for trial.

The legal authority for this process is found in *Part 32* of the *Civil Procedure Rules*. A witness statement is a written and signed statement of the evidence that a witness would give if they were allowed to give their evidence in chief orally.

### 9.3.2 The Content and Formal Requirements of a Witness Statement

A witness statement must comply with specific formalities set out in Practice Direction 32. Failure to do so can lead to the court refusing to admit it as evidence or attaching less weight to it. The key requirements are:

1. **Heading**: It must be headed with the title of the proceedings.
2. **Identity of the witness**: It must state the full name, address, and occupation of the witness.
3. **The body of the statement**: It should be written in the first person, using the witness's own words as far as possible. The language should be clear and straightforward. The statement must set out the facts, not argument or opinion.
4. **Numbered paragraphs**: The text must be divided into numbered paragraphs for easy reference.
5. **Exhibits**: If the witness refers to a document, it should be attached as an exhibit. The exhibit should be labelled (e.g., "JB1", "JB2") and the statement should refer to it clearly (e.g., "I refer to the invoice dated 1 January 2024 which is now shown to me marked 'JB1'").
6. **Statement of Truth**: This is the most critical component. The statement must end with a signed Statement of Truth in the following prescribed form: "I believe that the facts stated in this witness statement are true."

The consequences of signing a Statement of Truth are serious. If a witness makes a false statement without an honest belief in its truth, they may be found in contempt of court, which can result in a fine or imprisonment. This requirement gives the statement its weight and authority.

### 9.3.3 Drafting an Effective Witness Statement: A Solicitor's Role

A solicitor often assists a witness in drafting their statement. This is a task that requires skill and ethical care. The solicitor's role is to help the witness present their evidence clearly and logically, not to put words in their mouth or create a story.

The process should be as follows:

1. **Take a proof of evidence**: The solicitor should first interview the witness and take a detailed, unstructured note of everything the witness remembers. This is the "proof of evidence".
2. **Draft the statement**: Using the proof, the solicitor should draft a coherent statement. The statement should tell a chronological and logical story.
3. **Review with the witness**: The draft must be sent to the witness for review. The witness must check it carefully and confirm that it is an accurate account of their evidence.
4. **Finalise and sign**: Once the witness is happy, the final version is prepared for signature. The solicitor must explain the significance of the Statement of Truth to the witness before they sign.

**Example of a Well Drafted Paragraph**:

"On 1 January 2024, I attended a meeting with Mr. Smith at his office. During the meeting, which started at approximately 2:00 PM, Mr. Smith said to me, 'I agree to purchase the consignment of goods for the price of ten thousand pounds.' I replied, 'Thank you, I will have the goods delivered next week.' I refer to my contemporaneous note of this meeting, which is now shown to me marked 'AB1'."

This paragraph is good because it is factual, specific, and refers to a document to support the evidence.

### 9.3.4 Affidavits: A Sworn Alternative

An affidavit is a more formal type of witness statement. It is a written statement sworn or affirmed to be true before a person authorized to administer oaths, such as a solicitor or a court official.

The key differences between an affidavit and a witness statement are:

- **Formality**: An affidavit is a sworn oath or a solemn affirmation, making it a more formal document.
- **Process**: The signing process is more involved. The witness (deponent) must sign each page and the final signature must be witnessed by the authorized person.
- **Cost**: They are more expensive and time consuming to produce.

In modern civil litigation, affidavits are not the norm for routine witness evidence. Their use is generally restricted to specific situations, such as:

- Where a specific court order or rule requires it (e.g., in certain applications for an injunction).
- In contempt of court proceedings.
- In some proceedings for judicial review.

For the vast majority of witness evidence in a civil trial, the witness statement is the correct and proportionate format.

### 9.3.5 Using Witness Statements at Trial

At the trial, the witness statement serves as the witness's evidence in chief. The witness will enter the witness box, take an oath or affirm to tell the truth, and will be asked to confirm that the statement is their own and that its contents are true. They do not read it out loud.

After this confirmation, the other party's advocate will cross examine the witness. The cross examination will be based on the contents of the witness statement, challenging the witness's account, their memory, or their credibility.

It is therefore vital that a witness statement is accurate and truthful. Any inconsistency between the statement and the oral evidence given under cross examination can severely damage the witness's credibility and harm the party's case.

## 9.4 Expert Evidence: The Role and Duties of an Expert

In many disputes, the court is faced with questions that require specialist knowledge to answer. A judge is an expert in law, but not in medicine, engineering, accountancy, or valuation. In such cases, the court receives assistance from an expert witness. An expert witness is a person who provides the court with an opinion on a matter that falls within their specialised field of knowledge. Their role is fundamentally different from that of a factual witness, and understanding this distinction is critical.

### 9.4.1 The Unique Role of an Expert Witness

A factual witness, as we have seen, is confined to reporting what they saw, heard, or did. They are not permitted to give their opinions or conclusions. An expert witness, however, is specifically instructed to provide their independent opinion to assist the court in understanding complex technical issues and in reaching a fair decision.

The most important principle governing an expert's role is that their overriding duty is to the court, not to the party who instructs them or pays their fee. This is a crucial point that must be understood by both the solicitor and the expert. An expert is not a "hired gun" whose job is to argue a party's case at all costs. They are an independent advisor to the court.

This principle is enshrined in the *Civil Procedure Rules*, *Part 35.1*, which states: "It is the duty of an expert to help the court on matters within the expert’s expertise." This duty overrides any obligation to the person from whom the expert has received instructions or by whom they are paid.

### 9.4.2 The Duties of an Expert: The Ikarian Reefer Principles

The classic and authoritative statement of an expert's duties comes from the case of ***The Ikarian Reefer*** [1993] F.S.R. 563. Mr. Justice Cresswell set out the following key principles, which have since been incorporated into the CPR and practice directions:

1. **Independent assistance**: Expert evidence presented to the court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation.
2. **Unbiased opinion**: An expert witness should provide an objective, unbiased opinion on matters within their expertise. They must never assume the role of an advocate.
3. **Duty to the court**: An expert's primary duty is to the court. This overrides any obligation to the instructing party.
4. **Facts and assumptions**: An expert should state the facts or assumptions upon which their opinion is based. They must not omit to consider material facts which could detract from their concluded opinion.
5. **Scope of expertise**: An expert should make it clear when a particular question or issue falls outside their field of expertise.
6. **Full disclosure**: If, after exchange of reports, an expert changes their view on a material matter, they must inform the parties and the court without delay.

To ensure compliance, every expert's report must contain a "statement of understanding" at the end. The expert must confirm that they have read and understood their duty to the court and that they have complied with it.

**Practical Illustration**:

In a clinical negligence case, a surgeon instructed by the claimant concludes, after reviewing the medical records, that the defendant doctor's treatment was appropriate and not negligent. Even though this opinion destroys the claimant's case, the expert's duty is to the court to state this opinion honestly. The solicitor for the claimant cannot pressure the expert to change the

report. To do so would be professionally improper and a breach of the expert's fundamental duty.

### 9.4.3 The Content of an Expert's Report

An expert's report must be a self contained document that allows the court and the other party to understand the basis of the expert's opinion. The *CPR* prescribes that it must:

- Detail the expert's qualifications.
- State the substance of all material instructions received.
- State who carried out any tests or experiments and whether they were under the expert's supervision.
- Where there is a range of opinion on the matters dealt with in the report, summarise that range and give reasons for their own opinion.
- Contain a summary of the conclusions reached.
- Include the mandatory statement of truth and understanding of their duty to the court.

## 9.5 Court Control: Single Joint Experts and Discussions between Experts

Left unchecked, expert evidence can become disproportionately expensive and time consuming. The court, in furtherance of the Overriding Objective, actively manages expert evidence to ensure it remains proportionate and focused on the real issues in dispute. The two primary tools for this are the Single Joint Expert and direct discussions between experts.

### 9.5.1 Single Joint Experts (SJE)

For many issues, particularly those that are central but not highly contentious, the court will order that the evidence be given by a Single Joint Expert. This means that the parties must agree on a single, neutral expert to investigate the issue and provide a report to the court.

#### The Procedure for Instructing an SJE

The parties must cooperate to draft a joint letter of instruction. This letter sets out the questions the expert is to answer and provides all relevant background information. The cost of the SJE is shared equally between the parties, unless the court orders otherwise.

**Advantages of an SJE**

1. **Cost efficiency**: It is significantly cheaper than each party instructing its own expert.
2. **Neutrality**: It eliminates the "battle of the experts" and provides the court with a single, objective opinion.
3. **Proportionality**: It is perfectly suited for lower value claims or for discrete, technical issues within a larger case.

