The ultimate guide to dispute resolution litigation

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Guide to Litigation

Introduction

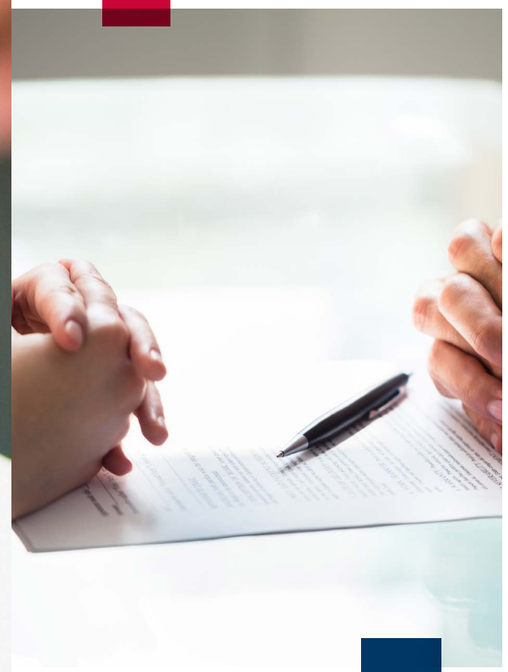
Litigation is a complex process which includes many steps, forms and procedures.

In the following guide we'll attempt to simplify the complicated world of litigation and provide you with a strong understanding of everything that's involved.

Starting with important things you really need to know before starting court proceedings and ending with what happens at the conclusion of a trial.

We'll also cover all of the important bits in between the two and help you understand what to do if you ever find yourself in a case.

By the end you'll understand the process of litigation and realise why cases rarely make it to trial!



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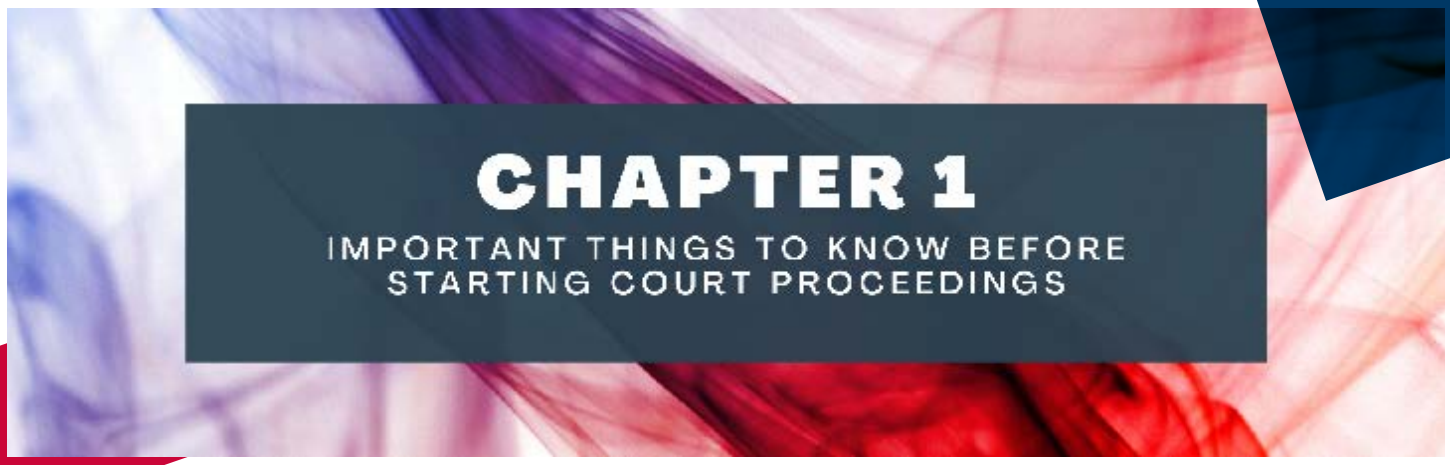


CHAPTER 1

IMPORTANT THINGS TO KNOW BEFORE STARTING COURT PROCEEDINGS

Know your opponent

Starting point – do you know who your claim is against?

Double check your opponent's identity as applying for court permission to amend the names later is expensive, and may be unsuccessful.

The court fee paid on issuing the wrong claim is non-refundable. If claiming against a company cross-check their company number on Companies House and get an up to date address to use.

Investigate whether your opponent has the financial standing to pay any judgment you are claiming.

Consider using credit check services or enquiry agents to find assets that can be enforced against.

Check filed accounts from Companies House if a limited company.

Quantify your loss

What are you seeking?

Claims for the price of goods and services are easily quantified but if your claim arises out of other circumstances, can you quantify the financial loss you have suffered?

Is that loss reasonably attributable to someone/something?

Confidentiality

Expect most hearings to be open for public viewing including documents referred to.

Bear in mind that if you reach the disclosure stage covered later in this guide you will have to hand over to your opponent all documents relevant to the case even if they harm your chances of success.

If in doubt, check with us as almost all information you provide toyour legal advisors is confidential.

Insurance

Check any policies you have.

Usually home insurance and many business policies cover legal fees for the pursuit or defence of a claim.

Consider taking out a product called After the Event Insurance (ATE) to cover your liability to pay the opponent's costs although premiums can be high.

Other ways of funding are available, usually for large cases, such as funders paying costs in return for you agreeing to repay them with a large premium out of winnings made in the litigation.

Discuss the options with your solicitor if you are interested.

Legal costs

The general rule is the successful party will be able to recover their legal costs from their opponent.

For most cases the judge will summarily assess costs once a final order has been made. The judge has discretion on how much to award and will take into consideration both parties conduct throughout the proceedings and any offers that have been made.

Be aware of the limitation period

Most claims have to be issued at court within a set time – known as the limitation period – otherwise the opposition will have an automatic defence that the claim is out of time.

The limitation period varies depending on the type of claim, for example in personal injury cases it is usually three years from the date of an accident and for contract cases, six years from the date the contract was breached.

The pre-action protocols

The civil procedure rules govern how cases proceed through the courts and they include pre-action protocols, which set out what the courts expect parties to do before a claim is issued.

