Hogan Lovells

Introduction to civil proceedings in England and Wales

2016

Contents

Basis of law	1	Security for costs	5
Court system	1	Summary judgment	5
Lawyers	2	Disclosure of documents	5
Rules of procedure and the overriding objective	2	Privilege	6
Pre-action conduct	2	Witness statements and experts' reports	7
Case management	2	Settlement	7
Claim forms	3	Preparation for trial	8
Service	3	Trial	8
Statements of case	4	Remedies	9
Statements of truth	4	Legal costs	9
Acknowledgment of service	4	Appeals	9
Interim injunctions and other remedies	4	Enforcement of judgments	10

Further information

If you would like further information on any aspect of civil proceedings generally, please contact the person mentioned below or the person with whom you usually deal.

The object of this note is to provide an overview for clients, in particular international clients who are not familiar with the English law system, of the principal elements of the procedures that are followed in the English courts, and the technical expressions that are frequently used.

Contact

Michael Davison

Practice Group Leader – Litigation, Arbitration and Employment

Tel: +44 (0)20 7296 5981

michael.davison@hoganlovells.com

This note is written as a general guide only. It should not be relied upon as a substitute for specific legal advice.

Introduction to civil proceedings in England and Wales

Basis of law

English civil law essentially comprises legislation by Parliament and decisions by the courts. There is no civil code. English courts may not override Acts of Parliament and are usually required to follow decisions on the same legal issue by a court of equivalent or higher status.

Legislation and decisions of the courts are subject also to European Union legislation and judgments issued by the Court of Justice of the European Union.

Court system

In civil matters, jurisdiction is divided between the High Court and the county courts, according to the size and complexity of the claim. This note is principally concerned with procedure in the High Court.

Normally, cases involving less than £100,000 (or £50,000 for personal injury cases) will be heard in a county court, and cases involving more than £100,000 (£50,000 for personal injury cases) will be heard in the High Court.

A further distinction is made between "small claims" of up to £10,000, in which a party only has the risk of paying very limited costs of a successful opponent; "fast track" cases valued between £10,000 and £25,000 which follow a strict timetable and in which fixed costs on a sliding scale may be awarded; and "multi-track" cases which will involve a higher level of judicial intervention. Virtually all High Court cases are multi-track cases.

The High Court is divided into three divisions: the Chancery, Queen's Bench and Family Divisions (family proceedings are beyond the remit of this note).

The Chancery Division deals with companies generally and such specialist matters as wills, property, trusts, insolvency, tax, copyright, trade marks and patents (the latter in a separate court called the Patents Court).

The Queen's Bench Division or "QBD" deals with all other civil matters, for example personal injury cases, industrial accidents, defamation cases, negligence claims and other cases which are required to be heard in the High Court, such as applications for a "judicial review" of decisions by governmental bodies. The issue of the correct division in which to bring a claim is determined according to criteria laid down in the Civil Procedure Rules 1998 (see below under "Rules of procedure and the overriding objective").

There is a section of the QBD known as the Commercial Court, comprising Queen's Bench judges who are particularly knowledgeable about commercial matters, particularly shipping, insurance, commodities, banking and other specialised financial issues.

Another section of the QBD, the Technology and Construction Court (the "TCC") deals with disputes involving information technology, engineering and construction.

The Financial List ("FL") is a joint initiative between the Chancery Division and the QBD which was launched in October 2015. The aim of the FL is to use the financial expertise and experience of judges from both divisions who have been nominated to sit as FL judges. Disputes are eligible for inclusion in the FL if they principally relate to financial disputes worth over £50m or equivalent, require particular market expertise or raise issues of general market importance.

In the QBD and the Chancery Division, matters which arise in the course of an action are generally dealt with by "masters", who are junior to judges. Trials and other important matters such as applications for freezing injunctions may only be heard by judges, who also hear appeals from the decisions of masters. In the Commercial Court and TCC there are no masters, and all matters, including interim or pre-trial issues, are heard by a judge. This is often perceived to be one of the advantages of proceeding in these courts.

In civil cases, a judge usually hears a case on his or her own. There is no right to trial by jury, with the exception of fraud (where it is hardly ever exercised) and some defamation cases (where it is more frequently exercised).

An appeal from a decision of a judge is heard by the Court of Appeal, which will comprise either two or three more senior judges, known as Lords Justices. On issues of public importance, there is a further and final stage of appeal to the Supreme Court. In that court,

appeals are usually heard by five or, very occasionally seven, Supreme Court Justices.

