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A Guide to the Litigation Process

This guide sets out a general overview of the litigation process in England and Wales under the Civil Procedure Rules (CPR), including steps to be taken before a claim is commenced.

It does not cover every possible stage of the process and is not a substitute for specific legal advice. This Guide is applicable to cases allocated to the Fast Track or Multi Track of the Court and does not apply to the Small Claims Track.

As each case is different, the particular steps required, and timetable to be followed, will vary depending on the facts and circumstances and the dispute. Uncertainty is inherent in all litigation so although we can advise as to the prospects of success, we cannot guarantee any outcome as to the claim or damages. Additionally, our view may change once further documents/witness statements is provided.

There are some factors that cannot be predicted in advance, such as actions taken by the other party, evidence that emerges during the case, and directions or orders given by the Court. The following summary is intended to give you a general indication of the procedure and steps that may be required.

Please also note in particular the section on costs risks (Section O) which contains important information on costs and recovery of your costs.

A. THE OVERRIDING OBJECTIVE

1. One important principle that underpins litigation is the "overriding objective" of enabling the Court to deal with cases justly and at proportionate cost. The key factors include:
   - Enforcing compliance with the CPR and any Court orders.
   - Dealing with a case in a way that is proportionate to the
     - Amount of money involved;
     - Importance of the case;
     - Complexity of the issues; and
     - Financial position of each party.
   - Saving expense.
   - Ensuring that the case is dealt with expeditiously and fairly.

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

B. PRE-ACTION PROTOCOLS

3. Depending on the type of claim, the Court will expect the parties to adhere to a 'Pre-Action Protocol' prior to commencing Court proceedings and the type of claim affects which Pre-Action Protocol should be followed. These protocols usually involve a stage of negotiations or Alternate Dispute Resolution ('ADR') which enables the parties to either resolve or narrow the issues in dispute. If the parties cannot resolve the dispute under the Protocol, Court proceedings may be issued.

C. STATEMENTS OF CASE

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

Claim form

5. Proceedings are started by issuing a Claim Form at Court and paying the required Court fee. The Claim Form contains a concise statement of the nature of the claim and the remedy sought (for example, damages).

6. It is necessary for the person bringing the claim (the Claimant) to serve the Claim Form on the Defendant within the prescribed time. The time limit is generally four months after the claim was issued. The Claimant should take steps to serve the Claim Form as soon as possible after issue. The timetable for the Defendant to respond to the claim will not start until the Claimant has served the Particulars of Claim, as explained below.

Particulars of Claim

7. The Particulars of Claim set out full details of the claim, including the alleged facts on which the claim is based. The Particulars of Claim must be served on the Defendant within 14 days of service of the Claim Form.

Acknowledgment of Service

8. The Defendant must file an Acknowledgment of Service within 14 days of service of the Particulars of Claim. In the Acknowledgment of Service, the Defendant must indicate whether they intend to defend all or part of the claim.

Defence

9. Unless the Defendant admits the whole of the claim, they must file a Defence in which they must state which allegations in the Particulars of Claim are admitted, which are denied, and those which are neither admitted or denied but which they require the Claimant to prove. Where the Defendant denies an allegation, they must state reasons for the denial and put forward their own version of events.

10. The Defendant must file a Defence either:
    - Within 14 days after service of the Particulars of Claim, if they have not filed an Acknowledgment of service.
    - Within 28 days after service of the Particulars of Claim, if they have filed an Acknowledgment of service.

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

12. If a Defence is not filed, the Claimant can apply to the Court for Judgment in default of Defence (see below.)

Counterclaims and additional claims

13. Depending on the factual circumstances, the Defendant may make a Counterclaim. A Counterclaim or an additional claim may be served with the Defence without the Court's permission, or at any other time with the Court's permission.

Subsequent statements of case

14. A Claimant may file a Reply to the Defence but is not obliged to do so. A Claimant will not be taken to have admitted any matter raised in the Defence if they fail to deal with it in a Reply. If the Claimant files a Reply that does not deal with a matter raised in the Defence, the Claimant is not taken to have admitted that matter, but is taken to require the Defendant, to prove that matter.

15. If a Counterclaim is served, the Claimant should normally file a Defence to the Counterclaim within 14 days of service of the Counterclaim.