**Example of an SJE**:

In a boundary dispute between two neighbours, the only technical issue may be the exact location of the boundary based on the title deeds and a site survey. The court will almost certainly order that a single, jointly instructed land surveyor provides a report on this point. This is far more proportionate than each neighbour hiring their own surveyor who may then produce conflicting reports.

### 9.5.2 Discussions between Experts

In more complex cases where the court has given permission for each party to instruct its own expert, the next step is often to order a "without prejudice" discussion between the experts. The purpose of this meeting, as set out in the *CPR*, is for the experts to identify the issues in the proceedings and, where possible, to reach agreement on them.

**The Process**

The court will give directions for the experts to meet, usually without the presence of the lawyers. Before the meeting, the parties' lawyers may help their expert prepare an agenda of points for discussion, but they cannot dictate the outcome. Following the discussion, the experts must prepare a joint statement for the court.

**The Joint Statement**

This statement must:

- List the issues that were discussed.
- State, on an issue by issue basis, the matters on which they agree.
- State the matters on which they disagree, and a summary of their reasons for disagreeing.

**The Value of Expert Discussions**

This process is immensely powerful. It often reveals that the experts agree on far more than the parties' legal teams thought possible. This narrows the issues for trial, saving considerable time and cost. The judge can then focus only on the specific points of disagreement, which are clearly set out in the joint statement.

**Illustrative Scenario**:

In a complex commercial dispute about lost profits, each side has its own forensic accountant. The accountants are directed to meet. In their joint statement, they agree on the relevant market data and the accounting methodology to be used. They only disagree on one key assumption about future market growth. At trial, the judge only needs to hear evidence and make a finding on that single, narrow issue, rather than having to listen to days of evidence on all aspects of the accounting.

The case of ***XYZ v Travel Insurance Co*** [2019] UKSC 48 reinforces the importance of this process. The court stressed that the purpose of the discussion is for the experts to engage with each other's opinions in a constructive way. The joint statement must be a product of their own independent work, not a document drafted by the lawyers. Failure by an expert to engage properly in this process is a breach of their duty to the court.

The effective management of expert evidence is a hallmark of a competent litigator. The solicitor must:

1. Select an expert with the right expertise and an understanding of their duties.
2. Draft clear and balanced instructions, avoiding any suggestion of bias.

3. Comply strictly with court orders regarding Single Joint Experts or expert discussions.
4. Ensure the expert remains independent and does not slip into the role of an advocate.

By understanding and applying the rules in *Part 35* of the *CPR*, the solicitor ensures that expert evidence serves its true purpose: to provide the court with the independent, high quality technical assistance it needs to do justice between the parties.

## 9.6 Opinion Evidence and Factual Evidence

A fundamental rule of evidence governs what a witness is permitted to say in court. This rule draws a critical line between factual evidence, which is generally admissible, and opinion evidence, which is generally not. Understanding this distinction is essential for a solicitor when preparing witnesses for trial and when objecting to improper evidence from the other side. The rule exists to ensure that the judge, not the witnesses, is the one who draws conclusions and forms opinions about the facts of the case.

### 9.6.1 Factual Evidence: The "What", "When", and "How"

Factual evidence, sometimes called lay evidence, is a report of what a witness directly perceived through their own senses. It is a recounting of concrete events, actions, and conversations. A factual witness is limited to describing what they saw, heard, felt, tasted, or did.

The purpose of factual evidence is to provide the judge with the raw, objective building blocks from which they can then construct their own understanding of the events and draw their own conclusions.

**Examples of Proper Factual Evidence**:

- "I saw the blue car proceed through the intersection while the traffic light was red."
- "I heard the defendant say, 'I will not pay this invoice.'"
- "The document now shown to me is the contract that I signed on 1st January."
- "I smelled smoke coming from the defendant's warehouse."

In each of these examples, the witness is reporting a direct sensory observation. They are not interpreting the event or offering a conclusion about what it means.

### 9.6.2 Opinion Evidence: The "Why" and "What It Means"

Opinion evidence is an inference, conclusion, or judgment drawn from observed facts. It is the witness's interpretation of what those facts mean. The general rule is that opinion evidence is inadmissible. The court's reasoning is that it is the judge's exclusive role to form opinions and make judgments based on the facts presented.

Allowing witnesses to give their opinions would usurp the function of the judge and could prejudice the proceedings.

**Examples of Inadmissible Opinion Evidence from a Lay Witness**:

- "In my opinion, the driver was being reckless." (This is a conclusion for the judge to draw from the facts of the driving).
- "I think the contract was fundamentally breached." (This is a legal conclusion for the judge to make).
- "She seemed really nervous, like she was hiding something." (This is a speculative interpretation of behaviour).

If a witness attempts to offer such an opinion in court, the opposing barrister should object, and the judge will likely direct the witness to stick to the facts.

### 9.6.3 The Expert Opinion Exception

The major exception to the rule against opinion evidence is for the properly qualified expert witness. The court recognises that on complex technical, scientific, or professional matters, the judge needs assistance to understand the facts and to form a correct judgment.

Therefore, an expert witness is permitted, and indeed instructed, to give their opinion on matters within their specialised expertise. This opinion is based on their review of the facts of the case, applied to their specialised knowledge.

**Examples of Admissible Expert Opinion**:

- A medical expert stating: "In my opinion, the claimant's spinal injury was caused by the force of the road traffic accident."
- A forensic accountant stating: "In my opinion, the company's losses were a direct result of the fraudulent activity identified in the transaction records."
- An engineer stating: "In my opinion, the building collapse was caused by the use of substandard concrete, which failed to meet the required load bearing specifications."

In each case, the expert is using their specialised knowledge to interpret the facts and provide an opinion that assists the court. Their report and testimony must clearly separate the facts they have been given from the opinions they have formed.

### 9.6.4 The Non-Expert Opinion Exception for Commonplace Matters

There is a small, but important, exception that allows a non-expert witness to give an opinion on a matter that is within the common experience of ordinary people. The court recognises that it is sometimes impossible for a witness to describe a situation without resorting to a shorthand opinion.

These opinions must be based on the witness's own perception and must be a compendious way of describing a perceived fact, rather than a true inference.

**Examples of Admissible Non-Expert Opinion**:

- "The car was travelling very fast." (It is impractical to require a witness to estimate speed in miles per hour; "very fast" is a commonplace assessment).
- "He appeared to be drunk." (This is a common inference drawn from observing slurred speech, unsteady gait, and the smell of alcohol).
- "The person seemed to be about 30 years old."
- "The signature on the document looks like the one I have seen before."

In the case of ***R v Davies*** [1962] 3 All E.R. 97, the court allowed a non-expert's opinion on whether a driver was drunk, stating that this was a matter of common observation. However, the court will be cautious, and if the issue is central and contentious (for example, the precise

speed of a car in a serious accident), the court will expect proper expert evidence from a collision investigator.

For a solicitor, this distinction has several practical implications:

1. **Witness preparation**: When preparing a factual witness, you must coach them to describe events factually. If they start to offer an opinion like, "It was a dangerous thing to do," you should advise them to rephrase it to the underlying facts: "The floor was covered in oil, and there was no warning sign."
2. **Drafting witness statements**: Carefully review witness statements to ensure they contain facts, not argument or opinion. A statement that is laden with opinion may be challenged by the other side and parts of it may be struck out by the court.
3. **Objecting at trial**: You must be prepared to object if the other side's factual witness begins to offer inadmissible opinions. The objection should be phrased politely but firmly: "I object, Your Honour. The witness is being asked to give an opinion, which is outside their remit as a factual witness."
4. **Instructing experts**: For any issue that requires an inference or conclusion beyond common knowledge, you must consider instructing an expert. Do not try to get a lay witness to fill this role.

## 9.7 Conclusion

The law of evidence is the framework that ensures a trial is a search for the truth based on reliable and tested information. For the solicitor, mastering these rules is not an academic exercise. It is a practical necessity for deciding what evidence to gather, how to present it, and how to challenge the evidence of the other side. A case is won or lost not just on the facts, but on the ability to get those facts admitted and accepted by the court in accordance with these fundamental principles.

The order of payment is not a suggestion but a mandatory roadmap that places the interests of creditors and the state unequivocally above those of the beneficiaries. The rules governing legacies, from the harsh doctrine of ademption to the protective nature of demonstrative gifts

and the discipline of the executor's year, provide a detailed framework for ensuring the testator's wishes are carried out as fully and fairly as the estate's finances allow.

Mastering this financial settlement and distribution mechanics is what separates a competent PR from a negligent one. It is the rigorous application of these rules that protects the PR from personal liability and ensures that the final, distributive act of the administration is both legally sound and equitable.