Lawyers

The legal profession is divided between solicitors and barristers. In a typical civil action, the solicitors will investigate the matter; collect together and exchange relevant documents with the other party or parties; obtain statements of evidence from witnesses; consult experts; advise on the relevant procedure, law and tactics; correspond with the solicitors for the other party; select a barrister when necessary; attend interim hearings (with or without a barrister); and generally be the contact point for the client. Solicitors normally practise in partnership. The partners will have working for them a number of assistant solicitors and trainee solicitors (university graduates who are completing their training). The division of the work amongst those involved will depend on the importance and size of the case.

Barristers, often referred to as "counsel", are specialist advocates who have the automatic right to appear in all levels of civil court. They also draft statements of case (commonly known as "pleadings" – see below), give opinions on particular areas of the law in which they have particular expertise and prepare "skeleton arguments" (see below) for hearings. Barristers are generally instructed by solicitors rather than by clients direct. Senior barristers may be appointed as Queen's Counsel ("silks"). All other barristers are known as juniors. Barristers are self-employed and practise with other barristers in sets of "chambers".

Solicitors may also appear as advocates in hearings in the higher courts, provided they have been authorised to do so by the Law Society ("solicitor advocates"). Authorisation is granted to those solicitors able to demonstrate the appropriate advocacy experience and expertise.

Barristers and solicitors are eligible, after seven years in practice, for appointment as High Court judges. Traditionally, most appointments are of barristers.

Rules of procedure and the overriding objective

The procedure of the High Court, the Court of Appeal and the county courts is laid down in the Civil Procedure Rules 1998 (the "CPR"). The CPR are sub-divided into Parts, dealing with separate stages of a civil action, and are supported by detailed "practice directions".

The CPR begin by expressing the "overriding objective" of the Rules, which is "enabling the court to deal with cases justly and at proportionate cost". The court has to give effect to this overriding objective whenever it is exercising its discretion or interpreting the meaning of any rule. Parties are required to help the court to achieve this objective.

Part 1 of the CPR states that "dealing with a case justly and at proportionate cost" includes, so far as practicable:

- ensuring that the parties are on an "equal footing";
- saving expense;
- dealing with the case in ways which are proportionate:
    - to the amount of money involved;
    - to the importance of the case;
    - to the complexity of the issues; and
    - to the financial position of each party;
- ensuring that 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; and
- enforcing compliance with rules, practice directions and orders.

Pre-action conduct

There are a number of provisions in the CPR which govern the way in which the parties should conduct themselves prior to the issue of court proceedings. These provisions are designed to encourage parties to act reasonably in exchanging information and documents at an early stage and generally to try to settle their dispute without recourse to litigation. Sanctions may be imposed against litigants who fail to comply with these requirements.

In addition there are a number of "pre-action protocols", which set out the procedure that parties are expected to follow in certain categories of case, for example, judicial review or professional negligence. These protocols are designed to ensure that litigation is a last resort.

Case management

The CPR require the court to engage in active case management. This includes:

- identifying the issues at an early stage;
- encouraging the parties to use alternative dispute resolution (such as mediation);
- helping the parties to settle their dispute;
- fixing timetables; and
- considering whether the likely benefits of taking a particular step justify the cost of taking it.

Early in the life of a multi-track case, there will be a case management conference ("CMC") with a master or judge, at which these issues will be discussed. Where a party has a legal representative, a representative must attend the conference who is familiar with the case and has sufficient authority to deal with any issues that are likely to arise at the CMC.

In advance of the CMC, in most cases each party will be required to prepare (and, if possible, agree with the other party) a costs budget, which is an estimate of the costs that have been incurred to date and are estimated to be incurred up until the conclusion of the proceedings. To the extent that the budgets are not agreed the court will record its approval of the budgets subject to any revisions it requires. This process is known as "costs management". Failure to file a budget on time when one is required may lead to that party being unable to recover its costs from other side if it is ultimately successful.

To assist the court at the CMC, the parties and their solicitors will usually be expected to:

- ensure that all documents that the court is likely to ask to see are brought to the hearing;
- consider whether the parties should attend;
- consider whether a case summary will be useful; and
- consider what orders each wishes to be made and give notice of them to the other parties.