The first step is to exchange letters with your opponent setting out your position, the evidence you rely on and the recompense you are seeking.

You should check to see if there is a specific protocol that applies to your type of dispute.

This will set out what to include in your letter and what further steps to take.

For example, business debts and personal injury claims have their own pre-action steps to follow. All the protocols are listed here.

There will be cases where it may not be possible to follow the relevant protocol often due to there not being enough time.

Be wary of consequences of not following a protocol which can include paying the costs even if you are successful.

CHAPTER 2

WHY YOU NEED TO UNDERGO ALTERNATIVE DISPUTE RESOLUTION FIRST (SETTLEMENT NEGOTIATIONS)

These take many forms and can happen at any stage of the case. The term you will hear most often is "alternative dispute resolution" (ADR) i.e. resolution without a trial.

At trial a judge will expect the parties to have attempted ADR first and may penalise a party when making an order on costs if they have decided, without good reason, not to engage in attempts to resolve the dispute.

The main reason for issuing without trying ADR is where the other side is not willing to participate or where you are constrained by a time limit. Even then the court may pause court proceedings and insist the parties try ADR.

You should consider having a meeting with the opposing party, either with solicitors or a mediator present.

A judge will expect you to have met at least once (virtually or in person) in order to narrow the issues by agreeing common points and to put forward your best and final offers to settle the dispute.

A mediation is when all parties meet with a third-party mediator who specialises in resolving disputes and is commonly a solicitor, barrister or other professional such as a surveyor.

Other forms of ADR include referring the matter to an arbitrator, early neutral evaluation by an independent third party, adjudication and expert determination.

When making offers to settle, decide whether you want the judge to be aware of the terms or not.

Letters marked or settlement meetings described as "without prejudice" mean a judge will usually never know about them and certainly not before giving judgment at the end of a trial.

"Without prejudice save as to costs" means a judge will see the letters after he/she has given judgment but before deciding on who is liable for costs (more on this later).

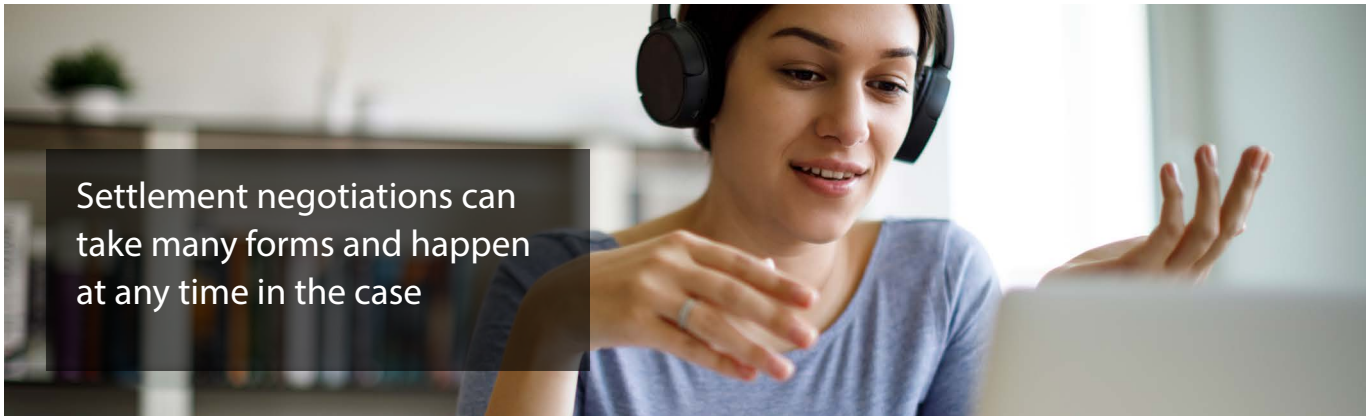
Consider making a without prejudice offer pursuant to Part 36 of the CPR; this is essentially a written offer that ups the ante in terms of what's at stake when it comes to the final judgment and hopefully will make the opposition consider accepting it rather than face those consequences.

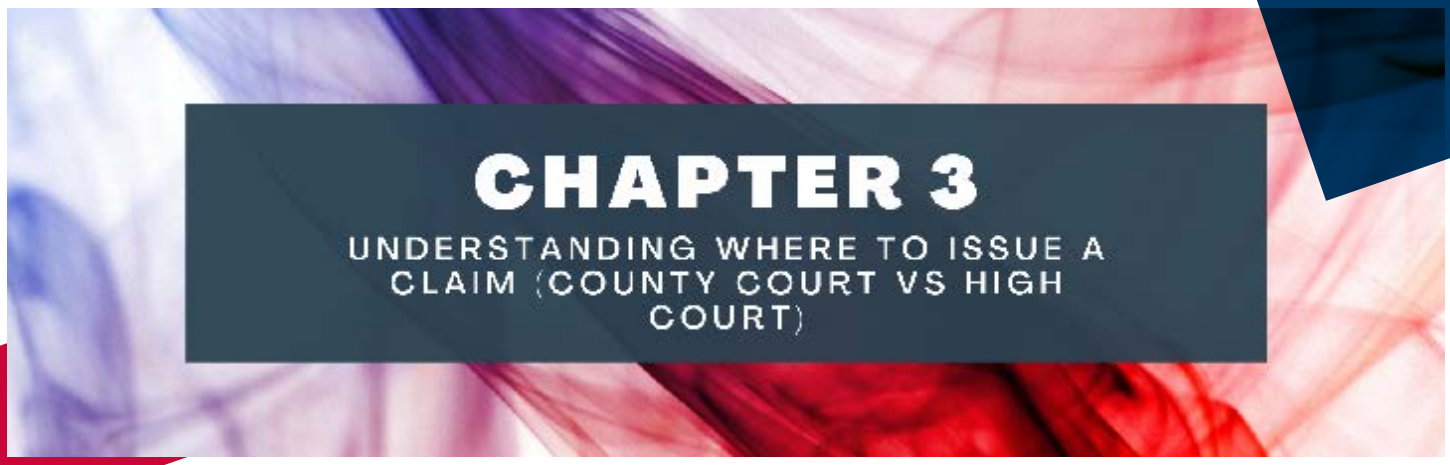
If a Part 36 offer is not accepted within 21 days then if a judgment is later awarded that is less favourable than the terms in your offer, your opponent will suffer certain financial consequences. These include higher legal costs from the time the 21 days expired and potentially an uplift of 10% more in damages.