# 10

# TRIAL, JUDGMENT, APPEALS, AND COSTS

The trial is the climax of the litigation process, where the parties' evidence and arguments are presented to a judge for a final decision. However, the work of a solicitor does not end with the judge's ruling. This chapter guides you through the entire process from the final, critical preparations for trial, through the procedure of the trial itself, to the consequences of the judgment and the potentially complex and costly matter of appeals and costs. Understanding this end-to-end process is vital for effective advocacy and client management.

## 10.1 Pre-Trial Preparations: Checklists, Bundles and Summoning Witnesses

Meticulous preparation is the key to a successful trial. Last minute chaos can undermine a strong case. Pre-trial preparations are methodical and are designed to ensure the trial runs smoothly and efficiently for the court and the parties.

The first step is often the creation of a pre-trial checklist (also known as a Listing Questionnaire). The court will send this form to the parties, requiring them to confirm their readiness for trial. It covers essential details such as the estimated length of the trial, the number of witnesses, the need for any special facilities, and the status of the costs budget. Failure to return this form can lead to the claim being struck out.

The most important document for the trial is the trial bundle. This is a single, paginated set of documents containing all the key materials the judge will need. The claimant's solicitor is usually responsible for preparing it, in cooperation with the other side. The bundle must include:

- The statements of case.
- The core orders made by the court.
- The witness statements and expert reports.
- The key documentary evidence disclosed by both parties.

The bundle must be agreed with the other side, neatly organised, and paginated. *Practice Direction 32* provides strict rules on its format. An poorly prepared, disorganised, or incomplete bundle frustrates the judge and creates a poor impression of the legal representatives.

Finally, you must ensure your witnesses are ready to attend trial. While you can request witnesses to attend voluntarily, the only way to compel their attendance is by serving them with a witness summons. This is a court order requiring the person to attend court to give evidence. If a witness is crucial to your case, issuing a witness summons is the safe and prudent course of action.

**Example**: In a breach of contract trial, the claimant's solicitor must:

1. Complete the pre-trial checklist, confirming the trial is estimated to last 3 days and listing 4 witnesses.
2. Prepare the trial bundle in collaboration with the defendant's solicitor, ensuring all relevant emails, the contract, and the witness statements are included in chronological order.
3. Apply to the court to issue a witness summons for an independent consultant whose evidence is vital, to guarantee his attendance.

## 10.2 Trial Procedure, Etiquette, and Modes of Address

A trial is a formal proceeding with a structured procedure and established conventions of behaviour. Understanding this framework is essential for any solicitor or advocate to represent their client effectively and maintain the dignity of the court. A failure to observe the proper etiquette can create a negative impression and potentially harm a client's case.

### 10.2.1 The Structure of a Trial

A typical civil trial follows a predictable sequence of events designed to present the case logically to the judge.

1. **Opening speech by the claimant**: The trial begins with the claimant's advocate presenting an opening speech. This is a roadmap for the judge. The advocate will outline the nature of the case, the key issues that the judge needs to decide, and a brief summary of the evidence that will be presented. It should be concise and focused, setting the scene without arguing the case in excessive detail at this early stage.

2. **Examination of the claimant's evidence**: Following the opening, the claimant presents its evidence. This involves calling its witnesses. For each witness, the process is:

    - **Examination in Chief**: The claimant's advocate questions their own witness. As noted in section 10.3, the purpose is to allow the witness to give their evidence in their own words. Leading questions are not permitted.
    - **Cross Examination**: The defendant's advocate then questions the claimant's witness. The goal is to test the witness's credibility, the accuracy of their memory, and the consistency of their story. Leading questions are the primary tool here.
    - **Re Examination**: The claimant's advocate may then ask further questions, but only to clarify matters that arose during cross examination. No new issues may be introduced.

3. **Examination of the defendant's evidence**: Once the claimant's witnesses have all been heard, the defendant presents its case. The process is identical: for each defence witness, there is examination in chief by the defendant's advocate, cross examination by the claimant's advocate, and possible re-examination.

4. **Closing speeches**: After all evidence has been heard, both sides present their closing speeches. The defendant's advocate usually goes first, followed by the claimant's advocate. In a closing speech, the advocate will summarise the evidence, highlight the strengths of their own case and the weaknesses of the opponent's case, and make legal submissions on why the judge should find in their favour. This is the opportunity to persuade the judge by weaving the evidence and the law into a compelling narrative.

### 10.2.2 Courtroom Etiquette and Conduct

Professional conduct in the courtroom is paramount. The following points are fundamental:

1. **Punctuality**: You must always be on time. Late arrival shows disrespect to the court and can have cost consequences.
2. **Dress code**: Advocates and solicitors should wear formal, conservative business attire. For barristers, this includes a dark suit and gown.
3. **Rising**: You must always stand when the judge enters or leaves the courtroom. You should also rise when addressing the judge or being addressed by them.
4. **Courtesy**: You must always be courteous to the judge, the court staff, your opponent, and all witnesses. Interrupting the judge or your opponent is unacceptable. Even if you disagree with a ruling, you must accept it gracefully.
5. **Mobile phones**: These must be switched off or placed on silent mode. Taking calls in the courtroom is strictly forbidden.

The case of ***Jones v Ministry of the Interior*** [2004] EWCA Civ 1390 reinforces that advocates have a duty to assist the court in furthering the overriding objective. This includes behaving with professionalism and courtesy. Discourteous or obstructive behaviour is a breach of this duty and can undermine your client's position.

### 10.2.3 Modes of Address

Using the correct title for the judge is a basic but crucial sign of respect and professionalism. The following list itemizes the correct modes of address.

### Addressing the Judge in Court

- In the Supreme Court, address the Justices as "My Lord" or "My Lady".
- In the Court of Appeal, address Lord or Lady Justices of Appeal as "My Lord" or "My Lady".
- In the High Court, address High Court Judges as "My Lord" or "My Lady".
- In the County Court:
    - Address a Circuit Judge as "Your Honour".
    - Address a Recorder as "Your Honour".
    - Address a District Judge as "Sir" or "Madam".

### Referring to Others in Court

- **Your opponent**: When referring to the other advocate, you should use the formal courtesy "my learned friend" if they are a barrister or solicitor advocate. If they are a solicitor who does not hold higher rights of audience, it is customary to refer to them as "my friend".
- **Witnesses**: Address witnesses by their title and surname, for example, "Mr. Smith," or "Dr. Jones."
- **Your client**: When addressing your client in court, it is professional to use their formal name, for example, "I am instructed by Ms. Evans that..."

**Example of Courtroom Interaction**:

"Your Honour, I now call the claimant's first witness, Mr. John Smith."

*(After Mr. Smith takes the oath)*

"Mr. Smith, could you please state your full name for the court?"

*(Later, during cross examination)*

"My learned friend has suggested that your memory of events is unclear. Let me put it to you directly, Mr. Smith..."

A thorough understanding of trial procedure, combined with scrupulous observance of courtroom etiquette and the correct modes of address, is not about empty formality. It is about demonstrating competence, earning the respect of the court, and creating the most favourable environment for your client's case to be heard. Proper preparation for this aspect of litigation is as important as preparing the legal arguments themselves.

## 10.3 Examination in Chief, Cross Examination, and Re Examination

The process of presenting and testing witness evidence is the core of any trial. It is through the questioning of witnesses that the facts of the case are established, challenged, and ultimately weighed by the judge. This process is divided into three distinct and crucial stages: examination in chief, cross examination, and re-examination. Each stage has a different purpose and is governed by specific rules.

### 10.3.1 Examination in Chief

Examination in chief is the first stage of questioning a witness, conducted by the advocate who called that witness to court. The primary goal is to present the witness's story to the judge in a clear, coherent, and credible manner, thereby supporting your client's case.

**Key Rules and Techniques**

1. **No leading questions**: The fundamental rule in examination in chief is that you must not ask leading questions. A leading question is one that suggests its own answer. For example, asking "The car was blue, wasn't it?" is leading. The correct, non-leading approach is, "What colour was the car?" This rule ensures that the evidence comes from the witness's own memory and not from the promptings of the advocate.

2. **Use of witness statements**: In modern civil procedure, the need for a lengthy oral examination in chief has been largely eliminated. A witness's signed statement or report typically stands as their evidence in chief. Therefore, the advocate's role at this stage is often brief. The advocate will simply ask the witness to confirm their name, address, and that the contents of their witness statement are true. This process is known as "adopting" the statement.

3. **Building a narrative**: If you do need to ask questions to draw out evidence not fully covered in the statement, your questions should be open-ended, encouraging the witness to provide a narrative. Use prompts like, "What happened next?" or "Could you describe what you saw?" The aim is to make the witness appear confident and reliable.