The court has a positive obligation to help the parties settle their dispute, rather than litigate it, where possible. Where settlement is not possible, the court will take positive steps to ensure that everything necessary is done to prepare the case so that it is ready to start at the trial date. The court will fix that date (or at least a "trial window"), usually after the CMC. The whole emphasis is on disposing of the matter quickly and efficiently.

This approach means that much work and expense will be required during the early stages of a case. For example, in preparation for the CMC, the parties will be required to file copies of all statements of case (see below) and other documents with the court. To assist the court, the claimant may (if useful) prepare and file a summary of the issues in the case in not more than 500 words, and a skeleton argument giving a concise statement of its case on the points in issue at the hearing.

In general the parties will have to adhere to the timetable laid down by the court. Some time limits may be extended by agreement between the parties. In the case of serious non-compliance with a time limit, the court may order that the claimant's action should be dismissed or that judgment should be given against the defendant.

Claim forms

An action is started by the issue of a "claim form". This is a formal document which must:

- contain a concise statement of the nature of the claim;
- specify the remedy which the claimant seeks; and
- in a money claim, contain a statement of the value of the claim.

The claimant prepares the document, takes it to the court and pays a fee which is usually equal to 5% of the sum claimed, capped at the time of writing at £10,000. The claimant may ask the court to serve the claim form on the defendant, or may arrange service itself. In either case a copy of the claim form is kept by the court. In general, claim forms (and statements of case – see below) are available for public inspection, although in certain cases the court may be prepared, on the application of a party, to limit public access.

Service

If the claimant arranges service of the claim form itself, it must do so within four months of the date of issue (or six months if the claim is to be served out of the jurisdiction), after which time its validity will lapse. A claim form may be served on the defendant within the jurisdiction (that is, in England or Wales):

- by leaving it with the defendant personally;
- by delivering it to a solicitor who has instructions to accept service on behalf of the defendant;
- by sending it to the defendant by first class post, document exchange or other service which ensures next day delivery;
- by leaving it at the defendant's residence or business address;
- by fax or other electronic means, eg e-mail; or
- by any method authorised by the court.

Where the claimant has been notified that the claim may be served on a solicitor within the jurisdiction, the claim form must usually be served on that solicitor. Subject to that, it may be possible to serve at a place and by a method specified in the relevant contract, or in other ways.

A claim form may, in certain circumstances, be issued for service on a defendant outside the jurisdiction. Under the Recast Brussels Regulation (Regulation EU

1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters), the general rule is that defendants within the European Union ("EU") must be sued where they are domiciled (as defined) unless one of the specified exceptions applies. These exceptions include, for example, the right to pursue a claim for breach of contract in the place where the contractual obligation was to be performed.

Where none of these exceptions allows the claim to be tried within the jurisdiction, and there is no exclusive jurisdiction agreement in favour of the English courts, it may be necessary to obtain permission from the court to serve the claim form on a defendant outside the jurisdiction. The same applies if the dispute falls outside the scope of the Recast Brussels Regulation or the 2007 Lugano Convention, which extends EU rules on jurisdiction and judgments to most European Free Trade Association Member States. Permission will usually be given if the claim relates to a contract made within the jurisdiction, or to a tort committed within the jurisdiction, provided the claim is not a weak one and the court sees England and Wales as the proper place in which to try the claim. However, the case must fall within the circumstances specified in the relevant rule in the CPR. It is not sufficient, for example, to show simply that the defendant has business interests within the jurisdiction.

Statements of case

The documents in which the parties state their position are referred to as "statements of case" or "pleadings". One of these is the "particulars of claim", which must contain a concise statement of the facts on which the claimant relies. If, as is usual, the claimant also seeks interest, the particulars of claim must also state the basis of this claim and calculate the correct sum, and any costs claimed are usually stated as well.

The particulars of claim must either be contained in or served with the claim form, or be served separately within 14 days afterwards (but in any event no later than the latest possible time for serving the claim form). They must also be filed with the court.

Within 14 days after service of the particulars of claim, the defendant must file with the court (and serve on the other side) a "defence". In its defence the defendant must say which allegations it denies, which it admits and which it is unable to admit or deny but requires the claimant to prove. Most importantly, where the defendant denies an allegation, it must state its reasons for doing so. If it intends to put forward a different version of events from that given by the claimant, it must state its own version.

The defendant may, if appropriate, make a counterclaim against the claimant or join a third party to the main action in order to claim, for example, a contribution or indemnity from the claimant. These claims are referred to as "additional claims". If the defendant makes a counterclaim, it must pay a fee as if it were making a claim in a separate action. Again, this will vary according to the size of the claim up to a maximum of £10,000 (at the time of writing).

