# Client guidance note

## Guide to dispute resolution

*This publication gives general guidance only. It may not always apply and should not be relied on in place of specific legal advice.*

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Whilst this is a guide to dispute resolution it focuses on matters which ultimately end up in court litigation. Although most disputes are settled without going to court, and the modern approach is very much to consider litigation as a last resort, litigation remains the most common formal method of dispute resolution.

This guide takes you through the litigation process whilst also identifying alternative ways to resolve disputes.

### Terminology

As with most specialist subjects, there is a good deal of terminology connected with litigation. We have attempted to avoid jargon in this guide but as some is inescapable we have included a glossary, explaining the terms used, at the end of the guide.

### The aim of this guide

Litigation is governed by a large number of rules which set out what must be done at each stage, the way in which it must be done and the time limit for doing it.

This guide explains key steps in the process and identifies where your solicitor is likely to require information, instructions or assistance from you, either as a claimant or as a defendant. It assumes that you will have a legal advisor acting for you and references to 'we' and 'us' are to Cripps Pemberton Greenish or the person from this firm dealing with the matter.

This guide is not intended to constitute legal or other advice. Legal advice should always be sought in relation to any particular circumstances. It does not, for example, deal with claims which are specialist proceedings or appeals. In addition, it is focused on 'fast track' or 'multi-track' actions and many of the rules discussed are not relevant to 'small claims' which operate under a simpler procedure. We have produced a guide to the small claims procedure. Please ask your contact at Cripps Pemberton Greenish for a copy or you can find it on our website **www.crippspg.co.uk** (Search for 'Guide to dealing with a small claim'). Generally, the value of the claim determines the track that will apply.

| Value of claim | Procedure |
| --- | --- |
| Up to £10,000 | Small claims |
| £10,000 to £25,000 | Fast track |
| Over £25,000 | Multi-track |

## Funding

How much will it cost? Litigation is a time consuming and expensive business. This can mean that in disputes of low monetary value the cost to take the case to trial exceeds the amount in dispute. The courts have recognised this and the rules focus on aiming to keep costs proportionate to the issues or amounts involved (see the later section on costs for further information). However, anybody embarking on litigation still needs to be aware of the likely costs of pursuing or defending an action.

### Our fees

Our fees will normally be based on the time we spend dealing with the claim but in appropriate cases we also offer other pricing models, such as fixed fees, conditional fee agreements and contingency fee agreements (see below).

### Estimates

In anything other than very straightforward cases (for example routine debt collecting) it is very difficult to give an estimate of the total cost at the outset. Much depends on the way in which your opponent approaches the litigation and on other factors which are outside our control.

We will give you the best estimate we can at the outset of the case and at appropriate stages as the case proceeds. Unless we enter into a specific agreement with you, these estimates are only a 'best guess' and not fixed price quotations. This includes the budget that must be prepared for Court use in many multi-track cases.

### Expenses

In addition to our professional fees, we may have to incur other expenses such as court fees and barristers' fees, traditionally referred to as 'disbursements', on your behalf. If these are likely to be substantial we will endeavour to give you advance notice and obtain an estimate if asked to do so. We usually require larger items of expenditure, particularly barristers' fees, to be paid in advance.

### Conditional fee arrangements

In appropriate cases we can enter into conditional fee arrangements to pay for litigation. Under these agreements we agree to charge lower fees, or in some cases only expenses, if the case is lost, in return for higher fees than we would normally charge if the case is won. These are sometimes known as 'no win, no fee' arrangements. If you are interested in entering into such an agreement, please discuss this with the person who is dealing with your matter.

### Contingency fee arrangements

If there are no court proceedings we may enter into a bespoke contingency fee agreement where we can agree with you the contingency basis on which we will be paid.

In some instances where there are court proceedings we may agree to enter into a 'damages based' contingency fee arrangement. On this basis our charge will be a percentage of any recovery we achieve for

you. Special court rules apply to these agreements and they are not suitable in many cases.

**Insurance**

There is a wide range of insurance products available to cover the risk of having to pay your own or your opponent's costs in the event that your claim is unsuccessful. These can be purchased as stand alone policies or in conjunction with a conditional fee agreement or litigation funding agreement. We are not able to advise you as to which policy best suits your circumstances but can give you details of insurers and brokers from whom you can obtain such advice.

You should also check any household or business insurance policies as these may include legal expenses insurance which covers you for the case.

**Litigation funding**

This is often used alongside insurance cover. Investors provide funds to cover litigation costs. If you win the case, you repay the funds provided plus a proportion of any money recovered. If you lose, you do not usually have to repay the funds. It is not available for every type of case but can be a useful option in the right circumstances.

## Steps prior to commencing legal action

The emphasis in modern litigation is on a 'cards on the table' approach and the court rules encourage, and in some respects require, certain procedures to be carried out before a legal claim is issued.