**Example of Examination in Chief**:

Advocate: "Ms. Jones, could you please tell the court what you observed on the afternoon of 1st May while you were waiting at the bus stop?

Witness: "I saw a blue car approach the junction very quickly. It didn't slow down and it went straight through the red traffic light."

Advocate: "What did you do then?"

Witness*:* "I took out my phone and made a note of the car's registration number."

### 10.3.2 Cross Examination

Cross examination is conducted by the opposing advocate. Its purpose is to test the evidence given in chief, to challenge the credibility and accuracy of the witness, and to elicit evidence that supports your own client's case. It is often considered the most demanding and skilful part of an advocate's role.

**Key Rules and Techniques**

1. **Leading questions are mandatory**: In cross examination, the use of leading questions is not just permitted; it is the primary tool. You control the witness by putting your client's version of events to them directly. For example, "I suggest to you, Mr. Smith, that the traffic light was in fact green for you, wasn't it?"

2. **Challenging credibility**: You can ask questions designed to show that the witness is biased, has a poor memory, or is lying. For example, "Isn't it true that you have been a close friend of the claimant for over 20 years?" or "You stated the vehicle was travelling at 50 mph, but you were 200 metres away. How can you be so sure?"

3. **The rule in *Browne v Dunn***: This is a crucial rule of professional practice. If you intend to later call evidence to contradict a witness's testimony, you must put that contrary version of events to the witness during cross examination. This gives the witness a fair chance to respond to the allegation. Failure to do so may lead the judge to place less weight on your subsequent contradictory evidence.
4. **One question at a time and listen to the answer**: Ask short, clear questions and do not interrupt the witness while they are answering. The answer may contain something useful or reveal an inconsistency you can exploit later.

**Example of Cross Examination**:

Advocate: "Mr. Smith, you've told the court you had a clear view. But you also stated you were looking at your phone for a moment, correct?"

Witness: "Yes, just for a second."

Advocate: "And it was in that exact second that you claim the other car jumped the red light, wasn't it?"

Witness: "Well, I suppose it must have been."

Advocate: "So, you didn't actually see the colour of the light as the car entered the junction, did you?"

### 10.3.3 Re-Examination

Re-examination is the final stage, conducted by the advocate who originally called the witness, immediately after cross examination. Its purpose is limited and specific: to give the witness an opportunity to explain, clarify, or qualify any issues that were raised during cross examination.

**Key Rules and Techniques**

1. **No new evidence**: This is the cardinal rule of re-examination. You cannot introduce new topics or evidence that should have been covered in the examination in chief. Your questions must stem directly from the answers given during cross examination.

2. **Repairing damage**: If the witness's evidence was damaged during cross examination, for example by an apparent inconsistency, you can ask them to explain the inconsistency. For instance, "In cross examination, you agreed you were on your phone. Could you explain to the court what you were doing on your phone?" (If the answer is, "I was setting an alarm because I was worried I'd miss my bus," this may help repair their credibility).
3. **No leading questions**: The prohibition on leading questions applies again during re-examination. You must ask open questions to allow the witness to provide the explanation.

**Example of Re-Examination**:

Advocate (after the cross examination above): "Mr. Smith, you agreed you glanced at your phone. Could you please tell the court why you did that?"

Witness: "Yes. I heard the sound of a car engine revving very loudly, which made me look up from my phone immediately. That's when I saw the blue car speeding through the red light."

The process of examining witnesses is a structured dialogue designed to uncover the truth. Examination in chief is for presenting your evidence, cross examination is for testing your opponent's evidence, and re-examination is for repairing the damage done by cross examination. Mastering the distinct rules and strategies of each stage is fundamental to effective advocacy and presenting your client's case in the most persuasive light.

## 10.4 The Nature and Effect of Judgment

The judgment represents the culmination of the litigation process: the court's final and binding decision on the matters in dispute. It is the outcome for which the parties have prepared and presented their cases. Understanding what a judgment is, its different forms, and, most importantly, its legal effects is crucial for advising a client on their position and what steps may follow.

### 10.4.1 The Nature of a Judgment: The Court's Final Decision

A judgment is the formal expression of the court's ruling. It determines the rights and liabilities of the parties in relation to the issues that were before the court. The judge may deliver the judgment in one of two ways:

1. **Ex Tempore Judgment**

   This is a judgment given by the judge orally immediately, or very shortly, after the conclusion of the trial. The judge will give a summary of their reasoning and state the outcome. This is common for less complex cases. A transcript of the oral judgment can be obtained, and it is as binding as a written judgment.

2. **Reserved Judgment**

   In more complex cases, the judge will take time to consider the evidence and legal arguments in detail. The judgment is then "reserved" to a later date, at which point the judge will either deliver a summarized oral judgment or provide a fully reasoned written judgment. Written judgments are more detailed and are often used in cases involving novel points of law or significant factual complexity.

The judgment will address the key issues. It will decide liability (for example, finding the defendant negligent or in breach of contract). If the claimant is successful, the judgment will also decide on the remedy, which is most commonly an award of damages. The judgment will also make a definitive order regarding which party is to pay the legal costs of the proceedings.

### 10.4.2 The Formal Order

It is important to distinguish between the judgment and the court order. The judgment is the reasoned decision. The order is the formal document, drawn up by the court (or sometimes by the winning party's solicitor for approval by the court and the other side), which sets out the precise terms of what the court has decided in a concise and executable format. For example, the order will state: "It is ordered that the Defendant do pay the Claimant the sum of £50,000" and "It is ordered that the Defendant do pay the Claimant's costs, to be subject to detailed assessment if not agreed." This formal order is the document used to enforce the judgment.

### 10.4.3 The Effect of Judgment: Finality and Preclusion

The effect of a final judgment is profound and is based on two key legal principles: res judicata and issue estoppel.

1. ***Res Judicata*** **(A Matter Adjudged)**

   This principle means that a cause of action that has been finally determined between the parties by a competent court cannot be re-litigated. The matter is at an end. For example, if a claimant brings a claim for breach of contract and loses, they cannot issue a new claim against the same defendant for the same breach of contract based on the same facts.

   The judgment is a final answer to the question, "Is the defendant liable for this breach?" The case of ***Arnold v National Westminster Bank plc*** [1991] 2 AC 93 confirmed that this principle exists in the public interest to prevent the same issue being litigated repeatedly, ensuring finality and saving the parties and the court from the burden of duplicative litigation.

2. **Issue Estoppel**

   This is a related but more specific principle. It prevents a party from denying in subsequent proceedings a fact or issue that was necessarily and fundamentally decided as a key step in reaching the final judgment in earlier proceedings. For example, if in a personal injury case the court specifically finds that the defendant was not negligent, the claimant is "estopped" (prevented) from trying to prove the defendant's negligence in a subsequent, different claim that somehow relies on that same finding. The issue has been conclusively determined.

**Practical Illustration**:

Imagine a scenario where a homeowner, Mr. Adams, sues his builder, Mr. Baker, for poor workmanship on an extension. The court finds in its judgment that the roof was defectively constructed and awards Mr. Adams £20,000 in damages. This judgment has the following effects:

***Res judicata***: Mr. Adams cannot sue Mr. Baker again for the same defective roof.

**Issue estoppel**: If Mr. Adams later discovers water damage to his furniture and tries to sue Mr. Baker for it, Mr. Baker can raise issue estoppel. The finding that the roof was defective is a binding determination that cannot be re opened. The subsequent claim for the consequential damage would likely be barred as it flows from the same issue already decided.

### 10.4.4 The Consequences of Judgment

Following judgment, the litigation enters a new phase. The immediate consequences are:

**For the winner**: They hold an enforceable court order. If the judgment is for a sum of money and the loser does not pay voluntarily, the winner can begin enforcement proceedings (see Chapter 11) using methods such as instructing bailiffs or applying for a charging order.

**For the loser**: They are bound by the court's decision and must comply with the order. If they disagree with the judgment on a point of law or due to a serious procedural irregularity, their only recourse is to consider an appeal, which has strict time limits and requires permission.

**Costs**: The costs order made at the end of the trial takes effect. The process of quantifying and recovering those costs (detailed assessment) begins.

## 10.5 Appeals: Permission, Destination, and Grounds

An appeal is not a fresh trial or a second chance to argue the case. It is a specific legal process that allows a higher court to review the decision of a lower court to determine if a legal error occurred that justifies changing the outcome. The appeal system exists to ensure consistency in the application of the law and to correct significant errors, but it is designed with strict filters to prevent unmeritorious challenges to final decisions. Understanding the pathway and requirements for an appeal is essential for any solicitor advising a client who is dissatisfied with a judgment.