Statements of truth

The CPR require that certain documents, including all statements of case, are verified by a "statement of truth". Normally, the statement of truth will be signed by the party, not by a solicitor on its behalf. This requirement underlines the spirit of the CPR that the parties should be actively involved in the litigation and should take care to ensure that factual assertions are correct before they are put forward.

Acknowledgment of service

If the defendant is unable to file a defence within 14 days it may file an "acknowledgment of service". It will then have 28 days after service of the particulars of claim to file a defence.

The defendant must also file an acknowledgment of service if it wishes to dispute the court's jurisdiction. The application to dispute jurisdiction must be made within 14 days after filing the acknowledgment of service. This may be appropriate particularly in the case of a defendant served outside the court's jurisdiction.

Interim injunctions and other remedies

Before the case reaches trial the court may be willing to grant interim relief, ie an immediate order which will remain in force until the trial takes place or until a further order is made. For an injunction (an order requiring a party to refrain from doing a specific act) to be granted, the applicant would need to satisfy the court that there is a serious question to be tried, that damages would not be an adequate remedy and that certain other criteria are met.

Another order of this kind, frequently sought in commercial cases, is the "freezing injunction" (or "freezing order"). This restrains a defendant from disposing of its assets in order to avoid paying a judgment given against it later at the trial. Similarly a "search order" may be granted to enable the solicitors of a claimant (eg a copyright owner) to enter the defendant's premises and remove goods which infringe the claimant's rights. Freezing orders and search orders are draconian measures and the tests to be met are more difficult than that for other injunctions. Even when the relevant test is satisfied, it is at the court's discretion whether or not to make an order.

The hearing for the order or injunction can often take place within a few days. In appropriate cases, the application can be made without notice to the other side and an order obtained immediately, even by telephone. In such cases the other side may subsequently come before the court to challenge the order and give its version of events.

The evidence for freezing injunctions and search orders must be given in an affidavit sworn on behalf of the party concerned and must set out not just the facts on which the applicant relies but also all material facts of which the court should be made aware, even if they are adverse to its own case. This is because the defendant will not usually be present at the application to make such points itself.

To obtain any interim injunction the applicant must usually also give an "undertaking" to pay any damages which the respondent suffers and which the court considers the applicant should pay if the order is subsequently deemed not to have been justified.

Security for costs

In certain cases, for example, where the claimant is resident abroad (other than in certain countries), the defendant may seek an order requiring the claimant to provide "security" for the costs which the defendant will incur in defending the action, and which the claimant will have to pay if the claim fails. This can be a significant deterrent to a claimant, although the courts have gradually limited the circumstances in which an order for security for costs will be made. It is usual for the defendant to seek security at an early stage, and the action may be "stayed" (ie put on hold) until the security is given.

The amount of the security will be determined by the court. The security can be given by paying the appropriate amount into a fund at the court, by providing a bond or by arranging a deposit at a bank in the joint names of the parties' solicitors.

A claimant may not require a defendant to give security for the claimant's costs unless the defendant has made a counterclaim, which puts it in the position of a claimant for the purpose of that claim.

Summary judgment

If the claimant considers that the defendant has no real prospect of successfully defending the claim, it may, after a defence or an acknowledgment of service has been filed, make an application for "summary judgment" in its favour. Equally the defendant may apply for summary judgment if it considers that the claim against it has no real prospect of success. Where successful, this procedure avoids the additional work, expense and delay involved in proceeding to a full trial. Applications for summary judgment are, for example, made frequently on simple debt claims.

The respondent to the application for summary judgment must be given at least 14 days' notice of the hearing. If the respondent wishes to rely on written evidence, it must file and serve it at least seven days before the hearing, and any written evidence in reply must be filed and served at least three days before the hearing. The respondent will very frequently serve such evidence in an attempt to show that there are serious disputes over the facts and the relevant law, and that the action should be allowed to proceed in the normal way.

On the hearing of the application, the master or judge may give judgment for the applicant or dismiss the application and give further directions about the management of the case.

Disclosure of documents

If summary judgment is not given, it is the obligation of each party to "disclose" to the other side documents which may be relevant to the dispute, which are or have been in its control. A party discloses a document by stating that it exists or has existed. This is initially done by way of a "disclosure report", which briefly describes where, and with whom, those relevant documents may be located. Importantly, this requirement includes electronic documents. The parties must also estimate the broad range of costs that could be involved in giving disclosure (including the cost of searching for, and disclosing, any electronically stored documents). The disclosure report must be filed at court and served on the other party not less than 14 days before the first CMC.

