

Cohabitation – Law and Practice

Part II - Practice

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Jarndyce and Jarndyce drones on. This scarecrow of a suit has, in course of time, become so complicated that no man alive knows what it means. The parties to it understand it least, but it has been observed that no two Chancery lawyers can talk about it for five minutes without coming to a total disagreement as to all the premises. Innumerable children have been born into the cause; innumerable young people have married into it; innumerable old people have died out of it. Scores of persons have deliriously found themselves made parties in Jarndyce and Jarndyce without knowing how or why; whole families have inherited legendary hatreds with the suit. The little plaintiff or defendant who was promised a new rocking-horse when Jarndyce and Jarndyce should be settled has grown up, possessed himself of a real horse, and trotted away into the other world. Fair wards of Court have faded into mothers and grandmothers; a long procession of Chancellors has come in and gone out; the legion of bills in the suit have been transformed into mere bills of mortality; there are not three Jarndyces left upon the earth perhaps since old Tom Jarndyce in despair blew his brains out at a coffee-house in Chancery Lane; but Jarndyce and Jarndyce still drags its dreary length before the Court, perennially hopeless.

Bleak House by Charles Dickens.

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1 What this is about?

1.1 What this covers?

This seminar is about the procedure of the civil Courts. It will cover how to bring a claim and how it moves through Court to conclusion. It is designed to dispel some of the aspects of the civil procedure which may seem peculiar to people not familiar with them.

1.2 What is not covered?

This will not cover procedure within the context of family proceedings (e.g. applications under the *Children Act 1989 s.15 and sch.1* or the *Married Women's Property Act 1882 s.17*). Nor will it cover the resolution of trusts or equity questions which arise within the context of family proceedings where they are resolved within the 'intervener' procedure. Of course if civil proceedings are commenced to resolve that question this guide will be useful.

This does not cover bankruptcy procedure explicitly (they are governed by the *Insolvency Rules 1986*) though a lot of the CPR applies to bankruptcy procedure.

2 Jurisdiction

2.1 County Court

The County Court has unlimited jurisdiction in relation to questions arising under the *Trusts of Land and Appointment of Trustees Act 1996*: see the *High Court and County Court Jurisdiction Order 1991* as amended.

If however a party seeks relief against fraud or mistake (or in the opinion of some judges if one alleges a proprietary estoppel), then the County Court relies

on its equity jurisdiction. Currently the County Court can only consider such a claim where the estoppel or the relief sought does not exceed £30,000: s.23 County Courts Act 1984.

It can be extended in most cases by a memorandum signed by both parties (or their lawyers) specifying that a named County Court shall have jurisdiction: s.24 County Courts Act 1984.

It seems that the High Court can transfer a case to the County Court even if the case is one which the County Court does not otherwise have jurisdiction to determine: *National Westminster Bank Plc v King* [2008] EWHC 280 (Ch), The Times, April 14, 2008.

2.2 High Court

The High Court has unlimited jurisdiction. Cases can be dealt with by the Chancery Division or the Family Division. It is a question of judgment as to which division is best suited to hear and determine the case, though there is comment that pure family cases should be in the family division.

2.3 Which Court?

There is no fixed rule about in which Court the claim should be made. In my opinion a claim should be in the County Court unless:

- The value is significant (though that is not a decisive factor),
- The case is factually complex,
- The case is legally complex,
- The case is legally novel,
- The case involves Human Rights issues (highly unlikely)

- Most importantly, the County Court lacks jurisdiction and there is no memorandum conferring jurisdiction on the County Court (or such a memorandum is not possible).

3 The rules of Court

The rules governing civil procedure changed dramatically on 26.4.1999. The County Court Rules (CCR) and Rules of the Supreme Court (RSC) (which still supplement the Family Proceeding Rules) were replaced by the Civil Procedure Rules (CPR).

On 26.4.1999, under powers granted by the *Civil Procedure Act 1997*, a new code was introduced into the County and Supreme Courts of England and Wales.

The rules represented a major change in the approach that Courts would take to litigation. The most relevant development was that the Courts would now actively manage cases, rather than leave it to litigants to progress matters at their own pace, subject only to the sanction of a stay for want of prosecution.

3.1 The Application of the Rules

Rule 2.1 provides that the CPR applies as follows:

(1) Subject to paragraph (2), these Rules apply to all proceedings in –

(a) County Courts;

(b) the High Court; and

(c) the Civil Division of the Court of Appeal.

Paragraph 2 provides that the rules do not apply to a host of proceedings. Most relevant are family proceedings (as defined under the *Matrimonial and Family*

Proceedings Act 1984 s.40 read with *s.31* and the *Supreme Court Act 1981*) and insolvency proceedings as defined in the *Insolvency Act 1986*.

Though family proceedings, *Children Act 1989 sch.1* proceedings can be and often are conjoined with the property dispute. The civil claim usually becomes the lead case for case management purposes.

3.2 How the rules are structured

The rules are structured in a way that differs considerably from the old RSC and CCR.

3.2.1 The Parts

The rules themselves are divided into Parts. Each Part deals with a specific topic. The Parts apply equally to the High Court, County Court and Court of Appeal (Civil Division) unless the rules or a statute say otherwise.

3.2.2 The Schedules

There appears to be the CPR 2 schedules. These contain the orders of the RSC and CCR which are still in force. These have nevertheless been modified to reflect the terms used in the CPR and the CPR themselves.

3.2.3 The Practice Directions

With each Part there is (usually) a practice direction. Often there may be 2 or 3 practice directions. These sometimes repeat what is said in the rules, often illustrate how the rules should be applied and in one or two cases are effectively the rules themselves. For example, a Practice Direction was used for the Money Claim Online and Possession Claim Online scheme.

3.2.4 *Stand-alone Practice Directions*

There are finally one or 2 stand alone practice directions such as the Insolvency Practice Direction.

3.2.5 *The guides*

Though not part of the rules, there are also specialist guides such as the Queen's Bench Guide and the Chancery Division Guide. These illustrate what those divisions expect of advocates and litigators in cases before it. The latter guide is particularly useful in this area.

4 Pre-action attempts to resolve the dispute

The parties are expected to try to resolve their disputes without the need for litigation or, at the very least, narrow the issues. That means co-operation so far as possible. Failure to co-operate could result in an adverse costs order.

The pre-action protocols sit outside the rules. Lord Woolf said that pre-action protocols

are intended to build on and increase the benefits of early but well informed settlements which generally satisfy both parties to disputes.

There is no pre-action protocol for cohabitation disputes, but there is a practice direction for cases which do not fall within the pre-action protocols. The practice direction as it will be from 6.4.2009 appears in section 0, “

Annexe: The pre-action protocol practice direction” which is on page 55. The current practice direction is in similar terms.

5 The Court rules: the fundamental rules

The CPR is one code. There are a few rules which apply at all stages. The most fundamental are the rules in Part 1 (the overriding objective) and Part 3 (the Court’s case management powers). One should have these in the back of one’s mind at all times.

5.1 The overriding objective – Part 1

The overriding objective was revolutionary and has now found its way into procedural rules created since the advent of the CPR (e.g. the *Family Procedure (Adoption) Rules 2005*, *Criminal Procedure Rules 2005* etc.).

It provides as follows:

*1.1 (1) These Rules are a **new** [my emphasis] procedural code with the overriding objective of enabling the Court to deal with cases justly.*

(2) Dealing with a case justly includes, so far as is practicable –

(a) ensuring that the parties are on an equal footing;

(b) saving expense;

(c) dealing with the case in ways which are proportionate –

(i) to the amount of money involved;

(ii) to the importance of the case;

(iii) to the complexity of the issues; and

(iv) to the financial position of each party;

(d) ensuring that it is dealt with expeditiously and fairly; and

(e) allotting to it an appropriate share of the Court’s resources, while taking into account the need to allot resources to other cases.