Sound complicated? It is!

Also you must make sure the offer is set out correctly, if making it yourself consider relying on court form N242A.

One of the biggest pitfalls is that if making a Part 36 offer on behalf of a defendant, if it is accepted, you automatically accept the claimant's costs up to the time of making the offer.





CHAPTER 3

UNDERSTANDING WHERE TO ISSUE A CLAIM (COUNTY COURT VS HIGH COURT)

Where to issue your claim

Where you should issue your claim depends on the nature and value.

The majority of claims are divided between money claims and non-monetary claims.

If you are seeking an order from the court that someone pays you money for a specified sum, then for claims of £100,000 or less you either send a paper claim form to Salford County Court or use the money claims online ("MCOL") system.

For claims more than this sum consider whether to issue in the High Court especially if the matter is complex.

For more information visit the MCOL website and here for the useful guide.

Claiming under Part 8

This is an alternative method of bringing a claim under Part 7 which this guide focuses on.

A Part 8 claim is used when a rule requires or permits it, or where the claimant seeks the court's decision on a question that is unlikely to involve a substantial dispute of fact.

For example, some commercial lease renewal claims or claims arising in connection with the administration of the estate or when seeking a declaration for the court to determine the construction of a contract.

Unlike the Part 7 procedure a claim under Part 8 requires parties to serve witness evidence from the start, with their claim form or with the acknowledgment of service.

It is a more streamlined process that can help parties put their cases across more effectively at less cost.

Claim forms for Part 7 and Part 8 claims

To issue a claim your starting point is to complete a claim form (form N1 for Part 7 and N208 for Part 8 claims).

It may also be appropriate to prepare a detailed "particulars of claim" in a separate document.

When summarising your claim, it is important to set out the facts in chronological order with a summary at the end setting out what you are seeking the court to order.

A mistake here that we often see claimants make is including lots of information that is not relevant to the case; stick to the essential facts as you will have an opportunity when drafting your witness statement to go into more detail.

If you have not done so already this is a good time to get a solicitor involved to read through your case papers and give you an opinion on your case as once the claim has been issued it's very difficult to change.

To succeed you will have to convince a judge on the balance of probabilities that your position is correct.

Statement of truth

At various points in the proceedings you will have to sign a statement stating that the information you are providing is true to the best of your knowledge and belief.

For more information on this read our article "Guidance on signing a Statement of Truth".

If you sign this statement knowing you are providing false information you may be found in contempt of court that can result in imprisonment for up to 2 years.

Being found not to be telling the truth on any particular point in your statement is also one of the quickest ways to discredit all of your evidence in front of the judge hearing your case.

Court fee

Claimants, you will need to pay a court fee (see form EX50).

For monetary claims court fees increase with the amount being claimed, in June 2020 they started from £25.

Fees for claims greater than £10,000 in value are calculated at 5% of the value of the claim up to a maximum fee of £10,000.

Sending your claim form to the opposing party

There are very specific rules when it comes to service of court papers and you need to make sure these are followed or risk your claim not going much further.

For claims in England & Wales the claim form must be sent to the defendant's registered office or last known address within 4 months from the date the claim was issued (stamped) at court.

Ths is known as serving the claim. If the defendant's address is in the UK, the court is likely to send a copy of your papers directly to them; this is subject to you providing them with copies to do so if submitted on paper.

There may be occasion to instruct a process server to trace and personally hand deliver your papers to the defendant if his/her address remains unknown or make other arrangements if the defendant lives abroad.

CHAPTER 4

RESPONDING AND DEFENDING CLAIMS (REPLIES & COUNTER-CLAIMS)

The defendant's response to your claim

The court will send to the defendant the claim form with a response pack which will include an acknowledgement form to complete and a defence statement form.

Usually the defendant will have 14 days from receipt of the particulars of claim to send to the court the acknowledgment form. However, if the particulars of claim are served separately a further 14 days can be added on to this.

The date of service is therefore crucial to ascertain because this determines the time-scales all parties need to follow subsequently.

Unless the claim is admitted, a defence will need to be filed and served.

In this statement the defendant sets out which allegations they admit, which they dispute and which they do not admit or deny but require the claimant to prove.

If disputing the claim, it's important for the defendant to justify the position taken by setting out the facts relied on in support of the defence.

Defendants – there are two time limits for issuing and serving the defence.

You have 28 days to file and serve the defence after you are served the particulars of claim. If no acknowledgment was sent you have just 14 days from service of the particulars of claim.

Quite often the form you receive from the court will set out the date the defence needs to be returned by.

Running out of time? You can try and agree an extension with the other side for up to 28 days or ask the court for more time if there are special reasons for needing this.

If you deny the claim and want to issue a counter-claim, now would also be the time to do so.

Counter-claims incur a court fee in the same way as a new claim. As above with the claim, copies are needed, as the court will, after sealing the defence/counterclaim, send a copy to each claimant.

Reply and defence to counter-claim

Claimants – rarely will you need to serve a reply to a defence statement as you will have an opportunity to set out your position in your witness statement.

If you dispute a counter-claim served, you will need to submit a defence to counter-claim within 14 days from receipt.

CHAPTER 5

UNDERSTANDING THE CASE MANAGEMENT PHASE & DEFAULT JUDGMENT

Case management

Once the claim form, defence and any other relevant documents have been served (known collectively as the 'statements of case'), the case will enter what is known as the 'case management' phase in which the court will set a timetable of things (known as "directions") for the parties to do to prepare for trial.

Certain directions include, for example, when documentary evidence (disclosure) and witness statements need to be exchanged, whether or not expert evidence will be required, when bundles of documents and written submissions need to be filed ahead of the trial.

The court will also decide how long the trial is likely to take and fix a date.

Usually the parties agree the directions and the court gives their approval to them in correspondence but if agreement is not reached or there are issues which need to be discussed, the judge may settle these issues at a hearing called a 'case management conference.'