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

D. STATEMENTS OF TRUTH

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

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

19. A failure to verify a document can mean that the party will be unable to rely on the document as evidence of any of the matters set out in it, or that a Statement of Case is struck out.

E. INTERIM REMEDIES AND FINAL JUDGMENTS WITHOUT TRIAL

20. There are certain procedures that might enable a party to obtain a remedy or Judgment before a full trial of the claim. Some examples of these remedies are mentioned below. We will advise further on these issues, should they become appropriate to your matter. For example:

Strike out

21. The Court has the power to strike out a party's Statement of Case (including a Claim Form, Particulars of Claim or Defence), either in whole or in part, if one of the following applies:
    - The Statement of Case discloses no reasonable grounds for bringing or defending the claim.
    - The Statement of Case is an abuse of process.
    - There has been a failure to comply with a rule or Court order.

Default Judgment

22. If a Defendant fails to file a Defence within the relevant time limit, the Claimant may obtain a Judgment in default of Defence, which means that Judgment is entered on the claim without a trial. If default Judgment is entered, the Defendant may apply to Court to have the Judgment set aside or varied on the grounds that the Defence has a real prospect of succeeding, or there is some other good reason to do so.

Summary Judgment

23. Summary Judgment is a means of the Court determining the claim at an early stage, avoiding the need for a full trial. It may be appropriate to apply to Court for summary Judgment, either on the whole of the claim or on a particular issue, if it can be established that:
    - The claim or issue has no real prospect of succeeding.
    - There is no other compelling reason why the claim or issue should be disposed of at a trial.

24. Note that summary Judgment may also be sought by a Claimant, on the grounds that there is no real prospect of the Defence succeeding.

Security for costs

25. In certain circumstances, the Court may order a Claimant to provide security for the Defendant's costs of the proceedings, usually by way of a payment of money into Court. This would offer protection against the risks of the Claimant not being able to pay litigation costs if ordered to do so. The Court must be satisfied that it is just to make an order for security for costs in all the circumstances of the case. Note that the Claimant would be able to seek security for costs in respect of any Counterclaim made against it.

Injunction

26. An injunction is an order that requires a party to do, or to refrain from doing, a specific act or acts. For example, a freezing injunction preserves the Defendant's assets pending Judgment or final order, if the Court is satisfied that there is a risk that the Defendant will dispose of assets that would otherwise be available to meet its liability.

27. An application for injunctive relief is not a step that should be taken lightly. The Applicant is usually required to give an undertaking in damages, that is, an undertaking to compensate the Defendant for any loss incurred, should it later transpire that the injunction was wrongly granted.

F. CASE MANAGEMENT

28. After a Defence has been filed, the Court will serve a notice of proposed allocation. The Court will allocate a matter to the Multi Track or the Fast Track. The notice of proposed allocation will require the parties, by the specified date, to:
    - Complete, file and serve a "Directions Questionnaire" to enable a timetable to be agreed.
    - File proposed directions or a timetable.
    - Comply with any other matters.

Directions Questionnaire

29. The aim of the Directions Questionnaire is to provide information to assist the Court in allocating the case to the appropriate track and in giving directions for how the case should be conducted. In the Directions Questionnaire, you must set out your proposals in relation to the following:
    - Disclosure of documents.
    - Scope and extent of disclosure of electronic documents.
    - Expert evidence that will be required.
    - Witness evidence that will be relied on.
    - Directions, that is, the procedural timetable for the matter.
    - Possible settlement, or reasons why settlement is not appropriate at that stage.

30. If a matter is allocated to the Multi Track, each party must also file a Costs Budget of their case for each stage of the litigation up to and including trial.

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

Case management conference

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

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

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

35. If a matter is allocated to the Multi Track, the parties' Costs Budget will also be reviewed by the Judge who, if the parties have not reached agreement between themselves on this aspect, will set each party's recoverable costs of the case.

G. INTERIM APPLICATIONS

36. An interim application is made when a party seeks an order or directions before the trial or substantive hearing of the claim. An application may be made for a variety of procedural or tactical reasons, depending on the circumstances (for example, to seek an interim injunction, specific disclosure of documents or an extension of time to complete a procedural step).