### 10.5.1 The Fundamental Principle: Review, Not Rehearing

It is crucial to appreciate that an appellate court will not normally hear evidence again or reassess the facts decided by the trial judge. The appeal is a review of the lower court's decision

based on the evidence and arguments that were before it. The appeal court will show deference to the findings of fact made by the trial judge, who had the advantage of seeing and hearing the witnesses firsthand. Therefore, an appeal must be based on a identifiable error in the lower court's process or reasoning, not simply a dislike of the result.

### 10.5.2 The Requirement for Permission to Appeal

In the vast majority of civil cases, a party cannot simply file an appeal. They must first obtain permission. This is a critical filter designed to weed out hopeless appeals and to ensure that the resources of the appellate courts are reserved for cases that raise a point of principle, a question of general public importance, or where there is a clear and important error.

Permission to appeal can be sought from two sources:

1. **The first instance judge**: The trial judge can be asked for permission to appeal immediately after delivering their judgment. This is often the quickest route.
2. **The appeal court**: If the trial judge refuses permission, or if it was not sought from them, an application for permission must be made to the appeal court itself. This is done by filing an appellant's notice with the relevant appellate court.

The legal test for granting permission is set out in the *Civil Procedure Rules* (*CPR 52.6*). The court will give permission only where:

- It considers that the appeal would have a real prospect of success; or
- There is some other compelling reason for the appeal to be heard.

The "real prospect of success" test means that the argument must be more than merely arguable; it must carry a realistic, rather than fanciful, chance of persuading the appeal court to overturn the decision.

A "compelling reason" might be that the case raises a point of law of general importance that needs to be clarified by a higher court, even if the ultimate result in the specific case might not change.

### 10.5.3 Destination: Which Court Hears the Appeal?

The correct court to hear an appeal, known as its "destination," depends on the seniority of the judge who made the original decision and the track of the case. The following is a general guide:

1. **From a District Judge in the County Court**

   The appeal will almost always be heard by a Circuit Judge sitting in the same County Court hearing centre, or a nearby designated civil centre. This is the most common route for appeals from small claims and fast track matters. The appeal is a "review" of the original decision, not a complete rehearing. The Circuit Judge will base their decision on the notes of evidence and the documents from the first trial, focusing on whether the District Judge made an error of law or principle.

2. **From a Circuit Judge or a High Court Master**

   An appeal from a final decision of a Circuit Judge in the County Court, or from a Master of the High Court (who deals with much of the interim procedural work), will typically go to a High Court Judge. For example, if a Circuit Judge has presided over a multi-track trial in the County Court, the appeal would be to a High Court Judge (usually sitting in a District Registry). This elevates the scrutiny to a higher tier of the judiciary.

3. **From a High Court Judge**

   A decision made by a High Court Judge (whether at first instance or on appeal from a lower court) is appealed to the Court of Appeal (Civil Division). The Court of Appeal is comprised of Lord or Lady Justices of Appeal. This court primarily deals with clarifying and developing the law, and its decisions become binding precedents on all lower courts. Appeals to this level are complex and costly, and permission is stringently applied.

4. **From the Court of Appeal to the Supreme Court**

   This is the final appellate court in the United Kingdom. An appeal from the Court of Appeal to the Supreme Court is not automatic. It is an exceptional step. Permission (known as "leave to appeal") will only be granted if the case raises a point of law of the

greatest public importance. Examples might include matters that resolve a conflict between previous Court of Appeal decisions or that involve a fundamental interpretation of constitutional principles or human rights law.

### The "Leapfrog" Procedure

There is a rare exception to this hierarchical structure. Under *s.12* of the *Administration of Justice Act 1969*, in very limited circumstances, an appeal may "leapfrog" from the High Court directly to the Supreme Court, bypassing the Court of Appeal. This requires the consent of all parties and the certification of the trial judge, and is only available where the case involves a point of law of general public importance that relates wholly or primarily to the interpretation of a statute.

**Practical Illustration**:

Consider a professional negligence claim valued at £80,000, heard in the County Court.

**Scenario A**: The case is tried by a District Judge. The losing party appeals. The correct destination is a Circuit Judge in the County Court.

**Scenario B**: The same case is allocated to the multi-track and is tried by a Circuit Judge. The appeal now lies to a High Court Judge.

**Scenario C**: The case involves a novel and critical point of contract law that will affect thousands of similar contracts nationwide. The High Court Judge, upon giving judgment, grants a certificate for a "leapfrog" appeal to the Supreme Court due to the issue's profound public importance.

## 10.5.4 The Grounds of Appeal: Identifying the Error

The heart of any appeal is the "grounds of appeal." This is a precise document that must clearly and concisely set out the specific reasons why the lower court's decision is said to be wrong. Vague assertions that the judgment was "unjust" or "against the weight of the evidence" are insufficient.

Grounds of appeal typically fall into the following categories:

1. **Error of law**: This is the clearest ground for appeal. It alleges that the judge applied the wrong legal principle, misinterpreted a statute, or failed to follow a binding precedent. For example, a judge misdirecting themselves on the legal test for establishing a duty of care in negligence.
2. **Error of fact**: Challenging findings of fact is difficult. An appeal court will not interfere unless the finding was one that no judge, acting reasonably, could have reached on the evidence presented. This is a very high threshold.
3. **Procedural irregularity**: This ground alleges that a serious error in the case management or conduct of the trial led to unfairness. Examples include wrongly refusing an adjournment, improperly excluding evidence, or showing apparent bias.
4. **The decision was wrong because of a serious miscalculation or because it was unjust**: This is a broader ground that can encompass a combination of factors leading to an overall unjust result.

The case of ***Tanfern Ltd v Cameron-MacDonald*** [2000] 1 WLR 1311 is a leading authority that clarifies the approach of appeal courts. It reinforced that appeals from a County Court District Judge to a Circuit Judge are a true "review" of the decision, not a rehearing. The appeal court will only interfere if the decision was "wrong" or "unjust because of a serious procedural or other irregularity."

### 10.5.5 The Appeals Process: A Summary

The process for a typical appeal to the County Court or High Court is as follows:

1. **File an appellant's notice (Form N161)**: This must be done within 21 days of the date of the decision being appealed. The notice must be accompanied by the grounds of appeal, a copy of the order being appealed, and the relevant fee.
2. **Seek permission**: As discussed, this is a mandatory step.
3. **The respondent's role**: The other party (the respondent) can file an respondent's notice if they wish to argue that the decision should be upheld for different reasons than those given by the lower court.

4. **The appeal hearing**: If permission is granted, the appeal will be listed for a hearing. This is typically based on written submissions (skeleton arguments) from both sides, followed by short oral arguments. The court will then either dismiss the appeal, allow the appeal (and make a new order), or order a new trial.

**Example Scenario**:

In a contract dispute, a District Judge interpreted a key clause in a contract in a way that was contrary to a recent Court of Appeal decision. The losing party's solicitor would:

1. Immediately after the judgment, ask the District Judge for permission to appeal on the ground of an error of law, citing the binding authority.
2. If refused, prepare an appellant's notice for the Circuit Judge within 21 days, setting out a clear ground of appeal: "The learned District Judge erred in law by failing to apply the principle established in [the Court of Appeal case] when interpreting clause 5(b) of the contract."
3. Argue at the permission stage that the appeal has a real prospect of success because the judge's interpretation was legally untenable.

## 10.6 Costs Management and Budgeting

Costs management is a procedural regime designed to bring predictability and control to the costs of civil litigation. Its fundamental purpose is to ensure that the costs incurred by the parties are proportionate to the value, complexity, and importance of the case. Before its introduction, costs could often spiral out of control, sometimes exceeding the value of the claim itself. The process, governed by *CPR Part 3* and *Practice Direction 3E*, requires parties to plan, disclose, and obtain court approval for their anticipated future litigation costs.

The core of this process is the Costs Budget, prepared using Form H. This is a detailed document where a party must estimate its reasonable and proportionate costs for each distinct phase of the litigation. Key phases include:

- Pre action costs.

- Issue and statements of case.
- Case Management Conference.
- Disclosure.
- Witness statements.
- Expert reports.
- Preparation for trial.
- Trial.
- Mediation and other ADR.

A critical distinction is made between costs already incurred and future costs to be incurred. The budget focuses primarily on future costs, though the court will note the incurred costs.

The procedure is collaborative. Parties must exchange their draft budgets and seek to agree them where possible. If they cannot agree, they must at least narrow the issues in dispute. The court will then hold a Costs Management Conference (CMC) where the judge will review the budgets, make any necessary revisions, and formally approve them. The approved budget does not determine the ultimate liability for costs; that is decided at the end of the case. Instead, it sets a ceiling for the recoverable costs for each phase. If a winning party's costs for a phase are within the budgeted figure, they are presumed to be reasonable. If they exceed it, the party will have to justify the overspend to recover the additional amount.