For multi-track cases (see below for definition), the conference will also cover costs.

Both parties will usually be expected to prepare cost budgets setting out costs incurred to date and estimated future costs.

These budgets will often need to be exchanged 21 clear days before the first cost and case management conference if you have solicitors acting for you.

Failing to complete this step may result in you only being able to recover the court fee at the end of the proceedings.

At the conference the judge will approve any budgets that have not been agreed by the parties.

Summary and default judgments

It takes a long time to get a case to trial, often anywhere between 6 months to two years in the civil courts.

As a result, and in order to save costs, both parties may want to try and short cut through the whole process and there are a few ways to do this.

The easiest option is only available when your opposition fails to serve a defence or comply with one of the directions, such as pay a court fee: you can then make an application to court for what is called a judgment in default.

If a defence is outstanding then judgment should follow quickly.

However, if it is any other court direction that has been breached then the court may make an unless order instead, providing your opponent with a final deadline to comply before judgment is entered in your favour.

Note, this option is not available for Part 8 claims.

The second, riskier option is by applying to court for a summary judgment on the basis that you are confident the other party's claim or defence has no real prospect of success; i.e. you have such a "slam dunk" case that the judge does not need to hear all the evidence.

Evidence will be given by written statements only and a short hearing perhaps for a few hours will typically be scheduled.

A judge has the option to enter judgment in favour of the applicant or strike out part of the matter in dispute.

In deciding whether to choose this route you should weigh up the options of losing and incurring an early costs order against you, but at the same time getting a better understanding of the opposing party's case against the advantage of a quick disposal of the case.

Summary judgment applications are rare and only suitable for particular types of case; not an option we would recommend when there is an issue of disputed facts that require parties to give evidence in person.

There are other options available that are less well known as the two listed above.

Consideration should be given to making an application for interim payments or for security for costs (if you think the other side are short on funds). Other possible applications are for early disclosure or to strike out the case altogether, usually for a procedural error.

CHAPTER 6

CASE ALLOCATION TO FAST TRACK, SMALL TRACK OR MULTI TRACK

Case management - allocation to track and directions

The court will now notify all parties which of the three tracks they have allocated the case to, either small, fast or multi.

The case will be allocated to the small claims track if the value is for £10,000 or less or for personal injury or housing disrepair cases less than £1,000.

The fast track is usually allocated for cases where claimants are seeking damages not more than £25,000 and the issues are not complex; multi-track for everything else including often commercial lease renewal proceedings.

Legal fees are not generally recoverable in the small claims track but they are for the other two.

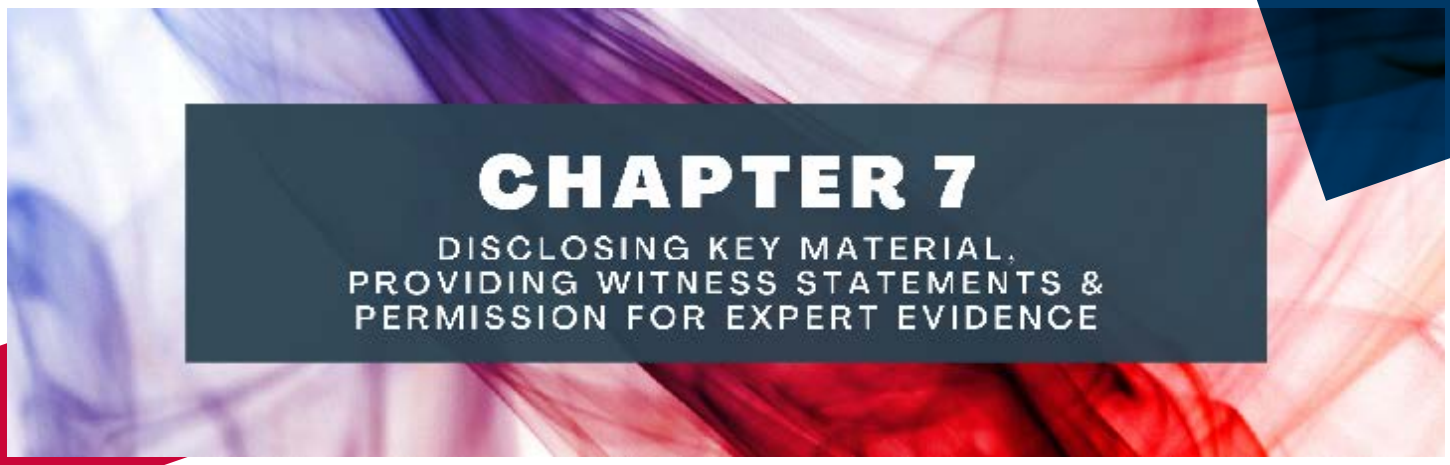
Fast track often restricts recovery of legal fees to fixed sums set out in CPR 45.

With the notice of allocation, the court will also send a directions questionnaire to each party to complete in order to allow the court to prepare a timetable to hear the case at trial.

Parties should seek to agree a list of deadlines for each of the steps as this can then avoid attending a case management hearing.

At any point in the proceedings, parties can jointly agree to extend any deadline for up to 28 days.

For any longer or if one party does not consent, an application to the court will need to be made using the standard form N244 (known as an "interim application notice").



CHAPTER 7

DISCLOSING KEY MATERIAL, PROVIDING WITNESS STATEMENTS & PERMISSION FOR EXPERT EVIDENCE

Disclosure

Be aware of your obligations to disclose key material early on and start collating this material.

You will have to disclose to the opposing party the existence of all documents (including electronic files) that are relevant to the case and that are in your control, even if they are harmful to your case!

There are two exceptions to this rule:

You do not need to disclose any communication with your lawyer where they are giving legal advice as this is protected under a veil called legal advice privilege.

You also do not have to disclose confidential documents created for the dominant purpose of obtaining advice or collecting evidence during litigation.

These documents are excluded from disclosure under what is called litigation privilege.

It is likely you will need to complete a disclosure form N263 setting out what search you have done to locate relevant documents; i.e. checked your home hard-drives, mobiles and filing cabinets from a specific year to now.