The parties must also identify in their reports what form of disclosure they believe would be proportionate. They must subsequently try to agree this, not less than seven days before the CMC, with their opponents. The court will then, at the CMC itself, approve their plan or substitute what it perceives to be a more proportionate means of disclosure.

As well as a disclosure report, the parties may wish (or may be ordered by the court) to complete an electronic documents questionnaire.

Traditionally, parties are ordered to give "standard disclosure", that is disclosure of all documents on which they rely, and all documents which adversely affect their or another party's case or support another party's case. The parties may however agree (or the court may impose) a more or less restricted type of disclosure, for example that the parties only disclose documents

relating to identified issues in the case or even that there should be no disclosure at all.

The other party is entitled to "inspect" and obtain (subject to agreeing to pay reasonable copying costs) copies of all the disclosed documents still held by the party disclosing them, except documents which the latter may legitimately withhold from inspection, eg because they are privileged (see below). Parties must also indicate what has happened to any disclosable documents which are no longer in their control.

Disclosure is confined to "documents", but for this purpose a document means anything in which information of any description is recorded. In addition to correspondence and memoranda it therefore includes computer records, e-mails, voice-mail, video recordings, sound recordings, photographs, drawings, electronic documents which have been deleted and metadata.

Disclosure is a vital stage of the proceedings. Many cases terminate in some form of settlement following disclosure, when the strengths and weaknesses of the parties' cases have become apparent from their documents.

It is essential that all possibly relevant documents and electronic data are preserved by a party as soon as it knows that litigation is contemplated.

Privilege

Certain documents that are otherwise disclosable may properly be withheld from the other party on the ground of "privilege". Whether or not a document is privileged can be a matter of argument between the parties. It is often necessary for lawyers to give careful consideration to the issue.

There are two main types of privilege:

- "legal advice privilege", which arises in respect of confidential communications between a client and its lawyers whether or not they relate to contentious proceedings; and
- "litigation privilege", which arises in respect of confidential communications with certain third persons if (i) contentious proceedings were pending, in existence or reasonably contemplated at the time the communications were made; and (ii) the communications were made for the dominant purpose of those proceedings.

The following documents will in general be protected by legal advice privilege:

- documents containing legal advice to the client;
- communications between the client and its lawyers made for the purpose of obtaining such advice; and
- file notes and drafts made by the client's lawyers, and their instructions and briefs to counsel, and counsel's opinions and notes.

The following documents will in general be protected by litigation privilege, in addition to any documents which fall within the categories above which were generated in connection with litigation:

- communications with a third person such as a witness in connection with the litigation;
- witness statements prepared in connection with the litigation, unless and until disclosed to the other side.

Correspondence with an expert witness in relation to the preparation of an expert report for use in court is not privileged. However the court will only allow inquiry about it in very limited circumstances.

Confidential communications (both internal and external) with in-house lawyers at a client company will normally in all these cases be privileged, unless they relate to business matters outside the relevant legal context, or to administrative matters, and so are not essentially concerned with legal advice.

It is necessary to consider in each situation who constitutes "the client". Only those persons within a company who by virtue of their role need to be involved in the consideration of legal advice should be included in the client team requesting and receiving the advice.

The following documents will not be privileged:

- board minutes, internal reports and internal notes regarding the litigation prepared by the party for information purposes, unless they are:
  - reporting when strictly necessary to others within the party's organisation on advice received from lawyers, or
  - seeking information requested by lawyers for the purposes of the litigation;
- notes to the published accounts concerning the litigation and any provision for the proceedings in the accounts (whether or not privilege ever existed, it will have been waived by inclusion in the published accounts), and related correspondence with accountants.

Sometimes a party may claim privilege for part only of a document, or only part of the document may be relevant to the issues in the case. In such a case, the privileged or irrelevant part of the document may usually be blanked out (redacted) before the document is inspected by the other side.

Witness statements and experts' reports

In English court proceedings, there is generally no pre-trial oral discovery by deposition in which the lawyers for each party question witnesses as to the evidence they will give. Instead, the parties exchange written "witness statements". The process is subject to the overall control of the court, which may give directions as to:

- the issues on which it requires evidence;
- the nature of the evidence which it requires; and
- the way in which the evidence is to be placed before the court.