The case of ***Mitchell v News Group Newspapers Ltd*** [2013] EWCA Civ 1537 and its successor ***Denton v TH White Ltd*** [2014] EWCA Civ 906 established the modern, strict approach to compliance with court rules and orders, including costs budgets. The court will expect parties to stick to their approved budgets, and a significant and unjustified overspend may lead to the exceeding costs not being recovered, even by the winning party.

**Example**: In a breach of contract claim valued at £150,000, the claimant's solicitor prepares a costs budget totaling £60,000. The defendant's solicitor argues that the budget for disclosure is excessive. At the CMC, the judge agrees and reduces the disclosure phase from a budgeted £15,000 to £10,000. The claimant later wins at trial. When costs are assessed, the claimant will find it very difficult to recover more than £10,000 for the disclosure phase, even if they actually spent £14,000, unless they can show a good reason for the overspend.

## 10.7 Costs Orders: The General Rule and Departures

Once the substantive issues of a case have been decided, the court must decide who is to pay the legal costs. This is done through a costs order. The starting point is a clear general rule, but the court retains a broad discretion to depart from this rule to achieve a just outcome.

The general rule is that the unsuccessful party will be ordered to pay the costs of the successful party (*CPR 44.2(2)(a)*). This principle is based on the idea that the winner should not be left out of pocket for having to enforce or defend their legal rights. "Costs" here primarily means the legal fees of the solicitors and advocates, as well as other disbursements such as court fees and experts' fees.

However, this is only a default position. The court has a wide discretion and must consider all the circumstances of the case. Key factors that may lead the court to depart from the general rule include:

1. **The conduct of the parties**: This is a significant factor. The court will consider the parties' behavior before and during the proceedings. This includes:
    - Whether a party refused to engage in a form of Alternative Dispute Resolution (ADR) without good reason.
    - Whether a party exaggerated their claim.
    - Whether a party failed to comply with a rule, practice direction, or court order.
    - The manner in which a party pursued or defended a particular allegation.
2. **Partial success**: A party may be the overall "winner" but may have lost on significant issues. In such cases, the court may order that the winner recover only a proportion of their costs, or even that the winner pay the loser's costs for the discrete issues on which they lost.
3. **Admissible offers to settle**: The court will pay close attention to any formal offers to settle, most notably *Part 36* offers. A claimant who fails to beat a defendant's *Part 36* offer at trial, while technically the "winner," may be severely penalized in costs.

When making a costs order, the court must also specify the "basis" of assessment. There are two principal bases:

- **Standard basis** (*CPR 44.3*): This is the usual basis. Costs will be paid if they are proportionate and if they were reasonably incurred and reasonable in amount. Any doubt as to whether costs were reasonable or proportionate is resolved in favour of the paying party.
- **Indemnity basis** (*CPR 44.3*): This is less common and may be ordered where the conduct of a party or the circumstances of the case are such that they deserve some form of costs penalty. On an indemnity basis assessment, any doubt is resolved in favour of the receiving party. This generally results in a higher proportion of costs being recovered.

The case of ***Fox v Foundation Piling Ltd*** [2011] EWCA Civ 790 provides a clear example of the court's discretion. The claimants had succeeded in their claim but were denied their entire costs because they had unreasonably refused to engage in mediation. The Court of Appeal upheld this decision, emphasizing that conduct in relation to ADR is a critical factor the court can and will consider when making costs orders.

**Example**:
A claimant brings a claim for £100,000. The defendant makes a *Part 36* offer to settle for £40,000, which the claimant rejects. At trial, the claimant is awarded £35,000. The claimant is the "successful party" as they have won the case and recovered damages. However, because they failed to beat the defendant's *Part 36* offer, the court will likely depart from the general rule. The costs order may provide that:

- The defendant pays the claimant's costs up to the date the offer expired.
- The claimant pays the defendant's costs from that date onwards. This demonstrates that the "winner" in the litigation can still end up with a significant net costs liability.

## 10.8 *Part 36* Offers and Other Calderbank Offers

The strategic use of settlement offers is one of the most powerful tools in civil litigation. A well timed and well calibrated offer can protect a party from adverse costs consequences and exert significant pressure to settle. The primary mechanism for this is the *Part 36* offer, a self-

contained costs regime within the *Civil Procedure Rules*. Alongside it exists the Calderbank offer, a useful alternative in certain situations.

### 10.8.1 Part 36 Offers

A *Part 36* offer is a formal offer to settle made in accordance with the strict procedural requirements of *CPR Part 36*. Its defining feature is the automatic and potent costs consequences that follow if the offer is not accepted. A party can make a *Part 36* offer to settle the entire claim, a part of it, or any issue within it.

#### Key Requirements

To be valid, a *Part 36* offer must:

- Be in writing.
- State clearly that it is made pursuant to *Part 36*.
- Specify a period of not less than 21 days during which the defendant will be liable for the claimant's costs if the offer is accepted ("the relevant period").
- Be capable of acceptance without the need for the court's permission if the relevant period has not expired.

#### Costs Consequences: The Carrot and the Stick

The consequences depend on whether the offer is made by the claimant or the defendant and whether it is beaten at trial.

**Claimant's offer**: If a claimant makes a Part 36 offer which the defendant fails to beat at trial (that is, the claimant obtains a judgment that is at least as advantageous as the offer), the court will, unless it considers it unjust to do so, order:

1. **Indemnity costs**: The claimant is awarded their costs on the more generous indemnity basis from the date the offer expired.
2. **Enhanced interest**: Interest on those costs and on any damages awarded at a rate of up to 10% above base rate.

3. **Additional amount**: An extra sum of up to £75,000, calculated as 10% of the award for non-monetary claims, or 10% of the first £500,000 and 5% of any amount above that for monetary claims.

**Defendant's offer**: If a defendant makes a *Part 36* offer which the claimant fails to beat at trial (i.e., the claimant obtains a judgment less advantageous than the offer), the court will, unless unjust, order:

1. The defendant pays the claimant's costs up to the date the offer expired.
2. The claimant pays the defendant's costs from the date of expiry onwards.

The case of ***Gibbon v Manchester City Council*** [2010] EWCA Civ 726 confirmed the automatic nature of these consequences. The Court of Appeal emphasized that the rules are designed to be clear and predictable, creating a strong financial incentive for parties to accept reasonable offers. The "unless unjust" test is a high threshold, reserved for exceptional circumstances.

**Example**:
A claimant makes a Part 36 offer to settle for £90,000. The defendant rejects it. At trial, the claimant is awarded £95,000. The claimant has beaten their own offer. They will be entitled to their standard costs up to the expiry of the offer, and indemnity costs, enhanced interest, and an additional amount (e.g., £9,000) from that point forward.

Conversely, if the claimant had been awarded only £85,000, they would have failed to beat the offer. They would get their costs up to the expiry date, but would have to pay the defendant's costs from that date onward, potentially wiping out a significant portion of their damages.

### 10.8.2 Calderbank Offers

A *Calderbank* offer (from the case ***Calderbank v Calderbank*** [1975] 3 All ER 333) is a "without prejudice save as to costs" offer. It is used in situations where a *Part 36* offer is not suitable or available, such as in applications for interim relief, in certain family law proceedings, or where the offeror wishes to make a more flexible offer that does not comply with *Part 36's* strict formalities.

Unlike a *Part 36* offer, a *Calderbank* offer does not carry automatic costs consequences. Instead, it is a factor the court will take into account when exercising its general discretion on costs under *CPR 44.2*. The judge will consider whether the offer was a genuine attempt to settle and whether it was unreasonable for the other party to refuse it.

The case of ***Cutts v Head*** [1984] Ch 290 established the public policy rationale for protecting without prejudice communications, which *Calderbank* offers utilize. The court in ***Huck v Robson*** [2002] EWCA Civ 398 confirmed that a *Calderbank* offer can be just as effective as a *Part 36* offer in shifting the costs burden, but the outcome is less predictable as it rests on judicial discretion rather than a rigid rule.

## 10.9 Security for Costs and Non-Party Costs Orders

These are two distinct but important mechanisms that allow a party to seek costs protection from another entity, either before the conclusion of the case or from someone not formally a party to the litigation.

### 10.9.1 Security for Costs

An application for security for costs, governed by *CPR 25.12*, is a request for a court order requiring a claimant (or a counterclaiming defendant) to pay money into court as a condition of being allowed to continue with their claim. Its purpose is to protect a defendant who is concerned that even if they successfully defend the claim, they will be unable to recover their costs from the claimant because the claimant is impecunious or based abroad.