Application by the Court of the overriding objective

1.2 The Court must seek to give effect to the overriding objective when it –

(a) exercises any power given to it by the Rules; or

(b) interprets any rule subject to rule 76.2 [terrorism matters].

Duty of the parties

1.3 The parties are required to help the Court to further the overriding objective.

Court’s duty to manage cases

1.4

(1) The Court must further the overriding objective by actively managing cases.

(2) Active case management includes –

(a) encouraging the parties to co-operate with each other in the conduct of the proceedings;

- (b) identifying the issues at an early stage;*
- (c) deciding promptly which issues need full investigation and trial and accordingly disposing summarily of the others;*
- (d) deciding the order in which issues are to be resolved;*
- (e) encouraging the parties to use an alternative dispute resolution procedure if the Court considers that appropriate and facilitating the use of such procedure;*
- (f) helping the parties to settle the whole or part of the case;*
- (g) fixing timetables or otherwise controlling the progress of the case;*
- (h) considering whether the likely benefits of taking a particular step justify the cost of taking it;*
- (i) dealing with as many aspects of the case as it can on the same occasion;*
- (j) dealing with the case without the parties needing to attend at Court;*
- (k) making use of technology; and*
- (l) giving directions to ensure that the trial of a case proceeds quickly and efficiently.*

5.2 The Court's case management powers – Part 3

Part 3 of the CPR gives the Courts generous powers when managing cases. They are incredibly powerful allowing the Court to strike out frivolous claim, make appropriate directions and correct any errors. For example, a dilatory party may find his case struck out if he fails to comply with a Court order.

The Court can strike out a claim for non-payment of fees, so pay up!

The most important parts of the Part 3 are in my opinion the following:

The Court's general powers of management

3.1

(1) The list of powers in this rule is in addition to any powers given to the Court by any other rule or practice direction or by any other enactment or any powers it may otherwise have.

(2) Except where these Rules provide otherwise, the Court may –

(a) extend or shorten the time for compliance with any rule, practice direction or Court order (even if an application for extension is made after the time for compliance has expired);

(b) adjourn or bring forward a hearing;

(c) require a party or a party's legal representative to attend the Court;

(d) hold a hearing and receive evidence by telephone or by using any other method of direct oral communication;

(e) direct that part of any proceedings (such as a counterclaim) be dealt with as separate proceedings;

(f) stay the whole or part of any proceedings or judgment either generally or until a specified date or event;

(g) consolidate proceedings;

(h) try two or more claims on the same occasion;

(i) direct a separate trial of any issue;

(j) decide the order in which issues are to be tried;

(k) exclude an issue from consideration;

(l) dismiss or give judgment on a claim after a decision on a preliminary issue;

(ll) order any party to file and serve an estimate of costs;

(m) take any other step or make any other order for the purpose of managing the case and furthering the overriding objective.

(3) When the Court makes an order, it may –

(a) make it subject to conditions, including a condition to pay a sum of money into Court; and

(b) specify the consequence of failure to comply with the order or a condition.

(4) Where the Court gives directions it may take into account whether or not a party has complied with any relevant pre-action protocol.

(5) ... (6) ... (6A) ...

(7) A power of the Court under these Rules to make an order includes a power to vary or revoke the order.

As for time limits, generally parties can agree between themselves to vary time limits so long as they do not interfere with any Court hearing or a date when a form must be filed with the Court.

Rule 3.3 allows the Court to make an order of its own initiative. In such a case a party affected by the order can apply for it to be varied or set aside within 7 days of service.

Rule 3.4 allows the court to strike out all or part of a statement of case. A statement of case is a particulars of claim, defence and the like.

(1) In this rule and rule 3.5, reference to a statement of case includes reference to part of a statement of case.

(2) The Court may strike out a statement of case if it appears to the Court –

(a) that the statement of case discloses no reasonable grounds for bringing or defending the claim;

(b) that the statement of case is an abuse of the Court's process or is otherwise likely to obstruct the just disposal of the proceedings; or

(c) that there has been a failure to comply with a rule, practice direction or Court order.

(3) When the Court strikes out a statement of case it may make any consequential order it considers appropriate.

Paragraph 4 states a Court can stay a new claim if the costs of a struck out claim have yet to be paid.

(5) Paragraph (2) does not limit any other power of the Court to strike out a statement of case.

Paragraph 6 deals with vexatious litigants and civil restraint orders.

5.3 Sanctions have effect unless defaulting party obtains relief

3.8

(1) Where a party has failed to comply with a rule, practice direction or Court order, any sanction for failure to comply imposed by the rule, practice direction or Court order has effect unless the party in default applies for and obtains relief from the sanction.

(Rule 3.9 sets out the circumstances which the Court may consider on an application to grant relief from a sanction)

(2) Where the sanction is the payment of costs, the party in default may only obtain relief by appealing against the order for costs.

(3) Where a rule, practice direction or Court order –

(a) requires a party to do something within a specified time, and

(b) specifies the consequence of failure to comply,

the time for doing the act in question may not be extended by agreement between the parties.

Relief from sanctions**3.9**

(1) On an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or Court order the Court will consider all the circumstances including –

(a) the interests of the administration of justice;

(b) whether the application for relief has been made promptly;

(c) whether the failure to comply was intentional;

(d) whether there is a good explanation for the failure;

(e) the extent to which the party in default has complied with other rules, practice directions, Court orders and any relevant pre-action protocol;

(f) whether the failure to comply was caused by the party or his legal representative;

(g) whether the trial date or the likely trial date can still be met if relief is granted;

(h) the effect which the failure to comply had on each party; and

(i) the effect which the granting of relief would have on each party.

(2) An application for relief must be supported by evidence.

Without going into the rules in detail evidence in applications is given in writing only, and can be given by a party's legal representative.

General power of the Court to rectify matters where there has been an error of procedure

3.10 Where there has been an error of procedure such as a failure to comply with a rule or practice direction –

(a) the error does not invalidate any step taken in the proceedings unless the Court so orders; and

(b) the Court may make an order to remedy the error.

5.4 Service – Part 6

CPR Part 6 deals with service. It is a rather involved part. Generally one can serve documents in a number of methods. These include personal service, leaving it at a specified place, sending it by fax or email or by post or DX.

In general

- If the other side has given the address of a solicitor within the jurisdiction who may accept service, serve it at the solicitor's address,
- If not, then if the defendant has given an address within the jurisdiction, serve it there,
- If not then you must serve at an address specified in a table in *CPR 6.9*. For individuals this is the usual or last known residence. Beware that special provisions apply if you know or have reason to believe the defendant no longer resides there. These are set out in *CPR 6.9*

Special rules apply to service out of the jurisdiction. These differ to rules governing family proceedings.

5.5 Statements of truth – Part 22

Every witness statement, witness summary and statement of case (that means particulars of claim, defence, counterclaim, reply etc.), and a few other documents must be verified by a statement of truth: CPR 22.1.

A statement of truth reads as follows

In the case of a statement of case

'[I believe][the (claimant or as may be) believes] that the facts stated in this [name document being verified] are true.'

In the case of a witness statement

'I believe that the facts stated in this witness statement are true.'

It does not need to be witnessed or sworn and the signature need appear only once at the end.

Signing a statement of truth without honest belief in its truth is Contempt of Court and may be actioned by the Attorney General or, with permission, another person: CPR 32.14.

5.6 Disclosure – Part 31

Disclosure is often seen as a massive headache. It is actually quite simple.

5.6.1 *How to disclose a document?*

A party discloses a document by saying it exists or has existed: CPR 31.2.

5.6.2 *What must be disclosed?*

A Court can specify what documents must be disclosed, and how they should be disclosed (e.g. by copy). Generally a Court merely orders standard disclosure.

Standard disclosure means a party must disclose only (see *CPR31.6*)

(a) the documents on which he relies; and

(b) the documents which –

(i) adversely affect his own case;

(ii) adversely affect another party's case; or

(iii) support another party's case; and

(c) the documents which he is required to disclose by a relevant practice direction.