A witness statement should set out the evidence intended to be relied upon in relation to the facts to which the witness will testify orally at the trial. It must be certified to be true by the witness by a statement of truth. At the trial the witness may, with the permission of the court, amplify his or her witness statement, and give evidence in relation to new matters which have arisen.

In relation to expert witnesses there is a positive duty on all parties to restrict the evidence to that which is reasonably required to resolve the proceedings. Every expert has a duty to help the court, which overrides any obligation he or she owes to the client.

Generally the evidence of an expert will be given in a written report. For the purpose of clarifying a report, an opposing party may, once only and within 28 days, put written questions to the expert about his or her report. The court may order the experts for both parties to discuss with each other and (as far as possible) agree the issues.

No party may call an expert without the permission of the court (usually given at the CMC), which may also limit the amount which may be recovered from any other party by way of fees and expenses of the expert. As a further means of limiting expense, the court may direct that evidence is to be given by a single joint expert, to be chosen by the parties or by the court if the parties cannot agree, and the parties will be liable for that expert's fees. Alternatively the court may appoint an assessor to report to the court.

An expert's report must state the substance of all material instructions, whether written or oral, on the basis of which the report was written. The instructions are not privileged from disclosure, although the court will not order disclosure of a specific document or permit questioning at the trial regarding the instructions unless there are reasonable grounds to consider that the statement of instructions is inaccurate or incomplete.

Settlement

Throughout the dispute, the parties will be encouraged to try to settle their action out of court. The settlement of actions is encouraged by the mechanism providing for a formal offer to settle, whether by the claimant or by the defendant, under Part 36 of the CPR. The amount and timing of an offer to settle may have very important costs consequences.

By way of example, if a claimant makes a claim for a specific level of damages and the defendant considers that it is likely to be held liable, but for a lesser sum, the defendant may make an offer to pay that lesser sum. If the claimant accepts the offer within 21 days, it is entitled to receive in addition the legal costs it has incurred up to the time of acceptance. If it accepts the offer after the 21 days are over, it is entitled to receive the settlement sum and its legal costs up to the end of the 21 day period, but will generally have to pay the defendant's legal costs after that time.

If the claimant does not accept the offer at all, the action proceeds in the normal way. Then, if at the end of the trial, or on summary judgment, the judge (who must not be told about the offer until the case has been decided) awards to the claimant damages at a level equal to or lower than the sum offered, the claimant will still receive those damages and its costs up to the end of the 21 day period, but can expect to pay both its own costs and the defendant's costs after that time.

The rationale for such a result is that, since the judge awarded no more than the defendant had previously offered, all the costs incurred afterwards were unnecessary. These later costs, especially the costs of the trial, can be substantial, and so from the point of view of the claimant the existence of a defendant's Part 36 offer is a powerful inducement to settle.

If at the trial the judge awards more than the sum offered by the defendant, the offer is not taken into account under Part 36, because it is clear that the offer was not sufficient, and the normal rules on costs will be applied (ie the loser pays the winner's costs – see "Legal costs" below).

From the point of view of the defendant, the Part 36 offer needs to be sufficiently high to create a substantial risk for the claimant that the judge will not award more.

In a corresponding fashion the claimant may make its own formal offer to settle under Part 36, agreeing to take less than the total of its claim. If the defendant accepts the offer before judgment is given, it will generally have to pay the claimant's costs in addition to the settlement sum. If the defendant does not accept the offer, then the action proceeds in the normal way, and the offer is disclosed to the judge only at the end of

the trial or summary judgment hearing, as is the case with a defendant's offer. The risks for the parties are different, however, since a defendant who decides not to accept a claimant's Part 36 offer, and is ultimately ordered to pay the same or more than the settlement sum proposed in that offer, will generally have to pay the claimant's costs on the indemnity basis (see below under "Legal costs"), enhanced interest on those costs and on the claimant's damages (for the post-offer period only), and an additional amount of up to £75,000.

Preparation for trial

At a time set by the court but not less than eight weeks before the date fixed for trial the parties will generally need to file a completed "pre-trial checklist" (formerly "listing questionnaire"). The court may decide to hold a "pre-trial review", which will be conducted by the judge who is to preside at the trial and may take place up to two months before trial. The object of the pre-trial checklist and review is for directions for the conduct of the trial to be given, including:

- the evidence to be given, especially expert evidence;
- a timetable for the trial, which may specify the time allowed for the presentation of particular issues; and
- preparation of the "trial bundle", a set of files containing copies of all the documents needed for the trial.