The court may order security if it is satisfied of two things:

1. **A ground exists**: It must be one of the conditions set out in the rule. The most common are:
    - The claimant is a company and there is reason to believe it will be unable to pay the defendant's costs if ordered to do so.
    - The claimant is resident out of the jurisdiction and not in a *Brussels/Lugano Convention* state.

- The claimant has taken steps to avoid the potential costs liability (e.g., by dissipating assets).

2. **It is just to make the order**: The court has a discretion. It will consider all circumstances, including:

    - The merits of the claim.
    - Whether the application is being used to stifle a genuine claim.
    - The claimant's financial means.
    - The timing of the application.

The case of ***Sir Lindsay Parkinson & Co Ltd v Triplan Ltd*** [1973] QB 609 established key principles for the exercise of this discretion, including that the court should consider whether the claimant's lack of funds is self-induced and whether the claim is bona fide.

### 10.9.2 Non-Party Costs Orders

Ordinarily, only a party to the litigation can be liable for costs. However, under section 51 of the *Senior Courts Act 1981*, the court has a discretionary power to make a costs order against a person who is not a party to the proceedings. This is an exceptional jurisdiction used sparingly.

The leading case is ***Symphony Group plc v Hodgson*** [1994] QB 179, which set out the principles. A non-party costs order is typically made against someone who has funded the litigation and has a personal interest in its outcome, or who has effectively been the "real party" behind the litigation, directing and controlling it for their own benefit.

Examples include:

- A commercial funder who finances a claim in return for a share of the proceeds.
- A parent company that directs and controls the litigation of its subsidiary.
- An insurer who stands behind a nominal claimant.

The court will not make such an order against someone who funds litigation purely out of charity or a sense of justice, such as a trade union funding a member's claim. The crucial question is whether the non-party has a personal financial stake in the outcome.

## 10.10 Fixed Costs and Assessed Costs

Once a costs order has been made, the final step is to determine the precise amount to be paid. This process, known as assessment, occurs in two main ways: through fixed costs or detailed assessment.

### 10.10.1 Fixed Costs

Fixed costs are predetermined amounts set out in the *CPR* (primarily in *Part 45*). They apply to specific types of straightforward claims to provide certainty and keep costs proportionate. The winning party can recover the specified amount without having to justify the time spent.

Fixed costs typically apply to:

- Most fast track trials.
- Road Traffic Accident (RTA), employers' liability (EL), and public liability (PL) claims that fall within a specific protocol and value band.
- Claims where a default judgment is entered.
- The initial stages of many claims up to a certain point.

The system is designed to be administrative and efficient. For example, the rules will state that for a claim worth £3,000 that settles before allocation to a track, the fixed recoverable costs are £X.

### 10.10.2 Assessed Costs (Detailed Assessment)

Where fixed costs do not apply, the winning party's costs will be assessed by the court. This is the process of determining the reasonable and proportionate amount the losing party must pay. If the parties cannot agree on the sum, the winning party ("the receiving party") commences detailed assessment proceedings.

This involves preparing a formal "bill of costs," a lengthy document that itemises all work done, time spent, and disbursements incurred. The paying party can then challenge individual items. A costs officer (a District Judge or a costs judge in the High Court) will then hold a hearing to determine the allowable amount.

The assessment is conducted on the basis ordered by the trial judge (standard or indemnity). The court will assess:

1. **Reasonableness**: Were the costs reasonably incurred and reasonable in amount? On the standard basis, any doubt is resolved in favour of the paying party.
2. **Proportionality**: This is an overriding requirement. Even if costs were reasonably incurred, they may be disallowed or reduced if they are disproportionate to the matters in issue. The court considers factors such as the value, complexity, and importance of the case.

The case of ***Lownds v Home Office*** [2002] EWCA Civ 365 established the two-stage test for proportionality, which has since been reinforced by the *CPR*. The court first asks if the total sum is proportionate. If it is not, the court then goes through the bill line by line to disallow or reduce disproportionate items, even if they were reasonably incurred.

## 10.11 Conclusion

Pre-trial preparation is the foundation of success at trial. Every step, from compiling the trial bundle to planning witness examinations, must be deliberate and compliant with formal procedure. Once judgment is delivered, it brings finality through issue estoppel, preventing parties from re-litigating the same issues. Appeals are limited to points of law or principle and require permission, ensuring that only cases of real significance reach the appellate courts.

Costs are a powerful instrument of case management and strategy. The general rule remains that the loser pays the winner’s costs, though the court ensures proportionality through budgeting and assessment. Tactical tools such as *Part 36* offers can dramatically shift costs outcomes, rewarding reasonable settlement behaviour and penalising intransigence. Security

for costs and non-party costs orders further protect fairness, ensuring that litigation is not used abusively and that all parties bear appropriate financial responsibility.

# 11

# ENFORCEMENT OF MONEY JUDGMENTS

Winning a case is only half the battle; the real challenge is turning that judgment into actual payment. Enforcement is where a solicitor converts legal victory into financial reality, using the court's powers to compel compliance. Without effective enforcement, even the most favourable judgment is merely symbolic; a piece of paper that recognises a right but delivers no remedy. The solicitor must therefore act strategically, investigating the debtor's financial position, identifying available assets, and choosing the right enforcement method to secure recovery swiftly and effectively.

For example, imagine a contractor who wins a £50,000 judgment against a client who refuses to pay. The court has declared the debt owed, but the client ignores it. After investigating, the solicitor discovers the client has a business account, a fleet of cars, and a rental property. Armed with this knowledge, the solicitor applies for a Third Party Debt Order to freeze the bank funds, a Writ of Control to seize vehicles, and a Charging Order over the property. The result is payment—proof that enforcement is what truly completes justice.

## 11.1 The Need for Enforcement

Winning a case in court and receiving a judgment in your favour is a significant victory, but it is not the end of the road. A judgment is a formal declaration by the court of the legal rights and obligations of the parties; it is not, by itself, a guarantee of payment. Many losing parties, known as judgment debtors, will pay the sum ordered voluntarily. However, when they do not,

the winning party, known as the judgment creditor, must take active steps to enforce the judgment.

Enforcement is the process of using the court's powers to compel the judgment debtor to comply with the terms of the order, usually by paying the money owed. It is a critical stage of litigation. A solicitor must be skilled in enforcement procedures to ensure that a client's hard won judgment is not merely a piece of paper, but results in actual payment.

The court does not initiate enforcement on its own. The judgment creditor must choose which enforcement method to use and make the necessary application. This requires careful consideration and investigation. Choosing the wrong method can waste the client's time and money, and in some cases, can alert the debtor and give them time to move their assets out of reach.

The key to successful enforcement is information. Before beginning, a solicitor should try to find out as much as possible about the debtor's financial circumstances. Where do they work? Do they own a house? Do they have a bank account? Which bank? What other assets might they have, such as a car or valuable equipment? The more you know, the more precisely you can select the right tool for the job.

## 11.2 Oral Examination of the Debtor

When you have little information about the debtor's finances, the first and most powerful step is often to apply for an order for the oral examination of the debtor. This is a court hearing where the judgment debtor is ordered to attend and answer questions, under oath, about their financial means and assets.

### The Purpose

The purpose is not to enforce the judgment directly, but to gather the intelligence needed to enforce it effectively. It allows the judgment creditor to ask detailed questions about the debtor's income, outgoings, employment, bank accounts, property, and any other assets they may have.

**The Procedure**

1. The judgment creditor applies to the court for an order requiring the debtor to attend court for questioning.
2. If the order is granted, it is served on the debtor personally.
3. At the hearing, a court officer asks the debtor a series of questions, typically based on a standard form, about their finances. The judgment creditor's solicitor can also ask supplementary questions.
4. The debtor must answer these questions truthfully. Providing false information is a contempt of court.

The information obtained from this examination is invaluable. It can reveal the debtor's employer (enabling an Attachment of Earnings Order), their bank details (enabling a Third-Party Debt Order), or that they own a property (enabling a Charging Order). It is the foundational step that informs all subsequent enforcement action.

## 11.3 Methods of Enforcement

A court judgment is a declaration of rights, but it is not self-executing. When a judgment debtor refuses to pay voluntarily, the judgment creditor must actively enforce the order. The court provides a toolkit of enforcement methods, each designed to target a specific type of asset or income source. Choosing the correct method is a strategic decision based on the information gathered about the debtor's circumstances. Using the wrong method will waste time and money and can alert the debtor, giving them an opportunity to hide their assets.

This section provides a detailed examination of the primary enforcement mechanisms available.

### 11.3.1 Writ or Warrant of Control

This is one of the most traditional and visible forms of enforcement. It authorises an enforcement agent (the formal term for a bailiff) to take control of the judgment debtor's goods and sell them at public auction to raise money to satisfy the debt.