You will then list the documents in chronological order that are relevant to the case. If you are not sure whether or not a document is relevant then it probably is.

Once everything has been listed, this list will get sent to the opposition who will then select which documents from the list they wish to see copies of.

Witness statements of fact

This is your best opportunity (aside from giving evidence in person at trial) to set out the full details of your case from your perspective.

The statement must be in the witness' own words and signed off with a Statement of Truth.

You should avoid getting carried away by detailing everything as the judge only has a limited amount of time to read all the papers; stick to the issues, write your statement in clear numbered paragraphs in chronological order.

> Do not feel the need to reply to every point set out in the other parties' statement of case.

If they have gone off point, don't follow them unless you think a reply necessary.

Attach any documents you want to rely on and number these on the documents themselves so you can easily refer to them in your statement.

Expert evidence

In cases where technical evidence or expert opinion is needed, you will need permission from the court if you want to rely upon expert evidence, for example on the construction of a building or a medical opinion.

Permission to rely upon expert evidence is usually dealt with during the case management stage referred to above.

Often the court will limit what the expert is to advise on and direct whether a single or joint expert is to be appointed.

The expert is likely to set out his/her evidence in a CPR compliant report.

Their duty is to the court and not you, so they must be impartial and provide the court with an independent, unbiased opinion.

If each party has appointed an expert, reports will be exchanged, questions raised by either side and possibly a joint report prepared.

When selecting your expert ensure that they are prepared to give evidence at trial as it's likely they will have to attend to answer questions from your opponent.

CHAPTER 8

THE FINAL PREPARATIONS FOR TRIAL (FROM LISTING QUESTIONNAIRE TO HEARING FEES AND FINAL TRIAL DOCUMENTS)

Listing questionnaire - pre-trial review

For fast and multi-track cases, the court will have made a direction for you to file at court a pre-trial checklist known as a 'listing questionnaire' (form N170).

In practice we usually serve this form on the opposition as well. This checklist gives the court a wider picture of where the case is currently sitting, for example, which directions have or have not been complied with and allows a judge to gauge what evidence will likely be used at trial.

For more substantial cases, a hearing may be listed to determine these issues.

The listing questionnaire's purpose is to help the court determine how many days will be needed to hear the case and whether further directions are needed before the trial.

Hearing fee

You will have received an order from the court to pay a hearing fee which will be for a small claim anywhere between £25-335, fast track claims – £545 and for a multi track claim – £1090.

For more information see Page 7 on the EX50 form.

Final trial documents

Usually in the case management order there will be directions for parties to exchange and file with the court a few days before the trial, skeleton arguments, and possibly a case summary and chronology agreed with the other side.

If you are instructing a barrister (counsel) to undertake the advocacy they will often produce the skeleton arguments for you.

Bundles

Generally, the claimant prepares the trial/court bundle which can be a costly exercise.

This is a folder of all the relevant documents associated with the case.

The bundle will be sent to the court before the trial so that the judge can read it beforehand and a copy given to the other side and one copy for the witness stand so that during the trial you can all refer to the same pages.

CHAPTER 9

WHY CASES RARELY MAKE IT TO TRIAL & THE OUTCOME WHEN THEY DO

The trial

You've made it this far; soon you will have that long awaited outcome.

It is so rare these days that any case goes to trial.

Reflecting back on the process you have gone through you can see why; not only is it often extremely expensive, but it is also time consuming and inevitably very stressful.

The trial will be held in public unless ordered otherwise before a judge.

The seniority of judge depends on the court and the type of claim you have started.

The length of the trial (and consequential costs) will depend on factors such as the complexity of the case and whether any witnesses or experts need to give evidence.

It is likely a barrister who has specific expertise within the area of law that is being disputed will be representing you at trial.

Judgment/order

The judge may give their decision on the outcome of the trial at the end orally or reserved for a later date.

The court will then prepare the judgment in the form of an order that is then sealed by the court and sent to all of the parties in the litigation.

The order will set out the next steps and when those next steps are to be complied with, e.g. Party B must pay Party A the sum of X by a certain date.

Recovery of costs

This is one of the main factors parties will consider throughout the litigation process as ultimately you are betting legal fees against the chance of winning at trial.

The general rule is the successful party will be able to recover costs from the other side. Do not expect to recover all of your costs, however, as this is very unlikely.

The judge may summarily assess the costs award at the end of trial or postpone this exercise for another day.

Recovery of costs are at the discretion of the court.

The judge will consider the conduct of the parties and any settlement offers that have been made that he/she is now able to see.

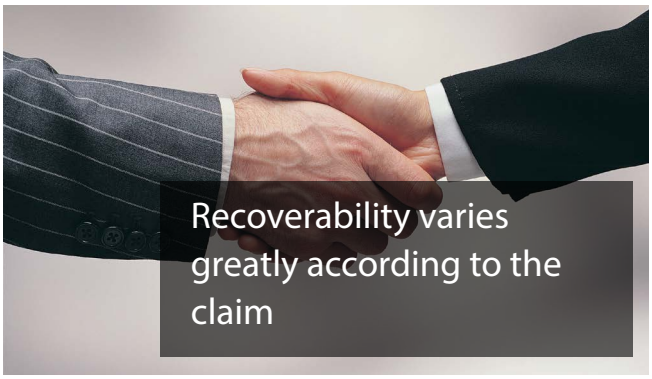
In multi-track cases, compliance with the cost budgets mentioned above will also be essential for the recovery of costs. If costs exceed the budget given for a particular element of the case, you will need to either get the opponent to agree to the increased costs or obtain a variation order from the court before they are incurred.

