

FACT SHEET - THE LITIGATION AND MEDIATION PROCESS

Litigation in England and Wales, both in the High Court and the County Court is governed by the Civil Procedure Rules ("CPR"). This is a set of rules with which litigants must comply during the litigation process.

We hope that this document will be helpful in explaining some of the terms used in the CPR and some of the issues that may be important in your case.

We have prepared other summary documents to help explain important processes in more detail. These are listed at the end of the fact sheet and are available on request.

Commonly used terms

Alternative Dispute Resolution (ADR) - The term used to cover the various methods, other than litigation and arbitration, that can be used to resolve a dispute, including, in particular mediation.

Arbitration - The procedure by which the parties' rights are decided by an arbitrator, who may be someone chosen by the parties, rather than by a judge.

Allocation - Under the CPR, every case is allocated by a judge to the small claims track, the fast track, or the multi-track. Different procedures and costs rules apply to the different tracks.

Claim form - The form that is used to start court proceedings. It has replaced the document that, in High Court cases, used to be called the writ.

Claimant - The party that makes the claim.

Defendant - The party against whom the claim is made.

Defence - The document that sets out the defendant's case.

Disclosure - The procedure by which each party provides a list of all relevant documents that he or she has or has had in their possession.

Expert report - A report prepared by an expert witness who may be appointed by one of the parties or jointly by all of the parties.

Expert witness - A witness whose opinion is based on experience and expertise in a particular field, for example an expert forensic accountant, or an expert building surveyor.

Injunction - A court order that prohibits a person or company from doing something or requires a person or company to do something.

Inspection - Following disclosure, a party is entitled to see, or be given copies of, many of the documents disclosed by the other party in their List of Documents.

Interim remedies - Orders (such as injunctions) that a judge can make at any time during the case prior to rendering a final decision at trial.

Limitation period - The period within which a claimant is entitled to commence court proceedings. Different periods are allowed for different types of claim.

Mediation - The process by which the parties appoint an independent mediator who will help them to reach terms of settlement.

Overriding objective - Under the CPR the judge must follow the overriding objective, which is to deal with cases justly. The judge has to try to avoid unnecessary cost or delay and to ensure that the parties are on an equal footing.

Part 20 claim - A Part 20 claim is any claim other than one by a claimant against a defendant. For example, a claim by a defendant against the claimant (a counterclaim) or by the defendant against a third party are Part 20 claims.

Part 36 offer - Part 36 of the CPR sets out a procedure by which any party can put forward a formal without prejudice save as to costs offer of settlement that can have costs consequences for the receiving party.

Particulars of Claim - The document which sets out the claimant's case.

Pre-action protocol - These are procedures that parties are expected to follow in certain types of case with a view to trying to promote settlement and avoid litigation. There are formal pre-action protocols for claims relating to specific types of claim including construction and engineering, defamation, personal injury and professional negligence.

Privileged document - A document which other parties are not entitled to see. For example, most confidential correspondence with a party's own solicitors about the case will be privileged.

Statement of truth - Many documents, including the claim form, the particulars of claim, any expert's report or witness statement, must contain a signed statement confirming that the facts set out in the document are true.

Summary judgment - A judgment given in a clear case after a short hearing and without a full trial. The party applying for summary judgment has to show that his opponent has no real prospect of succeeding with his pleaded defence or claim.

Without prejudice - If negotiations with a view to settlement are conducted without prejudice, the parties are not usually permitted to reveal them to the judge if the negotiations are unsuccessful.

Witness statement - A signed statement of witness' evidence. It is the form in which a party's evidence to be relied upon at the trial will be sent to the other parties.

Important Issues

Alternative Dispute Resolution (ADR)

Whether or not a court action is started, we will always have in mind settlement possibilities and will discuss these with you.

Many cases can be settled by without prejudice discussions or correspondence with your opponent or his or her legal advisors. Alternatively, it may be in your interests to consider mediation or another form of ADR. The costs of mediation can be significantly less than the costs of litigation.

Court Orders for Costs

Under the CPR, the judge has discretion as to whether to award costs to one or more of the parties. The costs which a party can recover from its opponent may be limited to a budget which is agreed with the opponent or approved by the Court at the start of the claim. If there is a trial, an award of costs will usually be made after judgment has been given. If costs are awarded, the same judge will often decide on the amount to be paid. Sometimes, the amount will be assessed separately at a later hearing after a detailed bill of costs has been prepared.

Costs may also be awarded to one of the parties at the end of the procedural hearing before the judge, in the course of a case, or at a hearing of an application for an interim remedy. Before the hearing, the solicitors acting for each party will usually prepare a statement of the costs relating to the application and the judge will normally decide on the amount to be paid when he or she makes the award of costs.

Once the judge has decided on the amount of the costs, they must normally be paid within 14 days. A party can

therefore sometimes have to pay substantial costs to an opponent during the course of the action and before there has been a decision on the claim itself.

The general principle is that an unsuccessful party will have to pay costs to the successful party. However, the judge has a wide discretion and will take a number of factors into account before deciding what costs order to make, such as a Part 36 Offer made, the conduct of the parties, and the proportionality of the costs in relation to the sum or issue in dispute.

Normally, the costs that a successful party recovers will be less than the costs that party has to pay his solicitors. If the other side is publicly funded, you are unlikely to recover any of your costs even if you are completely successful.

Security for Costs

The defendant may be entitled to ask the judge to order the claimant to pay a sum of money into court (or provide a bank guarantee) as security for the defendant's costs as a condition of pursuing the claim.

This provision is principally for circumstances in which a claim is made by a limited company if there is a good reason to believe that it would not be able to pay the defendant's costs if it lost the action. An order may also be made against a claimant who is resident outside the UK and outside the EU.

A defendant is entitled to defend the claim and therefore will not have to give security in respect of the costs. Defendants do not have to give security for costs, although if a defendant makes a Part 20 claim he may be ordered to give security in respect of costs relating to that claim.

Preservation of evidence and documents

Some disputes relate to the condition or physical being of property / items. In such cases the physical items must be kept safely so they can be inspected or tested, both by your expert witness and by any expert witness appointed by your opponent.

It is likely that you will have in your possession, or under your control, some documents that will be helpful or unhelpful either to your case or to your opponent's case. These documents may have to be disclosed at the appropriate stage in the action. You must ensure that relevant documents are preserved for disclosure and are not lost or destroyed.

Summary documents are available on aspects of the dispute resolution process including:

- Interim Remedies (injunctions, search and seizure orders and interim payments);
- Disclosure and inspection of documents;
- Expert witnesses;
- Mediation;
- Part 36 offers and payments; and
- Statements of truth.

This fact sheet is intended as guidance only and does not constitute legal advice in any individual case. Please do not take any step in reliance on its contents without taking specific advice from one of our lawyers.

If you would like any further information on any of the above please contact:



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