The parties' solicitors should seek to agree directions between themselves, but the court has an overriding power to make an order in different terms if appropriate.

In the time before the hearing, the solicitors and barristers will be making the final preparations in accordance with those directions, negotiating for a possible settlement, making arrangements for the attendance of witnesses, researching legal points and preparing the skeleton arguments. For large trials this last item will be a major document identifying all the issues which are to be argued, all the propositions of law to be advanced and all the legal authorities (eg earlier court rulings or statutory provisions) to be cited. The trial bundle will be prepared (usually by the claimant's solicitors) and lodged at the court shortly before the hearing.

Trial

The style of the trial is predominantly oral, although skeleton arguments and lists of issues are increasingly used. Before the start of the trial, the judge will generally have read the statements of case, witness statements, experts' reports and skeleton arguments lodged with the court. The judge does not make his or her own investigations as such.

At the opening of the trial, the claimant's advocate may describe to the judge the nature of the dispute and take him or her through the particulars of claim, the defence and the trial bundle. The defendant's advocate will usually then be invited to make a short statement in response.

The claimant's advocate will then call the claimant's first witness of fact and examine him or her "in chief". Normally, the witness statement of each witness will be taken as his or her evidence in chief for this purpose, so this examination may be brief. The claimant's advocate may, without leading the witness, ask him or her questions designed to provide an introduction to matters covered in the witness statement or to obtain his or her evidence in chief on any matters not covered in the witness statement. The defendant's advocate may invite the court to require that the witness be taken through all his or her evidence in this way if for some reason the witness statement is inadequate.

The witness is then "cross-examined" by the defendant's advocate. The questions to him or her will be "leading" and will challenge the witness. They will be designed to show that the witness's written statement or oral evidence is unreliable, even untruthful, perhaps by showing that his or her recollection is at fault, that he or she did not have close knowledge of the facts or that the evidence is contradicted by a contemporaneous document.

The claimant's advocate may then "re-examine" the witness to deal with any new points arising from the cross-examination.

The other witnesses follow and there is the same sequence of questioning. The judge will frequently interject with his or her own questions. Each of the defendant's witnesses of fact will be examined in the same way as the claimant's witnesses.

There is a presumption that experts' evidence will be their written reports, and the permission of the court is needed for them to give oral evidence at trial. When experts give oral evidence it is usually given in a similar way to the evidence of fact witnesses. However, the court can order that experts for opposing parties give evidence at the same time as each other, a process called "hot-tubbing".

The order in which witnesses and experts give evidence is generally up to the parties and their lawyers, and is often determined by the availability of the witnesses. Usually the claimant's witnesses of fact will give evidence first, followed by the defendant's witnesses of fact and then both parties' expert witnesses.

The defendant's advocate will then sum up the evidence and make submissions on the relevant law.

Finally, the claimant's advocate will sum up the evidence from his or her client's point of view and make submissions on the law.

The judge may give judgment immediately or, in a more complicated case, may reserve judgment until a later date when he or she has reflected on the issues. The judgment will usually comprise a review of the evidence, including the judge's conclusions as to the truth where the evidence conflicts, an analysis of the relevant law and, finally, his or her decision as to which party has won and the remedy that will be awarded.

The text of a reserved judgment may be delivered to a party's solicitors and counsel some days before it is due to be formally delivered, to allow time for costs applications to be considered and minor errors to be corrected. The court will usually order that there should be no communication with the clients or third parties regarding the result until an hour before the judgment is due to be formally announced in court.

Remedies

In its statement of case, the claimant will have specified the legal remedies it is seeking, eg specific performance of an obligation owed by the defendant, or an injunction to restrain the defendant from doing a particular act.

Most frequently, the claimant will be seeking damages. Under English law, damages are intended only to compensate the claimant for its loss. Punitive damages are available only in very exceptional cases. There are no circumstances at all in which multiple damages, for example treble damages, may be awarded.

Legal costs

Subject to the special provisions relating to small claims and fast-track cases and the Part 36 rules explained above, the normal rule in English proceedings is that the loser pays the winner's costs. Such costs include not only court fees but also the fees of the winner's solicitors, barristers and expert witnesses and numerous incidental expenses.