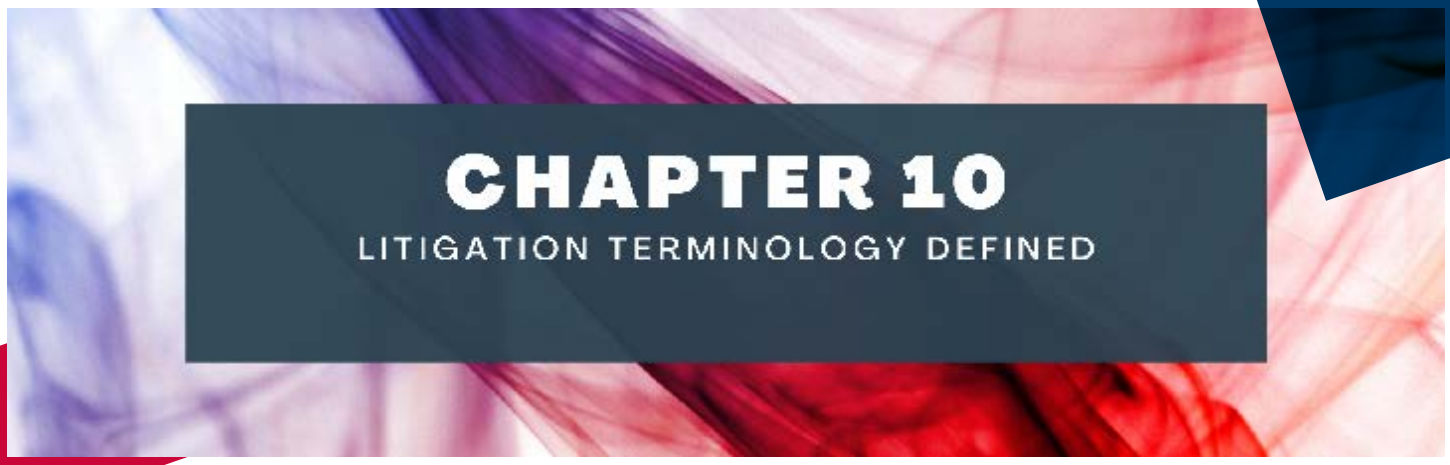
Recoverability varies greatly according to the type of claim, the extent of the budgeting by the court, offers made and general behaviour, but as a general rule of thumb, you might, if successful, expect to recoup about two thirds of your legal fees.

Enforcement of the judgment/order

The usual rule is that in cases involving a money claim unless ordered otherwise the judgment debtor should pay sums due (set out in the order) within 14 days of the date of the order.

If payment is not made there are various options available to recover the sums due such as appointing a bailiff, registering a charge against goods or property or seeking payment directly from the opponent's wages to name only a few.





CHAPTER 10

LITIGATION TERMINOLOGY DEFINED

Acknowledgement of service

The defending party must acknowledge that they have received a claim made against them. This should be done within 14 days of the particulars of claim being sent to them.

Alternative dispute resolution (ADR)

Alternative methods for resolving a dispute outside the use of litigation; such examples include – negotiation, mediation, conciliation and arbitration, to name a few.

Bundle

A list of collated documents relating to a case which is constructed into one large file.

Case management

The case will be managed according to timetabled directions in accordance to each stage of the case in an effort to narrow issues.

Case management hearing/conference (CMC)

If the parties cannot agree to directions or guidance is needed, a CMC can be arranged.

Charging order

A method of enforcing a court judgment in which the court gives the applicant a charge over another party's property.

Claim form

Standard form used to start a claim.

Conditional fee agreement (CFA)

An arrangement in which a party to litigation agrees with his solicitors that he will pay no fee/reduced costs if the case is unsuccessful, but a higher fee if the case is successful. The maximum a success fee can be is 100% of normal fees.

Counter-claim

A claim brought by a defendant against the claimant, in response to the claim that was initially brought by the claimant.

Cross-examination

The questioning of a witness at trial by the opponent's advocate.

Damages

Money awarded by the court to the claimant, payable by the defendant by way of compensation.

Damages based agreement (DBA)

An arrangement whereby a party's lawyers are paid a percentage of the money recovered from the litigation. The maximum amount is 50%.

Defence

The document in which a defendant will set out the grounds on which they are defending a claim made against them.

Directions

Timetabled actions given by the court to the parties.

Directions questionnaire

Provides court with information as to where the parties are currently with regards to the directions given to them, before heading to trial.

Disclosure

The act of identifying and disclosing documents to your opponent and the court.

Evidence in chief

Evidence given by a witness for the party who called him to be a witness.

Expert evidence

Unbiased evidence given by an expert that has been appointed by a party or appointed jointly.

Fast track

Usually allocated for cases where claimants are seeking damages not more than £25,000 and the issues are not complex.

Final trial documents

Usually in the case management order there will be directions for parties to exchange and file with the court a few days before the trial, skeleton arguments, and possibly a case summary and chronology agreed with the other side.

Freezing order

A type of injunction given by the court which prevents a person gaining access or moving their assets.

Hearing fee

An order from the court to pay a hearing fee which will be for a small claim anywhere between £25-335, fast track claims – £545 and for a multi track claim – £1090.

Inspection

The process of allowing the other parties to inspect disclosed documents.

Judgment in default

If a defendant fails to acknowledge receipt of a claim made against them it will be assumed that they are not in dispute of the claim and therefore a judgment in default can be made against them by the claimant.

Limitation period

The period of time within which a claim must be started. For commercial claims this is normally 6 years from the date in which the case of action arose.

Listing questionnaire

Similar to the direction's questionnaire – this is a checklist which the parties must fill out. Gives wider picture of issues.

Litigation privilege

Documents which are excluded from having to be disclosed due to their confidential nature.

Multi track

Anything that has not been allocated to either the small claims or fast tracks including often commercial lease renewal proceedings.

Part 36

An offer to settle the claim. These can be (and are expected) to be made at any time before trial.

Particulars of claim

Document made by the claimant which details the facts of the claim that they are making against the defendant(s).

Part 8 claim

A Part 8 claim is used when a rule requires or permits it, or where the claimant seeks the court's decision on a question that is unlikely to involve a substantial dispute of fact.

Part 20 claim

A claim other than a claim by the claimant against the defendant, e.g. counter-claim by the defendant against the claimant or against a third party for a contribution or indemnity relating to the claim.

Pre-action protocol

Party conduct protocols set by the court which the parties are expected to comply with.

Privilege

The right of a party to refuse to give inspection of a document on the basis that the document is confidential – can be between a lawyer and this client or a lawyer and a third party relating to legal advice.

Quantify your loss

The process of quantifying the financial loss of your claim whether it's for the price of goods and services or other circumstances.