He need only disclose documents which are or have been in his control. This means (a) it is or **was** in his physical possession; (b) he has or **has had** a right to possession of it; or (c) he has or **has had** a right to inspect or take copies of it: *CPR 31.8*.

A party need only carry out a reasonable search if he undertaking standard disclosure. He should take into account (a) the number of documents involved; (b) the nature and complexity of the proceedings; (c) the ease and expense of retrieval of any particular document; and (d) the significance of any document which is likely to be located during the search: *CPR 31.7*.

If a party has not searched for a category or class of document on the grounds that to do so would be unreasonable, he must state this in his disclosure statement and identify the category or class of document.

Note that one is required to disclose privileged documents. This is usually done by a statement such as

“communications between solicitor and client for the purposes of obtaining legal advice, notes taken of meetings between solicitor, client and/or counsel for the purposes of obtaining and giving legal advice and instructions to and advices received from counsel and documents thereto”

So how do you disclose something?

Unless the Court has ordered otherwise, it is done by a list. This list is set out in a practice form **N265**. The form should be signed by the party himself.

The list can be a summary, e.g.

Bank statements Bank of Money 01-02-03 45678901 May 2003-July 2007.

How do you inspect the documents?

Within 7 days of service of the disclosure statement, the party to whom disclosure was made gives notice that he wishes to inspect the document. The disclosing party then has 7 days to permit inspection. If the party to whom disclosure was made asks for a copy and undertakes to pay the costs involved, then a copy must be supplied.

Can you withhold inspection?

Yes in certain cases. If the document is no longer in the disclosing party's control then he is not required to permit inspection: *CPR 31.3(1)(a)*.

He can also withhold inspection if he has a right or duty to withhold inspection (e.g. legal professional privilege). So when disclosing the existence of advices from counsel etc, one states on the disclosure list that you object to inspection on the grounds that the documents are by their very nature privileged: CPR 31.3(1)(b).

Inspection can also be withheld if it is disproportionate to the issues: *CPR 31.3(1)(c)* and *CPR 31.3(2)*.

5.7 Witness statements – Part 32

Witness statements must be in the prescribed style. This is set out in *CPR PD 32*

17.1 The witness statement should be headed with the title of the proceedings ...; where the proceedings are between several parties with the same status it is sufficient to identify the parties as follows:

Number:

A.B. (and others) Claimants/Applicants

C.D. (and others) Defendants/Respondents

(as appropriate)

17.2 At the top right hand corner of the first page there should be clearly written:

(1) the party on whose behalf it is made,

(2) the initials and surname of the witness,

(3) the number of the statement in relation to that witness,

- (4) the identifying initials and number of each exhibit referred to, and*
- (5) the date the statement was made.*

Body of Witness Statement

18.1 The witness statement must, if practicable, be in the intended witness's own words, the statement should be expressed in the first person and should also state:

- (1) the full name of the witness,*
- (2) his place of residence or, if he is making the statement in his professional, business or other occupational capacity, the address at which he works, the position he holds and the name of his firm or employer,*
- (3) his occupation, or if he has none, his description, and*
- (4) the fact that he is a party to the proceedings or is the employee of such a party if it be the case.*

18.2 A witness statement must indicate:

- (1) which of the statements in it are made from the witness's own knowledge and which are matters of information or belief, and*
- (2) the source for any matters of information or belief.*

18.3 An exhibit used in conjunction with a witness statement should be verified and identified by the witness and remain separate from the witness statement.

18.4 Where a witness refers to an exhibit or exhibits, he should state ‘I refer to the (description of exhibit) marked ‘...’.

18.5 The provisions of paragraphs 11.3 to 15.4 (exhibits) apply similarly to witness statements as they do to affidavits.

18.6 Where a witness makes more than one witness statement to which there are exhibits, in the same proceedings, the numbering of the exhibits should run consecutively throughout and not start again with each witness statement.

Format of Witness Statement

19.1 A witness statement should:

(1) be produced on durable quality A4 paper with a 3.5cm margin,

(2) be fully legible and should normally be typed on one side of the paper only,

(3) where possible, be bound securely in a manner which would not hamper filing, or otherwise each page should be endorsed with the case number and should bear the initials of the witness,

(4) have the pages numbered consecutively as a separate statement (or as one of several statements contained in a file),

(5) be divided into numbered paragraphs,

(6) have all numbers, including dates, expressed in figures, and

(7) give the reference to any document or documents mentioned either in the margin or in bold text in the body of the statement.

19.2 It is usually convenient for a witness statement to follow the chronological sequence of the events or matters dealt with, each paragraph of a witness statement should as far as possible be confined to a distinct portion of the subject.

Paragraphs 11.1 – 15.4 provide

EXHIBITS

Manner of Exhibiting Documents

11.1 A document used in conjunction with an affidavit should be:

(1) produced to and verified by the deponent, and remain separate from the affidavit, and

(2) identified by a declaration of the person before whom the affidavit was sworn.

11.2 The declaration should be headed with the name of the proceedings in the same way as the affidavit.

11.3 The first page of each exhibit should be marked:

(1) as in paragraph 3.2 above, and

(2) with the exhibit mark referred to in the affidavit.

Letters

12.1 Copies of individual letters should be collected together and exhibited in a bundle or bundles. They should be arranged in chronological order with the earliest at the top, and firmly secured.

12.2 When a bundle of correspondence is exhibited, the exhibit should have a front page attached stating that the bundle consists of original letters and copies. They should be arranged and secured as above and numbered consecutively.

Other documents

13.1 Photocopies instead of original documents may be exhibited provided the originals are made available for inspection by the other parties before the hearing and by the judge at the hearing.

13.2 Court documents must not be exhibited (official copies of such documents prove themselves).

13.3 Where an exhibit contains more than one document, a front page should be attached setting out a list of the documents contained in the exhibit; the list should contain the dates of the documents.

Exhibits other than documents

14.1 Items other than documents should be clearly marked with an exhibit number or letter in such a manner that the mark cannot become detached from the exhibit.

14.2 Small items may be placed in a container and the container appropriately marked.

General provisions

15.1 Where an exhibit contains more than one document:

(1) the bundle should not be stapled but should be securely fastened in a way that does not hinder the reading of the documents, and

(2) the pages should be numbered consecutively at bottom centre.

15.2 Every page of an exhibit should be clearly legible; typed copies of illegible documents should be included, paginated with ‘a’ numbers.

15.3 Where affidavits and exhibits have become numerous, they should be put into separate bundles and the pages numbered consecutively throughout.

15.4 Where on account of their bulk the service of exhibits or copies of exhibits on the other parties would be difficult or impracticable, the directions of the Court should be sought as to arrangements for bringing the exhibits to the attention of the other parties and as to their custody pending trial.

5.7.1 Use of witness statements

If the evidence is to be given at trial, the witness must attend trial to give oral evidence (unless a hearsay notice has been given). Remember that evidence can be given by telephone (*CPR Part 3*) or video link (*CPR 32.1*) though in both cases you will need to raise it with the Court beforehand. At interim hearings a witness statement can be relied on without the maker having to attend. At interim hearings one can rely on statements of case and any application notices so long as it is verified by a statement of truth.

If a witness statement is served late, one needs the Court's permission to rely on it: *CPR 32.10*. Permission is almost always granted.

5.7.2 *Witnesses who do not speak English or who cannot read*

The CPR is oddly silent about how witnesses who are illiterate or who do not speak English should prepare their witness statements. There is in the practice direction the following certificate to be used where a deponent to an affidavit is unable to read or sign it

Sworn at this day of Before me, I having first read over the contents of this affidavit to the deponent [if there are exhibits, add 'and explained the nature and effect of the exhibits referred to in it'] who appeared to understand it and approved its content as accurate, and made his mark on the affidavit in my presence.

Or; (after, Before me) the witness to the mark of the deponent having been first sworn that he had read over etc. (as above) and that he saw him make his mark on the affidavit. (Witness must sign).