37. You will be advised as the matter progresses if any interim applications might be appropriate. If the opposing party makes any interim applications, it will be necessary to incur some additional time and cost in responding to them. Any costs orders that the Court makes in relation to an interim application may have to be paid during the course of the proceedings.

H. SETTLEMENT, ADR AND PART 36 OFFERS

38. It is important to keep settlement in mind at all stages of the proceedings. The CPR and the Courts encourage settlement of disputes in a number of ways; in particular, by the use of ADR or Part 36 offers to settle the case (see below). Although the Court cannot order the parties to enter into ADR, it may impose costs penalties on a party who unreasonably refuses to participate in a form of ADR. If there are any prospects of settling, it is usually better to do so sooner rather than later, to avoid further legal costs.

Part 36 offers

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

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

Alternative Dispute Resolution "ADR"

41. The most common form of ADR is Mediation although the Court is also at liberty to order settlement hearings in certain types of case to see whether the parties can negotiate a settlement. This is not a trial, but an opportunity for a Judge to give his view of a matter and for the parties to attempt settlement

I. EVIDENCE

42. To succeed in litigation, a Claimant must prove their case on a balance of probabilities. It is necessary to adduce evidence to support each of the essential ingredients of your claim. The Defendant will also need to adduce evidence to support their Defence to some or all of the essential ingredients of the claim.

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

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

J. DISCLOSURE OF DOCUMENTS

45. Please refer to the 'Disclosure Guide' for a comprehensive overview of the disclosure process.

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

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

48. Documents are disclosed by listing them and serving the list on the other party. It will be necessary for you (or if appropriate someone in your organisation) to deal with and supervise the disclosure search. This individual should also sign a disclosure statement in the List of Documents, certifying that he understands the duty of disclosure and that, to the best of their knowledge, he has complied with that duty.

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

50. You will be advised in detail of your disclosure obligations but you should consider now what documents you have and collate them for our review.

51. However, if you have any other documents which may exist which you believe are relevant for instance emails or electronic documents please let us know straight away.

Inspection of documents and privilege

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

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

K. WITNESS STATEMENTS

54. It would be helpful to identify those individuals who were involved in the events giving rise to the claim or who you believe will be able to provide evidence in support of your position. If a claim proceeds, it will be necessary for a written statement to be prepared of the evidence a witness will be prepared to give, if necessary at a trial. These statements will be exchanged between the parties.

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

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

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

L. EXPERT EVIDENCE

58. Expert evidence is used where the case involves matters on which the Court does not have the requisite technical or academic knowledge, or the case involves issues of foreign law.

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

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

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

62. Following the simultaneous exchange of expert reports, a party may put questions to the other party's expert for the purpose of clarifying their report. Questions must normally be put within 28 days of service of the report. There is then likely to be a discussion between the experts for the purpose of reaching an agreed opinion on the issues where possible. An expert may give oral evidence at trial only with the Court's permission.

M. PREPARATION FOR TRIAL

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

Pre-Trial Review

64. The Court may order that a Pre-Trial Review (PTR) be held, particularly in more substantial cases where there are significant issues between the parties. The main purposes of the PTR are to:
    - Check that the parties have complied with all previous Court orders and directions.
    - Prepare or finalise a timetable for the conduct of the trial, including the issues to be determined and the evidence to be heard.
    - Fix or confirm the trial date.

Preparation of Trial Bundles

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

Preparation of Skeleton Arguments

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

N. TRIAL AND JUDGMENT

67. You should note that:
    - The length of the trial will depend on the complexity of the legal and factual issues to be resolved and the number of witnesses permitted to give evidence.
    - The trial will be held in public, unless the Court has ordered that it may be held in private because it involves matters of a confidential nature and publicity would cause harm or damage.
    - The trial will be heard by a single Judge alone
    - The Judgment may be given immediately after the trial but is often "reserved" to a later date, particularly in complex matters. This means that the parties would not know the Judge's decision until some time after the end of the trial.

68. If you are awarded a Judgment in your favour, you may not immediately obtain your money. If payment of a Judgment sum, as ordered by the Court, is not made by your opponent, you may have to take steps to enforce your Judgment. There is no guarantee that taking enforcement action will successfully recover the money that you are owed and it is important to ascertain at an early stage whether your opponent has assets to meet the Judgment.