Serving documents

Term used to describe when a document has been formally administered into the court system.

Small claims track

Allocated to small claims track if the value is for £10,000 or less or for personal injury or housing disrepair cases less than £1,000.

Statements of case

Collective term which includes: claim form, defence, particulars of claim counter-claim relating to the case.

Statement of truth

Will be signed by a party/solicitor to state that the information they have provided is accurate to the best of their knowledge Knowingly deceiving the court is a criminal offence (contempt of court).

Strike out

A strike out order is an order of the court that identified written material cannot be relied on by a party.

Stay of proceedings

An agreement made between the parties that the case will be 'paused' for a duration of time.

Summary judgment

If a party is certain that the other party has no real prospect to succeed, or no compelling reason why the case or issue should be disposed of at trial.

Unless order

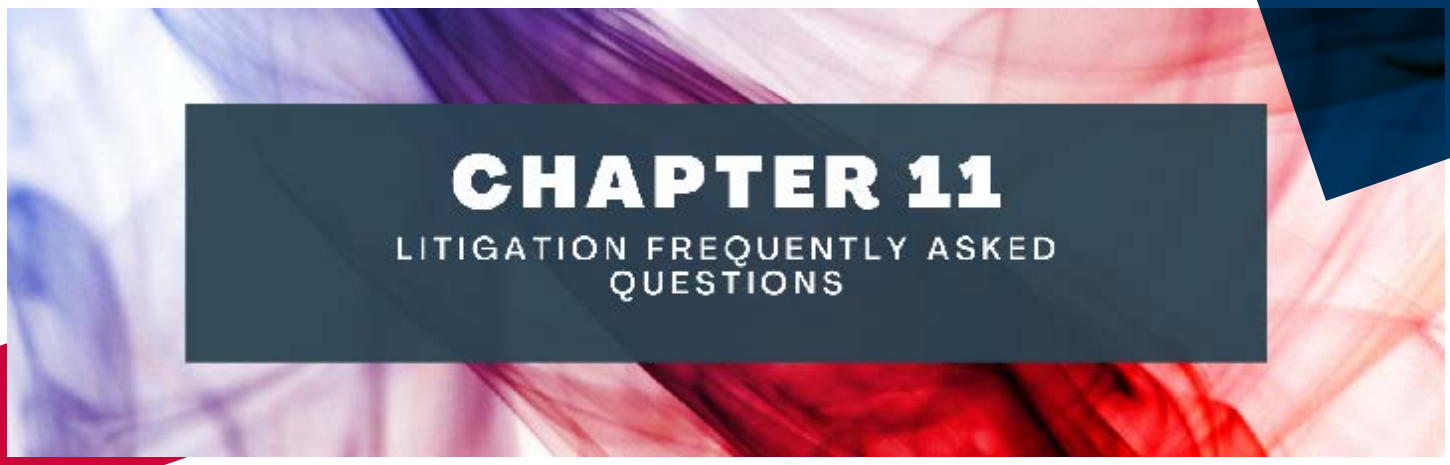
A final order will be made by the court unless a party complies with certain directions by a specific date.

Without prejudice

A document marked 'without prejudice' will be excluded from review of a judge in relation to determining the outcome of the case. ('Without prejudice, save as to costs', the judge will not view the 'without prejudice' marked document(s) until they are assessing costs element of the case.

Witness statements

Statements made by witnesses used by parties as evidence to prove/further their argument.



CHAPTER 11

LITIGATION FREQUENTLY ASKED QUESTIONS

Q: What does litigation mean?

A: Litigation is when a dispute becomes the subject of court proceedings.

Q: What does a litigator lawyer do?

A: A litigation lawyer will try to resolve disputes before they go to litigation (i.e. before they become the subject of court proceedings). If the matter does go to court they will deal with the court process necessary to take the matter to trial but usually will at all stages seek to settle the matter on the best possible terms.

Q: How does litigation funding work?

A: Litigation funding involves a third party funder providing finance to pay for your litigation fees and/or to pay the other sides costs in the event you lose. In return for this, the funder will require payment of an agreed amount from any sums recovered from your opponent. Litigation funding can be coupled with insurances that pay out to cover opponents legal costs.

Q: How much does litigation cost?

A: It varies widely depending upon the nature of the case, the amounts in dispute and the manner in which the parties' solicitors approach the case. With sensible litigators on both sides the cost should be kept proportionate to the sums in dispute although the lower value the claim is the less cost effective it tends to be. A typical county court case taken to trial would not normally expect to cost less than £30,000 but can be cheaper and very much more. The loser generally has to pay the majority of the other sides costs but rarely all of them. Funding or insurance arrangements may be available to assist with these costs

Q: What does litigation mean in law?

A: Litigation is when a dispute becomes the subject of court proceedings.

Q: How does litigation work?

A: Litigation is a complex process which includes many steps, forms and procedures. For a full explanation of how this works, please read the guide above.

Q: When does litigation privilege begin?

A: Litigation privilege begins when in contemplation of adversarial litigation documents are passed between a lawyer and his client or other third parties who are being consulted solely or for the dominant purpose of the litigation.

Q: When does litigation privilege end?

A: Litigation privilege once acquired never ends unless it relates to documents that become public in court proceedings. Once litigation is finally concluded then there can be no new documents that are covered by litigation privilege (except in the context of anticipated appeal proceedings).

Q: Can litigation privilege be waived?

A: Waiver of privilege occurs where a party to litigation discloses a privileged document to the other party, or to the court but if this is done accidentally waiver will usually still be retained. That disclosure may be done not only by producing a document but by openly referring to its contents in a document that is given to the other side.

Q: How does litigation finance work?

A: Litigation finance or litigation funding involves a third party funder providing finance to pay for your litigation fees and/or to pay the other sides costs in the event you lose. In return for this the funder will require payment of an agreed amount from sums recovered from your opponent. Litigation funding can be coupled with insurances that pay out to cover opponents legal costs.

Q: How long does litigation take?