It can be adapted for witness statements. I suggest that

- If the witness does not read or write English but can read or write a foreign language, the statement be in that language with a translation by an interpreter which the interpreter certifies as accurate.
- If the witness can read or write English but does not speak it well, the statement should be in English but with a paragraph explaining the difficulty.

- If the witness is illiterate but speaks English, the statement be read to him by his solicitor and the solicitor enters a certificate on the statement similar to the above. The witness should mark the statement
- If the witness is illiterate and does not speak English the statement should be in the witness's mother language and a certificate be made as above by an interpreter.

In the past the writer has got away with the use statements in English but translated orally by the solicitor to the witness. The danger with this is that any nuances may be lost, the solicitor is not independent and, like anyone, will not approach the case with a clear mind. Further translation is a difficult task that should not be underestimated.

5.8 Experts – Part 35

The Court is under a duty to restrict the use of expert evidence: *CPR 35.1*. The most revolutionary concept of the CPR was that experts are now expressly under an overriding duty to assist the Court and this overrides any obligation towards the party paying or instructing the expert: *CPR 35.3*. Was that not always the case?

To call an expert requires permission of the Court. You can apply for this in the allocation questionnaire. *CPR 35.4* provides

(1) No party may call an expert or put in evidence an expert's report without the Court's permission.

(2) When a party applies for permission under this rule he must identify –

- (a) the field in which he wishes to rely on expert evidence; and*
- (b) where practicable the expert in that field on whose evidence he wishes to rely.*
- (3) If permission is granted under this rule it shall be in relation only to the expert named or the field identified under paragraph (2).*
- (4) The Court may limit the amount of the expert's fees and expenses that the party who wishes to rely on the expert may recover from any other party.*

Expert's evidence is usually given in a written report. Specific permission is required for an expert to give oral evidence at trial.

5.8.1 Written questions to experts

When served with an expert's report, a party can ask questions. The Court often gives directions as to this but it is covered by *CPR 35.6*.

(1) A party may put to –

(a) an expert instructed by another party; or

(b) a single joint expert appointed under rule 35.7,

written questions about his report.

(2) Written questions under paragraph (1) –

(a) may be put once only;

(b) must be put within 28 days of service of the expert's report; and

(c) must be for the purpose only of clarification of the report,

unless in any case –

(i) the Court gives permission; or

(ii) the other party agrees.

(3) An expert's answers to questions put in accordance with paragraph (1) shall be treated as part of the expert's report.

(4) Where –

(a) a party has put a written question to an expert instructed by another party in accordance with this rule; and

(b) the expert does not answer that question,

the Court may make one or both of the following orders in relation to the party who instructed the expert –

(i) that the party may not rely on the evidence of that expert; or

(ii) that the party may not recover the fees and expenses of that expert from any other party.

5.8.2 Single joint experts.

Under *CPR 35.7* the Court can direct that the expert's evidence is given by a single joint expert. This should be done where the expert's evidence is not determinative of an issue.

(1) Where two or more parties wish to submit expert evidence on a particular issue, the Court may direct that the evidence on that issue is to given by one expert only.

(2) *The parties wishing to submit the expert evidence are called ‘the instructing parties’.*

(3) *Where the instructing parties cannot agree who should be the expert, the Court may –*

(a) *select the expert from a list prepared or identified by the instructing parties; or*

(b) *direct that the expert be selected in such other manner as the Court may direct.*

CPR 35.8 details the procedure for giving instruction

(1) *Where the Court gives a direction under rule 35.7 for a single joint expert to be used, each instructing party may give instructions to the expert.*

(2) *When an instructing party gives instructions to the expert he must, at the same time, send a copy of the instructions to the other instructing parties.*

(3) *The Court may give directions about –*

(a) *the payment of the expert’s fees and expenses; and*

(b) *any inspection, examination or experiments which the expert wishes to carry out.*

(4) *The Court may, before an expert is instructed –*

(a) *limit the amount that can be paid by way of fees and expenses to the expert; and*

(b) direct that the instructing parties pay that amount into Court.

(5) Unless the Court otherwise directs, the instructing parties are jointly and severally liable for the payment of the expert's fees and expenses.

5.8.3 Other matters.

A Court may direct a party to give information to an expert: *CPR 35.9.*

CPR 35.10 and the practice direction states what the report must contain

35.10 (1) An expert's report must comply with the requirements set out in the relevant practice direction.

(2) At the end of an expert's report there must be a statement that –

(a) the expert understands his duty to the Court; and

(b) he has complied with that duty.

(3) The expert's report must state the substance of all material instructions, whether written or oral, on the basis of which the report was written.

(4) The instructions referred to in paragraph (3) shall not be privileged against disclosure but the Court will not, in relation to those instructions –

(a) order disclosure of any specific document; or

(b) permit any questioning in Court, other than by the party who instructed the expert,

unless it is satisfied that there are reasonable grounds to consider the statement of instructions given under paragraph (3) to be inaccurate or incomplete.

The practice direction to CPR 35 provides in paragraph 2:

2.1 An expert's report should be addressed to the Court and not to the party from whom the expert has received his instructions.

2.2 An expert's report must:

(1) give details of the expert's qualifications;

(2) give details of any literature or other material which the expert has relied on in making the report;

(3) contain a statement setting out the substance of all facts and instructions given to the expert which are material to the opinions expressed in the report or upon which those opinions are based;

(4) make clear which of the facts stated in the report are within the expert's own knowledge;

(5) say who carried out any examination, measurement, test or experiment which the expert has used for the report, give the qualifications of that person, and say whether or not the test or experiment has been carried out under the expert's supervision;

(6) where there is a range of opinion on the matters dealt with in the report –

(a) summarise the range of opinion, and

(b) give reasons for his own opinion;

(7) contain a summary of the conclusions reached;

(8) if the expert is not able to give his opinion without qualification, state the qualification; and

(9) contain a statement that the expert understands his duty to the Court, and has complied and will continue to comply with that duty.

2.3 An expert's report must be verified by a statement of truth as well as containing the statements required in paragraph 2.2(8) and (9) above.

2.4 The form of the statement of truth is as follows:

I confirm that insofar as the facts stated in my report are within my own knowledge I have made clear which they are and I believe them to be true, and that the opinions I have expressed represent my true and complete professional opinion.

2.5 Attention is drawn to rule 32.14 which sets out the consequences of verifying a document containing a false statement without an honest belief in its truth.

(For information about statements of truth see Part 22 and the practice direction which supplements it.)

The Court can order experts on opposing sides to meet to prepare statements of the issues on which they agree and which they dispute (with reasons): *CPR 35.12*.

5.9 Preparation for trial – Part 39

Part 39 of the CPR (which is a sort of bargain bucket of rules) provides for trial bundles. Under rule *CPR 39.5* the Claimant has the job of filing a trial bundle. It must contain the documents set out in a relevant practice direction or Court order. This must be (*CPR 39.5(2)*)

not more than 7 days and not less than 3 days before the start of the trial.

The practice direction paragraph 3.2 says the trial bundle should include a copy of:

- (1) the claim form and all statements of case,*
- (2) a case summary and/or chronology where appropriate,*
- (3) requests for further information and responses to the requests,*
- (4) all witness statements to be relied on as evidence,*
- (5) any witness summaries,*
- (6) any notices of intention to rely on hearsay evidence under rule 32.2,*
- (7) any notices of intention to rely on evidence (such as a plan, photograph etc.) under rule 33.6 which is not –*
 - (a) contained in a witness statement, affidavit or experts report,*
 - (b) being given orally at trial,*
 - (c) hearsay evidence under rule 33.2,*

(8) any medical reports and responses to them,

(9) any experts' reports and responses to them,

(10) any order giving directions as to the conduct of the trial, and

(11) any other necessary documents.

5.10 Other parts

It is possible to add parties to proceedings under *CPR Part 20*. There are also special rules for the representation of children and protected parties (as defined by the *Mental Capacity Act 2005*): see *CPR Part 21*.