If the claim involves

- clinical negligence,
- commercial property dilapidations,
- construction and engineering,
- debt (owed by an individual to a business)
- defamation,
- disease and illness,
- gastric illness from a package holiday,
- housing disrepair,
- judicial review,
- personal injury,
- possession based on rent and mortgage arrears, or
- professional negligence,

the parties must follow detailed pre-action protocols which set out a series of steps which should be gone through before proceedings are issued. Other protocols will be introduced from time to time. Failure to comply with a relevant protocol can result in the court imposing a costs penalty. If your case is one that is governed by a pre-action protocol then the person who is dealing with your claim will explain the process to you.

Pre-action behaviour in all cases, whether or not subject to a specific pre-action protocol, must meet the requirements of the Practice Direction on Pre-Action Conduct and Protocols, which forms part of the Civil Procedure Rules (see below). The court will expect the parties to act reasonably in exchanging information and documents relevant to the claim and generally trying to avoid formal litigation. This means that it is appropriate to explore the possibility of settling a claim by alternative dispute resolution (ADR – see below)

before issuing a formal legal claim. Failure to do so may be seen by the court as being unreasonable.

As a result, it is now usually necessary to gather together all of the essential information about a claim before it is issued. This information normally includes the key documents which are relevant to the case and the basic information that will go in witness statements, or at least the identity of all witnesses who it is intended will give evidence. If expert evidence is required the identity of the proposed expert and why the evidence is required should, preferably, be determined prior to issuing.

Where a claimant or defendant is a company then at an early stage somebody in the company should be designated as the major contact for the litigation and given, for example, authority to sign any statement of truth on behalf of the company.

It is also possible in certain cases to apply for pre-action disclosure against a prospective defendant. This means an application directed to the person(s) who is/are likely to defend your claim and asking them to disclose documents that relate to the claim. Such an application may be appropriate where a potential defendant refuses to reveal documents known to be in existence which may have a significant impact on the merits of a claim.

From this you can see that significant costs may be incurred prior to the issue of any claim although the aim of the pre-action process is to encourage more cases to settle at an early stage. Both claimant and defendant can make offers of settlement prior to commencing proceedings which may have significant cost implications (explained later). The approach adopted by both parties before proceedings can also be relevant to the

## Civil Procedure Rules (CPR)

The Civil Procedure Rules (CPR) are the rules which govern the litigation process. They contain the detailed framework within which cases proceed. The Rules are accompanied by practice directions (PDs) which give guidance as to how the courts will operate the rules.

Underlying the CPR is the 'overriding objective', which is in effect a mission statement for the CPR. It is worth quoting the overriding objective in full as it is intended to govern the overall approach of both the parties and the court to litigation:

*''These Rules are a procedural code with the overriding objective of enabling the court to deal with cases justly and at proportionate cost.*

*Dealing with a case justly and at proportionate cost includes, so far as is 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*
• *the importance of the case*
• *the complexity of the issues, and*
• *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."*

Given the importance of this overriding objective to the way in which the courts expect litigation to be conducted, it is important that you are aware of its terms. Decisions must be taken with it in mind and cost proportionality and compliance are particularly important.

## Alternative dispute resolution

Alternative dispute resolution (ADR) is a general term for alternatives to litigation such as arbitration or mediation.

As part of the court's aim of settling cases at the earliest possible moment, the parties are encouraged to consider such alternatives and either party can request a stay of proceedings while mediation or some other form of ADR is explored.

The person dealing with your claim can discuss with you the suitability of ADR in your particular case but the following information may assist you in making a decision as to whether or not ADR should be attempted. The main forms of ADR are as follows.

### Negotiation

This is the simplest form of ADR and can be little more than an exchange of 'without prejudice' correspondence between the parties or their lawyers. The court may see a failure to engage in negotiation, where it is appropriate, as unreasonable and therefore impose a costs penalty.

### Early Neutral Evaluation

In Early Neutral Evaluation (ENE) the parties agree to appoint someone with specialist skills or knowledge to consider some or all of the issues, and the arguments being made, and give the parties a view on the strength of those arguments. The ENE is not binding and will not affect any court proceedings but it can help the parties to move on in their negotiations.

### Adjudication

In this form of dispute resolution a single adjudicator is appointed and will generally reach a decision based upon the documents provided by each party. The adjudicator's decision is binding on the parties unless it is overturned by the court.

Adjudication is generally only used in building and construction disputes and you should seek specialist advice if a dispute falls into this category.

### Arbitration

This is a formal dispute resolution procedure in which a tribunal or sole arbitrator issues a ruling, known as an award, on the issues put to it for decision. The tribunal is expected to behave judicially and will determine the rights and liabilities of the parties.

Arbitration is mandatory under some contracts. In those cases the court will not allow the parties to litigate unless both waive their right to arbitration. The form of the arbitration will normally be agreed between the

parties, or the contract will adopt one of the standard sets of arbitration rules. Otherwise there are procedures set out in the Arbitration Act 1996.