A: This varies depending on the nature of the case and the sums in dispute. The quickest that a case will get to trial in a county court in England and Wales is usually around 9 months from the date that court proceedings are commenced. However it can take a lot longer and the parties may also take months, or even years, in taking preparatory steps in accordance with the pre-action protocols applicable to the case including exploring Alternative Dispute Resolution, prior to proceedings being commenced.

Q: What does litigation do?

A: Litigation provides a remedy for a legal claim or complaint that one party may have against another. Remedies include an order for payment of money; a declaration that a certain state of affairs exists legally (e.g. a declaration as to the position of a property boundary, a right of way, that someone is entitled to shares in a company, that a contract has been terminated; an account between parties as to who owes what; an injunction order compelling a party to do something or to prohibit something being done). The court will also be able to order the enforcement of those remedies e.g for a fee a money judgement may be enforced by court bailiffs seizing goods of the debtor, or by ordering the sale of property owned by the debtor to repay the judgement creditor.

Q: Why is litigation better than arbitration?

A: Litigation is not better than arbitration. They each have their purpose. Arbitration can be quicker and the parties can have more control over who deals with the dispute. If the arbitration is about a technical dispute then an arbitrator with appropriate technical experience can be selected as opposed to the court deciding who is to be the judge at trial. Court proceedings can be cheaper than arbitration despite the often more formal and extended procedures involved with court action. Arbitrators are usually professionals who charge a high hourly rate and so the more involved the case is the higher the arbitrator's charges which initially are borne by both parties with the winner paying them all. The maximum court fee for commencing court proceedings in contrast is capped at £10,000.

Q: How does litigation end?

A: Litigation can end in the following ways:

1. A case being struck out for being without merit or by reason of the claimant being guilty of procedural defaults.
2. The claimant may discontinue the claim in which case the defendant is normally entitled to payment of it's costs.
3. The parties may come to a settlement of the dispute and not need it to go to trial. The settlement is usually recorded in writing and included in a court order concluding the proceedings.
4. If one party's case is considered to be overwhelmingly strong such that it is bound to win at trial then the case may be decided in favour of that party without it going to trial at what is called a summary judgement hearing.
5. The case goes to trial and a final order or judgement is made although there is usually a right of appeal. Depending on the case there could be an appeal to a judge, the court of appeal and in rare cases of extreme importance to the supreme court, although permission to appeal is usually required at each stage.

Q: When is litigation better than arbitration?

A: Litigation is not better than arbitration. They each have their purpose. Arbitration can be quicker and the parties can have more control over who deals with the dispute. If the arbitration is about a technical dispute then an arbitrator with appropriate technical experience can be selected as opposed to the court deciding who is to be the judge at trial. Court proceedings can be cheaper than arbitration despite the often more formal and extended procedures involved with court action. Arbitrators are usually professionals who charge a high hourly rate and so the more involved the case is the higher the arbitrator's charges which initially are borne by both parties with the winner paying them all. The maximum court fee for commencing court proceedings in contrast is capped at £10,000.

Q: Where does litigation begin?

A: Litigation in England and Wales usually involves the issue of a claim form in the county court or high court, either in hard copy sent to the court or some claims can be issued on line (including in particular money claims and residential possession claims).

Q: When is litigation used?

A: Litigation should only be used when the parties to a dispute have exhausted all avenues to resolve their differences. There are a number of pre-action protocols in the CPR that govern litigation in England and Wales which set out the requirements on parties before commencing proceedings including usually an expectation that the parties try mediation or some other form of alternative dispute resolution. Pre-action negotiation may not be appropriate in urgent cases where an injunction is urgently sought to prevent loss or damage which is immediately threatened. There may be other forms of dispute resolution provided for in contracts made between the parties (e.g. a clause that states any disputes are to go to arbitration) and these may prevent court proceedings from being pursued.

Q: When is litigation necessary?

A: Litigation is necessary where attempts to resolve the matter without the court's assistance have failed or there is an urgent need for an order to prevent further loss or damage. It should only be pursued where it is commercially viable to do so given the likely costs involved, taking in to account the risk of losing and the benefit that can be gained by winning the case. The financial standing of your opponent needs to be considered as a win against an insolvent opponent is of no value.

Q: What does a litigation solicitor do?

A: A litigation solicitor will try to resolve disputes before they go to litigation (i.e. before they become the subject of court proceedings) and if the matter does go to court will deal with the court process necessary to take the matter to trial but usually will at all stages seek to settle the matter on the best possible terms.

Q: Why is litigation good?

A: Litigation is often necessary in order to enforce a person's legal rights or to protect a person from civil or even criminal wrongs being committed against them. If litigation did not exist and court decisions were not enforceable then it is very likely that society as we know it would break down as there would be no way of ensuring that laws are obeyed. If you think law is good then so is litigation. As there can be bad law so there can be bad litigation but for the most part with a properly staffed and funded judicial system litigation is of benefit to society. It also brings finality to disputes enabling parties to move on and not be forever in conflict.

Q: How does litigation resolve a conflict?

A: Litigation should only be used when the parties to a dispute have exhausted all avenues to resolve their differences. There are a number of pre-action protocols in the CPR that govern litigation in England and Wales which set out the requirements on parties before commencing proceedings including usually an expectation that the parties try mediation or some other form of alternative dispute resolution. Pre-action negotiation may not be appropriate in urgent cases where an injunction is urgently sought to prevent loss or damage which is immediately threatened. There may be other forms of dispute resolution provided for in contracts made between the parties (e.g. a clause that states any disputes are to go to arbitration) and these may prevent court proceedings from being pursued. Ultimately litigation resolves a conflict by a judge making a decision on the dispute and providing an appropriate remedy.

Remedies include an order for payment of money, a declaration that a certain state of affairs exists legally (e.g. a declaration as to the position of a property boundary, a right of way, that someone is entitled to shares in a company, that a contract has been terminated), an account between parties as to who owes what, an injunction order compelling a party to do something or to prohibit something being done). The court will also be able to order the enforcement of those remedies e.g for a fee a money judgement may be enforced by court bailiffs seizing goods of the debtor, or by ordering the sale of property owned by the debtor to repay the judgement creditor.

Speak to an expert

If you are unsure of any of the steps or would like to discuss the case you are involved in do pick up the phone and speak to one of us.

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