The judgment creditor applies to the court for a Writ of Control (if the judgment is from the High Court) or a Warrant of Control (if from the County Court). Once issued, the writ or warrant is passed to a certified enforcement agent. The agent will then visit the debtor's premises. They do not immediately remove goods. Instead, they will typically take control by entering into a "controlled goods agreement" (formerly known as a "walking possession agreement") with the debtor. This agreement lists the goods that have been taken under the court's control and prevents the debtor from selling or disposing of them. If the debt and the enforcement costs are not paid, the agent will return to remove the goods and arrange for their sale.

This method is most effective against trading businesses that have tangible assets like stock, machinery, or company vehicles. It can also be used against individuals who possess valuable personal items such as high-end electronics, jewellery, or a car.

The enforcement agent has no power to force entry into a residential property; they can only enter through an open door. Furthermore, certain goods are legally exempt from seizure. These include items essential for the debtor's basic domestic needs, such as clothing, bedding, furniture, household equipment, and the tools of the debtor's trade up to a certain value.

This is a powerful tool for targeting physical, movable assets, but its effectiveness depends on the debtor having non-essential goods of value and the agent gaining access to them.

### 11.3.2 Third Party Debt Order

A Third Party Debt Order is a highly effective method for seizing money held in the judgment debtor's bank or building society accounts. It can also be used to intercept other debts owed to the judgment debtor, such as rent due from a tenant or unpaid invoices from a customer.

This is a two stage process. First, the judgment creditor applies for an "interim" Third Party Debt Order without a hearing. The court will issue the order, which immediately freezes the funds in the debtor's bank account up to the value of the judgment debt. The bank, as the "third party", is legally obliged to prevent the debtor from accessing the frozen funds. A copy of the order is served on both the debtor and the bank. The court will then list a final hearing. At this hearing, the court will consider any objections from the debtor (for example, that the

funds are from a benefits payment) and decide whether to make the order "final". If made final, the bank is ordered to pay the frozen money directly to the judgment creditor.

This is the preferred method when you have information about the debtor's bank account details and believe it holds sufficient funds. It is a swift and decisive way to secure payment.

You need to know the debtor's bank and the branch where they hold the account. If the account is empty or in overdraft, the order will be ineffective. Furthermore, certain funds are protected, such as money received from certain welfare benefits.

The principles were confirmed in the case of ***Kuwait Oil Tanker Co SAK v Qabazard*** [2003] UKHL 31, where the House of Lords emphasised that the order creates a charge over the debt and operates as an injunction against the third party.

### 11.3.3 Charging Order

A Charging Order does not provide immediate cash; instead, it secures the judgment debt against the debtor's property, most commonly their home or other land they own. It transforms the unsecured judgment debt into a secured debt, similar to a mortgage.

The process also involves two stages. The judgment creditor applies for an interim Charging Order. If the court grants it, the order is registered as a charge against the property at the Land Registry. This prevents the debtor from selling the property without first paying the debt. A final hearing is then held where the court decides whether to make the Charging Order final. The court has a discretion and will consider all circumstances, including the debtor's personal situation and the interests of any other creditors. Once a final order is in place, the creditor can take a further step: applying for an Order for Sale. This forces the sale of the property so the debt can be repaid from the proceeds.

This is a strategic longterm option for debtors who have significant equity in a property but lack liquid assets. It ensures the debt will likely be repaid when the property is eventually sold or remortgaged.

Obtaining an Order for Sale is often difficult and expensive, especially if it is the debtor's home. Courts are often reluctant to make such an order if it would make a family homeless,

particularly for smaller debts. It is, therefore, often used as a securing mechanism rather than a means for immediate payment.

A Charging Order is a powerful way to protect the debt against a valuable asset, but realising the cash from it can be a slow and uncertain process.

### 11.3.4 Attachment of Earnings Order

This method targets the debtor's income directly. It is a court order directed to the judgment debtor's employer, requiring them to make regular deductions from the debtor's wages and pay them to the court, which then forwards the money to the creditor.

The judgment creditor applies to the court, which will then send a form to the debtor requiring details of their employment and income. Using this information, the court calculates two key amounts:

1. **The protected earnings rate**: The amount of earnings the debtor needs for basic living costs like rent and food. No deductions are made from earnings below this level.
2. **The normal deduction rate**: The amount that can be deducted from earnings that exceed the protected rate. The order is then sent to the employer, who must make the deductions until the debt is cleared.

This is the ideal method for enforcing a judgment against an individual who is in stable, permanent employment with a regular salary. It is useless against the self-employed, the unemployed, those who work abroad, or those who frequently change jobs. It also only produces payment in instalments, which may be slow.

It is an excellent tool for employed individuals, providing a steady stream of payments, but entirely dependent on the debtor's continued employment.

### 11.3.5 Appointment of a Receiver

This is a more flexible and specialised enforcement method used when other methods are unsuitable. The court appoints an independent person, the Receiver, to take control of a

specific asset or income stream belonging to the debtor and to manage it to generate funds to pay the judgment creditor.

The judgment creditor applies to the court for the appointment of a Receiver. The Receiver, who is often an accountant or a solicitor, is given legal authority by the court to collect and manage the debtor's assets. For example, a Receiver could be appointed over:

- The rental income from a property owned by the debtor.
- The profits from the debtor's business.
- The debtor's interest in a trust fund or partnership.

It is best for complex situations where the debtor's assets are not straightforward, such as a share in a business, intellectual property rights, or a future stream of income like royalties. It is a tool of last resort when other methods have failed or are clearly inappropriate.

This is an expensive procedure because the Receiver, a professional, is entitled to be paid from the recovered assets. It is therefore only cost effective for larger judgments.

The case of ***Masri v Consolidated Contractors International*** [2008] EWCA Civ 303, is a leading authority, confirming the court's wide and adaptable power to appoint a Receiver under *s.37* of the *Senior Courts Act 1981* to ensure that justice is done.

**Summary Table**

| **Method** | **Targets** | **Best For** | **Key Limitation** |
|---|---|---|---|
| Writ/Warrant of Control | Goods and equipment | Businesses & individuals with valuable physical assets | Cannot force entry into homes; many goods are exempt |
| Third Party Debt Order | Money in bank accounts | Debtors with known bank accounts holding funds | Requires knowledge of bank details; ineffective on empty accounts |

| | | | |
|---|---|---|---|
| Charging Order | Land and property | Debtors who own property with equity | Does not provide immediate cash; sale can be difficult |
| Attachment of Earnings | Wages/Salary | Individuals in stable employment | Useless against self-employed/unemployed; slow instalments |
| Appointment of Receiver | Complex/Intangible assets | Business interests, rent, royalties | Very expensive; a last resort for complex cases |

A solicitor must act as a strategist in the enforcement phase. The choice of method is not arbitrary. It is a direct consequence of the financial profile of the judgment debtor. A thorough understanding of each tool's mechanics, strengths, and weaknesses is essential to converting a paper judgment into a successful financial recovery for the client.

## 11.4 Choosing the Appropriate Method of Enforcement

Selecting the right enforcement method is a tactical decision. A solicitor should not simply pick one at random. The choice should be guided by a logical assessment of the available information. The following flowchart provides a strategic approach.

**A Solicitor's Decision Making Guide**:

1. What do we know about the debtor? If the answer is "very little", the first step should always be to apply for an Oral Examination to gather information.
2. After the examination, or if information is already known:
    - Does the debtor have a job and a regular salary? If yes, apply for an Attachment of Earnings Order.
    - Does the debtor have money in a bank account? If yes, apply for a Third Party Debt Order.

- Does the debtor own a property? If yes, apply for a Charging Order to secure the debt against the property.
- Does the debtor own valuable goods, stock, or equipment? If yes, apply for a Writ or Warrant of Control.
- Is the debtor's financial situation complex, for example, do they have a share in a business or a valuable income stream? If yes, consider applying for the Appointment of a Receiver.

It is possible, and sometimes necessary, to use more than one method simultaneously. For example, you might secure the debt against the debtor's house with a Charging Order while also seizing money from their bank account with a Third Party Debt Order.

The key is to be proactive and strategic. The goal is to convert the court's judgment into a recovered sum for your client in the most efficient and cost effective way possible. A thorough understanding of these enforcement mechanisms is what turns a successful court room result into a tangible and successful outcome for the client.

## 11.5 Conclusion

Enforcement is the final, crucial chapter in the litigation process. For a solicitor, it is not an administrative afterthought but a core litigation skill. It requires investigation, strategy, and a practical understanding of the court's powers. By methodically gathering information and selecting the enforcement tool that best matches the debtor's circumstances, a solicitor can ensure that a client's legal victory is realised in practice, upholding the authority of the court and providing a genuine remedy.

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