There are special rules about adding and substituting parties: *CPR Part 19*.

Requests can be made for clarification of a party's case: *CPR Part 18*.

6 Bringing a claim

There are 2 methods for issuing a claim form: Under part 7 entitled “How to start proceedings – the claim form”, or under part 8, entitled “Alternative procedure for claims”.

6.1 How does the Part 7 procedure (the normal procedure) work?

Part 7 of the CPR represents the traditional way of bringing a claim. It is used when there is a significant dispute of fact and one is not required to use any other procedure.

6.1.1 Claim form

The first step is to issue the claim. It is issued when the Court enters the date on the form. If serving within the jurisdiction, one must take the first step to serve it

within 4 months. Outside of the jurisdiction, one has to serve it within 6 months.

Either the Court can serve it or the claimant can.

The claim form must have on it a brief statement about the nature of the claim and the remedy sought. This assists the Court staff to handle the case.

A claim form and particulars of claim must state ‘Chancery Business’ if the claim is one that in the High Court would be assigned to the Chancery Division: *CPR PD7 para. 2.5*.

6.1.2 Particulars of claim

This is a concise statement of the facts that the claimant relies on: *CPR 16.4(1)*. The particulars must appear on the claim form or follow within 14 days of the claim form being served: *CPR 7.4*. They must be served within the time for service of the claim form.

6.1.3 Defence

The Defendant then has to file an acknowledgement of service and a defence. The Court forms will tell you the deadlines, but they can be found in *CPR Parts*

In a defence, by *CPR 16.5* the Defendant must:

(1) In his defence, the defendant must state –

(a) which of the allegations in the particulars of claim he denies;

(b) which allegations he is unable to admit or deny, but which he requires the claimant to prove; and

(c) which allegations he admits.

(2) Where the defendant denies an allegation –**(a) he must state his reasons for doing so; and****(b) if he intends to put forward a different version of events from that given by the claimant, he must state his own version.****(3) A defendant who –****(a) fails to deal with an allegation; but****(b) has set out in his defence the nature of his case in relation to the issue to which that allegation is relevant,****shall be taken to require that allegation to be proved.**

Therefore the practice of ‘not admitting’ an allegation is not permitted by the CPR and should not be done. What does it really mean, anyway?

A defendant can make a counterclaim. If he does so then the Claimant must file a reply and defence to counterclaim. The Defence to counterclaim should adhere to the same criteria as above.

6.1.4 Next: allocation

The next stage is a thing called the allocation questionnaire. This form asks questions about the nature of the case to assist the Court to allocate it to a track.

There are 3 tracks:

- The small claims track: in short for money claims up to £5,000
- The fast track: for claims too large for the small claims track, but which are relatively straight forward (up to 1 day) and for claims up to £15,000 (£25,000 from 6.4.2009). Trial costs on the fast track are fixed.

- The multi-track: for the rest. Allows for longer trials, more intricate case management.

You will be asked to give your opinion and to suggest directions. It is often helpful to discuss them with the other side. In practice most cases should be allocated to the multi-track and I recommend you give that suggestion to the Court via the form. Only if it is a really simple issue should it be allocated to the fast track.

The form goes normally before a District Judge or Master who makes directions. Allocation is usually done without a hearing.

6.1.5 Directions

The usual directions that follow will provide for expert evidence, disclosure, mutual exchange of witness statements and preparation for trial.

6.2 How does the Part 8 procedure (the alternative procedure) work?

Part 8 of the CPR represents the summary style of procedure. It is used where

- A party seeks the Court's decision on a question which is unlikely to involve a substantial dispute of fact; or
- the rules require a party to use it.

6.2.1 Claim form

The first step is to issue the claim. It is issued when the Court enters the date on the form. If serving within the jurisdiction, one must take the first step to serve it within 4 months. Outside of the jurisdiction, one has to serve it within 6 months. Either the Court can serve it or the claimant can.

By *CPR 8.2* where the claimant uses the Part 8 procedure the claim form must state –

(a) that Part 8 applies;

(b)

(i) the question which the claimant wants the Court to decide;
or

(ii) the remedy which the claimant is seeking and the legal basis for the claim to that remedy;

(c) if the claim is being made under an enactment, what that enactment is;

As with part 7, a claim form and particulars of claim must state ‘Chancery Business’ if the claim is one that in the High Court would be assigned to the Chancery Division: *CPR PD7 para. 2.5*.

6.2.2 Defence

There is no defence as such. A defendant merely files an acknowledgement of service in which he indicates whether he contests the claim or not.

6.2.3 Evidence

***CPR 8.5* provides that**

- **a Claimant must file any written evidence on which he intends to rely when he files his claim form and must be served on the defendant with the claim form.**

- **A defendant who wishes to rely on written evidence must file it when he files his acknowledgment of service. If he does so, he must also, at the same time, serve a copy of his evidence on the other parties.**
- **If the defendant files and serves evidence, a claimant may, within 14 days of service of the defendant’s evidence on him, file further written evidence in reply. If he does so, he must also, within the same time limit, serve a copy of his evidence on the other parties.**
- **(7) The claimant may rely on the matters set out in his claim form as evidence under this rule if the claim form is verified by a statement of truth.**

Any evidence that is not filed and served may not be relied on at the hearing of the claim without permission

6.2.4 Allocation

Cases under the Part 8 procedure are automatically allocated to the multi-track, but can be reallocated if necessary.

6.2.5 Next steps

At the first hearing the Court can either determine the claim or give directions. Most often it will give directions as to disclosure, expert evidence etc.

6.2.6 Other matters

- A defendant can object to the use of the Part 8 procedure when he files his acknowledgement of service. It does not excuse him from filing evidence on which he wishes to rely: *CPR 8.8*.

- The Court may direct that a claim issued under part 8 shall not continue as a part 8 claim. This is most common when there is a significant dispute of fact: *CPR 8.1(3)*. This can be done at any stage of the proceedings.
- When the claim proceeds under Part 8, the rules about the contents of claim forms, defences etc do not apply: *CPR 8.9*.

6.3 Which part to use? Choices, choices...

Under the old rules, claims for resolution of trusts of land disputes were brought by originating summons.

CPR 8 PD para. 3.3 provides that the Part 8 procedure must also be used for any claim or application in relation to which an Act provides that the claim or application is brought by originating summons, originating motion or originating application. However *TOLATA s.14* talks of an application to the Court for an order.

Therefore it *appears* that Part 8 is the more appropriate procedure. Frankly it is rarely an issue because of the Court's wide powers. I would advise as follows:

You should use the Part 8 procedure unless

- **there are going to be significant disputes of fact such as (a) what happened and (b) whether they give rise to a remedy (it is easier to understand a case from a particulars of claim than a witness statement),**
- **long complex factual allegations,**
- **numerous and disparate remedies will be sought (e.g. orders for rectification of deeds, injunctions etc.)**

7 Settlement

7.1 Mediation and other ADR

Consideration should always be given to mediation and ADR. It is often cheaper and allows the parties to reach a result they can live with. It also allows parties to ‘vent their spleen’.

- An unreasonable failure to mediate when offered can result in an adverse costs order: *Halsey v Milton Keynes NHS Trust* [2004] EWCA Civ 576.
- A party who mediates but adopts an unreasonable position is in the same position as a party who unreasonably refuses to mediate: *Carlton v Strutt and Parker* [2008] EWHC 424 (QB).

Reject an offer to mediate at your peril.

7.2 Offers to settle

7.2.1 *Calderbank offers*

The *Calderbank* offer method works as well for civil proceedings as family proceedings and the rules and effect are the same.

7.2.2 *Part 36 Offers*

CPR Part 36 provides a self contained code for offers to settle. It contains provisions for making offers, the consequences of their acceptance and a failure to beat an offer.

Contrary to popular belief, an offer purportedly under Part 36 to settle on the basis of ‘no order for costs’ is not a Part 36 offer as it provides for a costs outcome different to that which the rules provides for.