This rule is also subject to the fact that the parties will usually have been asked to produce a budget of their costs early on in the case (see above under "Case management"). If so, the parties must at that point have agreed between themselves that their opponents' budgets are proportionate to the claim at stake and, if they could not agree, the court will have amended the budgets if necessary before approving them. Where the court has imposed costs management, it will not usually depart from the last agreed or approved budget unless satisfied that there is a good reason to do so.

There may also be a variation on the normal rule if the judge finds in favour of one party but considers its conduct unmeritorious. For this purpose the judge will take into account conduct before as well as during the proceedings. The judge may decide, for example, that it was unreasonable to pursue a particular allegation, that the claimant exaggerated its claim or that it failed to make a proper effort to settle the matter through ADR. In such a case the order may be that each side pays its own costs, or that the costs relating to only some of the issues can be recovered.

The order for costs is usually on the "standard" basis. This means that all the legal costs reasonably incurred by the receiving party and reasonable in amount must be paid, unless disproportionate. The burden of proving reasonableness is on the receiving party. The amount which may be obtained on this basis is therefore generally between one half and two thirds of the total costs which a party actually incurs. As noted above, the position is different if the parties have been subject to the costs budgeting regime, in which case the receiving party will usually obtain what was in its finally agreed or approved budget.

Alternatively the judge may award costs on the "indemnity" basis. This means that all the legal costs must be paid except to the extent that they are of an unreasonable amount or have been unreasonably incurred. The difference between this and the standard basis is that, on the indemnity basis the burden of proof of reasonableness is reversed, such that any doubt as to whether or not the costs were reasonable will be resolved in favour of the receiving party instead of the paying party, which means that the question of proportionality does not arise.

Where the court orders one party to pay costs to the other party, it may specify the amount of the costs there and then, or it may order the costs to be assessed later on by a court officer. In the latter case the parties' solicitors will normally try to agree the costs by negotiation and avoid the further cost of a "detailed assessment".

Appeals

Following judgment, the losing party may try to appeal against the ruling, that is ask a more senior court to overturn it, on the ground that the decision was wrong in law, or unjust because of a serious procedural or other irregularity. Permission to bring an appeal is needed either from the judge or the senior court and it will only be given where the appeal has a real prospect of success or there is some other compelling reason. Usually the appeal court will not review the judge's decisions on the facts of the case.

Enforcement of judgments

Subject to any appeal, when a judgment has been given against it, the defendant will often make payment voluntarily. If it does not, various enforcement procedures are available to the claimant, for example: arranging for an enforcement officer to seize and sell the goods of the defendant; diverting debts due to the defendant from third parties; obtaining a charging order over property owned by the defendant; or obtaining an order for payment to the claimant of any sums which were previously made the subject of a freezing injunction.

CPD Points

CPD points are available for reading this note if it is relevant to your practice. If you would like any live training on this subject, we would be happy to give you a presentation or organise a seminar, webinar or whatever is most convenient to you.

Notes

www.hoganlovells.com

Hogan Lovells has offices in:

Alicante
Amsterdam
Baltimore
Beijing
Brussels
Budapest*
Caracas
Colorado Springs
Denver
Dubai
Dusseldorf
Frankfurt
Hamburg
Hanoi
Ho Chi Minh City
Hong Kong
Houston
Jeddah*
Johannesburg
London
Los Angeles
Luxembourg
Madrid
Mexico City
Miami
Milan
Minneapolis
Monterrey
Moscow
Munich
New York
Northern Virginia
Paris
Perth
Philadelphia
Rio de Janeiro
Riyadh*
Rome
San Francisco
São Paulo
Shanghai
Silicon Valley
Singapore
Sydney
Tokyo
Ulaanbaatar
Warsaw
Washington, D.C.
Zagreb*

"Hogan Lovells" or the "firm" is an international legal practice that includes Hogan Lovells International LLP, Hogan Lovells US LLP and their affiliated businesses.
The word "partner" is used to describe a partner or member of Hogan Lovells International LLP, Hogan Lovells US LLP or any of their affiliated entities or any employee or consultant with equivalent standing. Certain individuals, who are designated as partners, but who are not members of Hogan Lovells International LLP, do not hold qualifications equivalent to members.
For more information about Hogan Lovells, the partners and their qualifications, see www.hoganlovells.com.
Where case studies are included, results achieved do not guarantee similar outcomes for other clients. Attorney Advertising.

©Hogan Lovells 2016. All rights reserved.

*Associated offices