69. Taking enforcement action should be the last resort after attempts to obtain payment from your opponent have failed. If, however, you are unable to reach agreement with your opponent and you have been successful in enforcement proceedings you may be able to recover some of your additional costs from your opponent in addition to the Judgment debt and interest.

O. COSTS RISKS

70. As you may already be aware, there are costs risks that accompany any litigation.

71. As a general rule, if a party is unsuccessful in Court or a party withdraws their claim, they are normally responsible for the other party's legal costs as well as their own.

72. Therefore, if the claim succeeds, the Claimant will be entitled to recover their costs from the Defendant. On the other hand, if the claim fails, the Claimant is likely to be required to pay the Defendant's costs. However, the Court has discretion to make a different costs order. The Court will take into account factors such as the conduct of the parties and any Part 36 or other admissible offers to settle the case.

73. However even where a party is successful, the Court can decide not to order the losing party to pay some or all of successful party's costs. It is unlikely that you will recover the full amount of fees that you will have paid us, but you remain fully responsible for any shortfall. **The sums you may not be able to recover may include any reduction in hourly rates (i.e. the hourly rates we charge you may not be recovered in full) or reduction for any work undertaken, reduction in expenses paid on your behalf, travel time and funding costs (for instance we may act on a CFA or advise on a CFA, ATE or BTE insurance policies and any work or expenses on such matters is not claimable from your opponents. This is not an exhaustive list.**

74. There may also be interim costs orders during the course of the litigation relating to applications which could result in costs orders being made against any party.

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

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

77. The entitlement to costs will be usually dealt with by a Court order or in a settlement agreement and consent order at the conclusion of the litigation. The actual amount of costs that can be recovered will either be fixed (if fixed costs apply), agreed by the parties in settlement negotiations or decided by the Court during an assessment of costs.

78. Please be aware that we do not know yet, nor can we guarantee, whether your opponents have insurance or would be able to pay any Judgment against them.

79. When a claim is defended, the Court will allocate an appropriate "track" depending on the amount in dispute and the nature of the claim. If the claim is allocated to the "Small Claims" track, then the recovery of costs is very limited, and usually not more than any Court fees paid. If a decision by a Judge within the Small Claims track is appealed, the standard costs restrictions will not apply. The recovery of costs in the "Fast" or "Multi" track is subject to the Court's discretion.

80. Lawyers must comply with requirements to submit and update Costs Budgets, which will apply automatically to most Multi Track cases. Parties are required to prepare a costs budget which must be agreed and approved by the Court in the early stages of a case. The Costs Budget must be filed at Court and give details of the estimated costs to be incurred. The parties must disclose their budgets to each other and attempt to agree those costs detailed. The Court will consider the budgets submitted and it can amend the budgets. The costs awarded at the end of the case to the winning party should be in line with the Court approved costs budget. No further costs beyond the approved budget will be allowed. We may have to involve specialist costs draftspersons for the preparation of budgets and the cost management process and that they will charge separately for their work.

81. You should note that some applications to Court can result in orders for payment of costs within 14 days of the order ("pay as you go orders").

82. Lawyers' success fees in CFAs and after-the-event insurance (ATE) premiums cannot be recovered from the losing party. The cost of this must instead be met by clients.

83. The estimated costs of the litigation can be one of the most significant factors to consider when deciding whether to pursue a case and please let us know if you would like to discuss this aspect further.

COURT DISCRETION TO STRIKE OUT CLAIMS

84. The Court has a broad discretion as to whether to enforce compliance with Court rules. Judges require litigation to be conducted efficiently, at proportionate cost, and with a need to enforce compliance with rules, practice directions and orders. Thus, Judges will be less lenient with parties who delay cases and who do not comply with the Court's orders during the case. Parties cannot expect indulgence if they fail to comply with procedural obligations and cases are likely to be struck out. This means that you will need to work closely with us and provide timely information, documentation and prompt instructions to ensure that the Court rules are followed.

DEALING WITH THE COURT

85. Please note that once a claim has been sent to the Court, we will have no control over how quickly the Court will deal with any aspect of the claim from its issue to trial. Nearly all individual Courts are now inaccessible by phone: the Court service has a central phone line which is manned by customer service agents who are only able to provide limited information about a claim. Individual Courts are to be allowed up to 10 working days to process any email before any attempt is made to chase for a response.