The scope of Part 36

36.1 (1) This Part contains rules about –

(a) offers to settle; and

(b) the consequences where an offer to settle is made in accordance with this Part.

(2) Nothing in this Part prevents a party making an offer to settle in whatever way he chooses, but if the offer is not made in accordance with rule 36.2, it will not have the consequences specified in rules 36.10, 36.11 and 36.14.

Form and content of a Part 36 offer

36.2 (1) An offer to settle which is made in accordance with this rule is called a Part 36 offer.

(2) A Part 36 offer must –

(a) be in writing;

(b) state on its face that it is intended to have the consequences of Part 36;

(c) specify a period of not less than 21 days within which the defendant will be liable for the claimant's costs in accordance with rule 36.10 if the offer is accepted;

(d) state whether it relates to the whole of the claim or to part of it or to an issue that arises in it and if so to which part or issue; and

(e) state whether it takes into account any counterclaim.

(3) Rule 36.2(2)(c) does not apply if the offer is made less than 21 days before the start of the trial.

(4)... (5)...

Part 36 offers – general provisions

36.3 (1) In this Part –

(a) the party who makes an offer is the ‘offeror’;

(b) the party to whom an offer is made is the ‘offeree’; and

(c) ‘the relevant period’ means –

(i) in the case of an offer made not less than 21 days before trial, the period stated under rule 36.2(2)(c) or such longer period as the parties agree;

(ii) otherwise, the period up to end of the trial or such other period as the Court has determined.

(2) A Part 36 offer –

(a) may be made at any time, including before the commencement of proceedings; and

(b) may be made in appeal proceedings.

(3) A Part 36 offer which offers to pay or offers to accept a sum of money will be treated as inclusive of all interest until –

(a) the date on which the period stated under rule 36.2(2)(c) expires;

or

(b) if rule 36.2(3) applies, a date 21 days after the date the offer was made.

(4) A Part 36 offer shall have the consequences set out in this Part only in relation to the costs of the proceedings in respect of which it is made, and not in relation to the costs of any appeal from the final decision in those proceedings.

(5) Before expiry of the relevant period, a Part 36 offer may be withdrawn or its terms changed to be less advantageous to the offeree, only if the Court gives permission.

(6) After expiry of the relevant period and provided that the offeree has not previously served notice of acceptance, the offeror may withdraw the offer or change its terms to be less advantageous to the offeree without the permission of the Court.

(7) The offeror does so by serving written notice of the withdrawal or change of terms on the offeree.

Part 36 offers – defendants' offers

36.4 (1)..., a Part 36 offer by a defendant to pay a sum of money in settlement of a claim must be an offer to pay a single sum of money.

(2) But, an offer that includes an offer to pay all or part of the sum, if accepted, at a date later than 14 days following the date of acceptance will not be treated as a Part 36 offer unless the offeree accepts the offer.

Time when a Part 36 offer is made

36.7 (1) A Part 36 offer is made when it is served on the offeree.

(2) A change in the terms of a Part 36 offer will be effective when notice of the change is served on the offeree.

Clarification of a Part 36 offer

36.8 provides a method of clarification. Requests must be made within 7 days of service of the offer.

Acceptance of a Part 36 offer

36.9 (1) A Part 36 offer is accepted by serving written notice of the acceptance on the offeror.

(2) Subject to rule 36.9(3), a Part 36 offer may be accepted at any time (whether or not the offeree has subsequently made a different offer) unless the offeror serves notice of withdrawal on the offeree.

(3) The Court's permission is required to accept a Part 36 offer where

–

(a)... (b) ... (c) ...

(d) the trial has started.

(4) Where the Court gives permission under paragraph (3), unless all the parties have agreed costs, the Court will make an order dealing with costs, and may order that the costs consequences set out in rule 36.10 will apply.

(5) Unless the parties agree, a Part 36 offer may not be accepted after the end of the trial but before judgment is handed down.

Costs consequences of acceptance of a Part 36 offer

36.10 (1) Subject to paragraph (2) and paragraph (4)(a), where a Part 36 offer is accepted within the relevant period the claimant will be entitled to the costs of the proceedings up to the date on which notice of acceptance was served on the offeror.

(2) Where –

*(a) a defendant's Part 36 offer relates to part only of the claim;
and*

(b) at the time of serving notice of acceptance within the relevant period the claimant abandons the balance of the claim, the claimant will be entitled to the costs of the proceedings up to the date of serving notice of acceptance unless the Court orders otherwise.

(3) Costs under paragraphs (1) and (2) of this rule will be assessed on the standard basis if the amount of costs is not agreed.

(4) Where –

(a) a Part 36 offer that was made less than 21 days before the start of trial is accepted; or

(b) a Part 36 offer is accepted after expiry of the relevant period,

if the parties do not agree the liability for costs, the Court will make an order as to costs.

(5) Where paragraph (4)(b) applies, unless the Court orders otherwise –

(a) the claimant will be entitled to the costs of the proceedings up to the date on which the relevant period expired; and

(b) the offeree will be liable for the offeror's costs for the period from the date of expiry of the relevant period to the date of acceptance.

(6) The claimant's costs include any costs incurred in dealing with the defendant's counterclaim if the Part 36 offer states that it takes into account the counterclaim.

It is vital to note the consequence of acceptance is that the Defendant will pay the Claimant's costs (unless the Court makes a different order or the parties agree otherwise) if a Part 36 offer is accepted. Is that what the Defendant intended?

In many cases, a Defendant may prefer to make a *Calderbank* offer; a Claimant would prefer to make a *Part 36* offer.

The effect of acceptance of a Part 36 offer

The effect of a Part 36 offer being accepted is to stay the claim. The Court can still enforce the terms however and determine costs.

Other matters

CPR 36.13 prohibits disclosure of the order to the trial judge until the case is decided except in cases where the parties agree or the case has been stayed under the rules or in the case of tender before claim. It also states a Part 36 Offer is without prejudice except as to costs.

Costs consequences following judgment

36.14 (1) This rule applies where upon judgment being entered –

(a) a claimant fails to obtain a judgment more advantageous than a defendant’s Part 36 offer; or

(b) judgment against the defendant is at least as advantageous to the claimant as the proposals contained in a claimant’s Part 36 offer.

(2) Subject to paragraph (6), where rule 36.14(1)(a) applies, the Court will, unless it considers it unjust to do so, order that the defendant is entitled to –

(a) his costs from the date on which the relevant period expired; and

(b) interest on those costs.

(3) Subject to paragraph (6), where rule 36.14(1)(b) applies, the Court will, unless it considers it unjust to do so, order that the claimant is entitled to –

- (a) interest on the whole or part of any sum of money (excluding interest) awarded at a rate not exceeding 10% above base rate for some or all of the period starting with the date on which the relevant period expired;*
- (b) his costs on the indemnity basis from the date on which the relevant period expired; and*
- (c) interest on those costs at a rate not exceeding 10% above base rate.*

(4) In considering whether it would be unjust to make the orders referred to in paragraphs (2) and (3) above, the Court will take into account all the circumstances of the case including –

- (a) the terms of any Part 36 offer;*
- (b) the stage in the proceedings when any Part 36 offer was made, including in particular how long before the trial started the offer was made;*
- (c) the information available to the parties at the time when the Part 36 offer was made; and*
- (d) the conduct of the parties with regard to the giving or refusing to give information for the purposes of enabling the offer to be made or evaluated.*

(5) Where the Court awards interest under this rule and also awards interest on the same sum and for the same period under any other power, the total rate of interest may not exceed 10% above base rate.

(6) Paragraphs (2) and (3) of this rule do not apply to a Part 36 offer

–

(a) that has been withdrawn;

(b) that has been changed so that its terms are less advantageous to the offeree, and the offeree has beaten the less advantageous offer;

(c) made less than 21 days before trial, unless the Court has abridged the relevant period.

The concept of what is meant by ‘more advantageous’ has been considered judicially. In *Carver v BAA* [2008] EWCA Civ 412, [2009] 1 WLR 113, C beat BAA’s offer by £51. She had exaggerated her claim. C ended up paying BAA’s costs from the date when she was last able to accept their offer. In upholding the first instance decision, Ward LJ said of the question “how does one decide if an outcome is more advantageous?”

[31] The answer must, in my judgment, take account of the modern approach to litigation. The Civil Procedure Rules, and Part 36 in particular, encourage both sides to make offers to settle. Compromise is seen as an object worthy of promotion for compromise is better than contest, both for the litigants concerned, for the Court and for the administration of justice as a whole. Litigation is time consuming and it comes at a cost, emotional as well as financial. Those are, therefore, appropriate factors to take into account in deciding whether the battle was worth it. Money is not the sole governing criterion.

8 Costs

The rules as to costs are lengthy and can be complicated. The key rules are found in *CPR 44.3*.

8.1 Court's discretion and circumstances to be taken into account when exercising its discretion as to costs

(1) The Court has discretion as to –

(a) whether costs are payable by one party to another;

(b) the amount of those costs; and

(c) when they are to be paid.

(2) If the Court decides to make an order about costs –

(a) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; but

(b) the Court may make a different order.

(3) The general rule does not apply to the following proceedings –

(a) proceedings in the Court of Appeal on an application or appeal made in connection with proceedings in the Family Division; or

(b) proceedings in the Court of Appeal from a judgment, direction, decision or order given or made in probate proceedings or family proceedings.

(4) In deciding what order (if any) to make about costs, the Court must have regard to all the circumstances, including –

- (a) the conduct of all the parties;*
- (b) whether a party has succeeded on part of his case, even if he has not been wholly successful; and*
- (c) any payment into Court or admissible offer to settle made by a party which is drawn to the Court's attention, and which is not an offer to which costs consequences under Part 36 apply.*

(5) The conduct of the parties includes –

- (a) conduct before, as well as during, the proceedings and in particular the extent to which the parties followed any relevant pre-action protocol;***
- (b) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;***
- (c) the manner in which a party has pursued or defended his case or a particular allegation or issue; and***
- (d) whether a claimant who has succeeded in his claim, in whole or in part, exaggerated his claim.***

(6) The orders which the Court may make under this rule include an order that a party must pay –

- (a) a proportion of another party's costs;*
- (b) a stated amount in respect of another party's costs;*
- (c) costs from or until a certain date only;*
- (d) costs incurred before proceedings have begun;*

- (e) costs relating to particular steps taken in the proceedings;*
- (f) costs relating only to a distinct part of the proceedings; and*
- (g) interest on costs from or until a certain date, including a date before judgment.*

(7) Where the Court would otherwise consider making an order under paragraph (6)(f), it must instead, if practicable, make an order under paragraph (6)(a) or (c).

(8) Where the Court has ordered a party to pay costs, it may order an amount to be paid on account before the costs are assessed.

(9) Where a party entitled to costs is also liable to pay costs the Court may assess the costs which that party is liable to pay and either –

- (a) set off the amount assessed against the amount the party is entitled to be paid and direct him to pay any balance; or*
- (b) delay the issue of a certificate for the costs to which the party is entitled until he has paid the amount which he is liable to pay.*

8.2 Assessment

If the hearing in an interim hearing and you seek the costs of that hearing, then you will need a costs schedule as the judge (if he makes a costs' order in your favour) will want to assess them there and then.

At the conclusion of a trial which is on the fast track or has taken less than one day, the judge may well want to assess costs and so a summary should be available.

Cases longer than one day or on the multi-track usually are adjourned for assessment. The same is true of **any** case where the receiving party is in receipt of legal aid.

Where the paying party is legally aided, then the court will make a ‘football pools order’ i.e. an order under *Access to Justice Act 1999 s.11*. This prevents a receiving party enforcing a costs order without the Court’s permission.

9 Annexe: The pre-action protocol practice direction – relevant parts

This is the amended version of the Practice direction that accompanies pre-action protocols and governs the cases that fall outside a pre-action protocol. **This version comes into force on 6.4.2009.** Current guidance is in similar terms.

SECTION III – THE PRINCIPLES GOVERNING THE CONDUCT OF THE PARTIES IN CASES NOT SUBJECT TO A PRE-ACTION PROTOCOL

6. OVERVIEW OF PRINCIPLES

6.1 The principles that should govern the conduct of the parties are that, unless the circumstances make it inappropriate, before starting proceedings the parties should—

(1) exchange sufficient information about the matter to allow them to understand each other’s position and make informed decisions about settlement and how to proceed;

(2) make appropriate attempts to resolve the matter without starting proceedings, and in particular consider the use of an appropriate form of ADR in order to do so.

*6.2 The parties should act in a reasonable and proportionate manner in all dealings with one another. In particular, the costs incurred in complying should be proportionate to the complexity of the matter and any money at stake. **The parties must not use this Practice Direction***

as a tactical device to secure an unfair advantage for one party or to generate unnecessary costs.

7. EXCHANGING INFORMATION BEFORE STARTING PROCEEDINGS

7.1 Before starting proceedings—

(1) the claimant should set out the details of the matter in writing by sending a letter before claim to the defendant. This letter before claim is not the start of proceedings; and

(2) the defendant should give a full written response within a reasonable period, preceded, if appropriate, by a written acknowledgment of the letter before claim.

7.2 A ‘reasonable period of time’ will vary depending on the matter.

As a general guide—

(1) the defendant should send a letter of acknowledgment within 14 days of receipt of the letter before claim (if a full response has not been sent within that period);

(2) where the matter is straightforward, for example an undisputed debt, then a full response should normally be provided within 14 days;

(3) where a matter requires the involvement of an insurer or other third party or where there are issues about evidence, then a full response should normally be provided within 30 days;

(4) where the matter is particularly complex, for example requiring specialist advice, then a period of longer than 30 days may be appropriate;

(5) a period of longer than 90 days in which to provide a full response will only be considered reasonable in exceptional circumstances.

7.3 Annex A sets out detailed guidance on a pre-action procedure that is likely to satisfy the Court in most circumstances where no pre-action protocol applies and where the claimant does not follow any statutory or other formal pre-action procedure.

7.4 ...

8. ALTERNATIVE DISPUTE RESOLUTION

8.1 Starting proceedings should usually be a step of last resort, and proceedings should not normally be started when a settlement is still actively being explored. Although ADR is not compulsory, the parties should consider whether some form of ADR procedure might enable them to settle the matter without starting proceedings. The Court may require evidence that the parties considered some form of ADR (see paragraph 4.4(3)).

8.2 It is not practicable in this Practice Direction to address in detail how the parties might decide to resolve a matter. However, some of the options for resolving a matter without starting proceedings are—

(1) discussion and negotiation;

(2) *mediation (a form of negotiation with the help of an independent person or body);*

(3) *early neutral evaluation (where an independent person or body, for example a lawyer or an expert in the subject, gives an opinion on the merits of a dispute); or*

(4) *arbitration (where an independent person or body makes a binding decision), many types of business are members of arbitration schemes for resolving disputes with consumers.*

8.3 *The Legal Services Commission has published a booklet on ‘Alternatives to Court’, CLS Direct Information Leaflet 23 (www.clsdirect.org.uk) which lists a number of organisations that provide alternative dispute resolution services. The National Mediation Helpline on 0845 603 0809 or at www.nationalmediationhelpline.com can provide information about mediation.*

8.4 *The parties should continue to consider the possibility of reaching a settlement at all times. This still applies after proceedings have been started, up to and during any trial or final hearing.*

SECTION IV – REQUIREMENTS THAT APPLY IN ALL CASES

9. SPECIFIC PROVISIONS

9.1 *The following requirements (including Annex C) apply in all cases except where a relevant pre-action protocol contains its own provisions about the topic.*

Disclosure

9.2 Documents provided by one party to another in the course of complying with this Practice Direction or any relevant pre-action protocol must not be used for any purpose other than resolving the matter, unless the disclosing party agrees in writing.

Information about funding arrangements

9.3 Where a party enters into a funding arrangement within the meaning of rule 43.2(1)(k), that party should inform the other parties about this arrangement as soon as possible.

(CPR rule 44.3B(1)(c) provides that a party may not recover certain additional costs where information about a funding arrangement was not provided.)

Experts

9.4 Where the evidence of an expert is necessary the parties should consider how best to minimise expense. Guidance on instructing experts can be found in Annex C.

Limitation Periods

9.5 There are statutory time limits for starting proceedings (“the limitation period”). If a claimant starts a claim after the limitation period applicable to that type of claim has expired the defendant will be entitled to use that as a defence to the claim.

9.6 In certain instances compliance may not be possible before the expiry of the limitation period. If, for any reason, proceedings are started before the parties have complied, they should seek to agree to apply to the Court for an order to stay (i.e. suspend) the proceedings while the parties take steps to comply.

Notifying the Court

9.7 Where proceedings are started the claimant should state in the claim form or the particulars of claim whether they have complied with Sections III and IV of this Practice Direction or any relevant protocol.

ANNEX A

Guidance on pre-action procedure where no pre-action protocol or other formal pre-action procedure applies

1. General

1.1 This Annex sets out detailed guidance on a pre-action procedure that is likely to satisfy the Court in most circumstances where no pre-action protocol or other formal pre-action procedure applies. It is intended as a guide for parties, particularly those without legal representation, in straightforward claims that are likely to be disputed. It is not intended to apply to debt claims where it is not disputed that the money is owed and where the claimant follows a statutory or other formal pre-action procedure.

2. Claimant's letter before claim

2.1 The claimant's letter should give concise details about the matter. This should enable the defendant to understand and investigate the issues without needing to request further information. The letter should include—

- (1) the claimant's full name and address;*
- (2) the basis on which the claim is made (i.e. why the claimant says the defendant is liable);*
- (3) a clear summary of the facts on which the claim is based;*
- (4) what the claimant wants from the defendant;*
- (5) if financial loss is claimed, an explanation of how the amount has been calculated; and*
- (6) details of any funding arrangement (within the meaning of rule 43.2(1)(k) of the CPR) that has been entered into by the claimant.*

2.2 The letter should also—

- (1) list the essential documents on which the claimant intends to rely;*
- (2) set out the form of ADR (if any) that the claimant considers the most suitable and invite the defendant to agree to this;*
- (3) state the date by which the claimant considers it reasonable for a full response to be provided by the defendant; and*
- (4) identify and ask for copies of any relevant documents not in the claimant's possession and which the claimant wishes to see.*

2.3 Unless the defendant is known to be legally represented the letter should—

(1) refer the defendant to this Practice Direction and in particular draw attention to paragraph 4 concerning the Court’s powers to impose sanctions for failure to comply with the Practice Direction; and

(2) inform the defendant that ignoring the letter before claim may lead to the claimant starting proceedings and may increase the defendant’s liability for costs.

3. Defendant’s acknowledgment of the letter before claim

3.1 Where the defendant is unable to provide a full written response within 14 days of receipt of the letter before claim the defendant should, instead, provide a written acknowledgment within 14 days.

3.2 The acknowledgment—

(1) should state whether an insurer is or may be involved;

(2) should state the date by which the defendant (or insurer) will provide a full written response; and

(3) may request further information to enable the defendant to provide a full response.

3.3 If the date stated under paragraph 3.2(2) of this Annex is longer than the period stated in the letter before claim, the defendant should give reasons why a longer period is needed.

3.4 If the defendant (or insurer) does not provide either a letter of acknowledgment or full response within 14 days, and proceedings are subsequently started, then the Court is likely to consider that the claimant has not complied.

3.5 Where the defendant is unable to provide a full response within 14 days of receipt of the letter before claim because the defendant intends to seek advice then the written acknowledgment should state—

(1) that the defendant is seeking advice;

(2) from whom the defendant is seeking advice; and

(3) when the defendant expects to have received that advice and be in a position to provide a full response

3.6 A claimant should allow a reasonable period of time of up to 14 days for a defendant to obtain advice.

4. Defendant's full response

4.1 The defendant's full written response should—

(1) accept the claim in whole or in part; or

(2) state that the claim is not accepted.

4.2 Unless the defendant accepts the whole of the claim, the response should—

(1) give reasons why the claim is not accepted, identifying which facts and which parts of the claim (if any) are accepted and which are disputed, and the basis of that dispute;

- (2) state whether the defendant intends to make a counterclaim against the claimant (and, if so, provide information equivalent to a claimant's letter before claim);*
- (3) state whether the defendant alleges that the claimant was wholly or partly to blame for the problem that led to the dispute and, if so, summarise the facts relied on;*
- (4) state whether the defendant agrees to the claimant's proposals for ADR and if not, state why not and suggest an alternative form of ADR (or state why none is considered appropriate);*
- (5) list the essential documents on which the defendant intends to rely;*
- (6) enclose copies of documents requested by the claimant, or explain why they will not be provided; and*
- (7) identify and ask for copies of any further relevant documents, not in the defendant's possession and which the defendant wishes to see.*

4.3 If the defendant (or insurer) does not provide a full response within the period stated in the claimant's letter before claim (or any longer period stated in the defendant's letter of acknowledgment), and a claim is subsequently started, then the Court is likely to consider that the claimant has complied.

4.4 If the claimant starts proceedings before any longer period stated in the defendant's letter of acknowledgment, the Court will consider

whether or not the longer period requested by the defendant was reasonable.

5. Claimant's reply

5.1 The claimant should provide the documents requested by the defendant within as short a period of time as is practicable or explain in writing why the documents will not be provided.

5.2 If the defendant has made a counterclaim the claimant should provide information equivalent to the defendant's full response (see paragraphs 4.1 to 4.3 above).

6. Taking Stock

6.1 In following the above procedure, the parties will have a genuine opportunity to resolve the matter without needing to start proceedings. At the very least, it should be possible to establish what issues remain outstanding so as to narrow the scope of the proceedings and therefore limit potential costs.

6.2 If having completed the procedure the matter has not been resolved then the parties should undertake a further review of their respective positions to see if proceedings can still be avoided.

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ANNEX C

Guidance on instructing experts

1. The CPR contain extensive provisions which strictly control the use of experts both before and after proceedings are started. These provisions are contained in—

(1) CPR Part 35;

(2) the Practice Direction supplementing Part 35; and

(3) the Protocol for the “Instruction of Experts to give Evidence in Civil Claims” which is annexed to that Practice Direction.

2. Parties should be aware that once proceedings have been started—

(1) expert evidence may not be used in Court without the permission of the Court;

(2) a party who instructs an expert will not necessarily be able to recover the cost from another party; and

(3) it is the duty of an expert to help the Court on the matters within the expert’s scope of expertise and this duty overrides any obligation to the person instructing or paying the expert.

3. Many matters can and should be resolved without the need for advice or evidence from an expert. If an expert is needed, the parties should consider how best to minimise the expense for example by agreeing to instruct—

(1) a single joint expert (i.e. engaged and paid jointly by the parties whether instructed jointly or separately); or

(2) an agreed expert (i.e. the parties agree the identity of the expert but only one party instructs the expert and pays the expert's costs).

4. If the parties do not agree that the nomination of a single joint expert is appropriate, then the party seeking the expert evidence (the first party) should give the other party (the second party) a list of one or more experts in the relevant field of expertise whom the first party would like to instruct.

5. Within 14 days of receipt of the list of experts, the second party may indicate in writing an objection to one or more of the experts listed. If there remains on the list one or more experts who are acceptable, then the first party should instruct an expert from the list.

6. If the second party objects to all the listed experts, the first party may then instruct an expert of the first party's own choice. Both parties should bear in mind that if proceedings are started the Court will consider whether a party has acted reasonably when instructing (or rejecting) an expert.

10 Annexe: flow chart of the process