The advantages of arbitration include some flexibility in the procedure and a degree of privacy as, unlike litigation proceedings, arbitrations are not open to the public. In addition, a tribunal with specialist knowledge of the issues in dispute can be chosen, which may make arriving at a decision quicker and easier. One further advantage, if a dispute has an international element, is that there are various international agreements which require other countries to recognise arbitration awards when they might not recognise a judgment made in another country's courts.

The disadvantages include the fact that it can be more expensive than court proceedings and the tribunal is less likely to see itself as being bound by legal precedent — although there is a right to appeal to the court on a point of law — which may mean the outcome is less certain. In addition, enforcement of the award still has to be done by application to the court.

**Mediation**

Mediation is negotiation conducted with the assistance of a neutral third party, the mediator. The mediator guides the parties through the negotiation process, advising and listening to both sides, endeavouring to help the parties arrive at a negotiated settlement.

A mediator does not impose a settlement on the parties and a mediated settlement is not binding on the parties until encapsulated in a formal agreement. That written agreement between the parties is then enforceable by the courts like a normal contract.

Unlike litigation or arbitration, if either party is not happy with the way the mediation is progressing they are free to walk away at any time and try another form of dispute resolution procedure. Matters discussed during a mediation are considered to be without prejudice and cannot therefore be used in later court proceedings if the mediation fails.

Mediation can be relatively quick and inexpensive, the process is private and confidential and since the goal is problem solving, it is often successful in preserving working relationships between parties. It is therefore particularly appropriate where the parties involved have an ongoing relationship which they do not wish to see irreparably damaged. Mediation does require the parties to enter into the process with a willingness to explore constructive solutions and the absence of an imposed decision may mean that it is not suitable for all cases.

**Expert determination**

This is a voluntary process where a neutral third party, who is usually an expert in the field in which the dispute arises, gives a binding determination on the issues in dispute. It is usually most appropriate where the dispute revolves around a specific technical issue between the parties.

The parties must agree in advance the choice of expert and his instructions and then agree to be bound by his finding. The advantage is that the procedure is quick and relatively inexpensive. The main disadvantage is that the decision is open to challenge only on very limited grounds.

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Given the importance of this overriding objective to the way in which the courts expect litigation to be conducted, it is important that you are aware of its terms. Decisions must be taken with it in mind and cost proportionality and compliance are particularly important.

## Costs shifting

This is the general rule in English civil litigation that the loser pays the winner's costs. It is only a very general rule and the court can overturn it for many reasons but it is an important concept to have in mind. It does not mean that if you win, your opponent will pay **all** of your costs. Only the costs of handling the dispute 'between the parties' are 'recoverable'. A certain proportion of the costs, which arise out of our relationship with you, 'solicitor – own client' costs will not be paid by the losing party.

## Issuing proceedings

The first formal step in the proceedings is the preparation of the claim form which is then sent to the court ('filed') together with the court fee. The court stamps the form with the court seal then either sends it to the defendant ('serves' it) or returns it to the claimant's solicitors to arrange for service.

Service is normally done by post but in certain circumstances may be carried out personally by process servers on your behalf. This means that we will arrange for a process server to hand deliver the claim form to the defendant. This will incur an additional charge and the person dealing with your claim will discuss with you whether personal service is required.

At the same time as the claim form is served, or not more than 14 days later, the particulars of claim must also

be filed with the court and served on the defendant. In simple cases the claim form and the particulars of claim will be contained in the same document.

The claim form contains a summary of the claim while the particulars of claim contain the detail. The particulars of claim must be verified by a statement of truth (see below).

The court rules set out certain matters which must be dealt with in the particulars of claim but the basic purpose of the document — and that of the defence — is to set out the facts relied upon so that the court and the parties can identify and define the issues in dispute. Failure to do this may result in a Court application by the other party for further information, the costs of which are likely to be awarded against the party in default.

## Statements of truth

A statement of truth is a statement that a party believes that the facts or allegations set out in a document which they put forward are true. It is required in any statement of case, witness statement or expert report and in certain other documents. Any document containing a statement of truth may be used in evidence.

A document with a signed statement of truth which contains false information given deliberately, that is, without an honest belief in its truth, will constitute a contempt of court by the person who provided the information and may attract a fine or, in exceptional circumstances, a prison sentence.

Solicitors may sign statements of truth on behalf of clients (except on witness statements) but this is on the understanding that it is done with the client's authority and with the client knowing that the consequences of any false statement will be personal to them. To avoid any misunderstandings in this respect we will normally ask you to sign the statement of truth on documents such as the statement of case.

Where the party is a company or other corporation the rules require the statement of truth to be signed by a person holding a senior position in the company or corporation, e.g. a director or manager. That person must state the office or position he or she holds.

## Defending proceedings

On receipt of a claim form and particulars of claim the defendant has three basic options:

- admit the claim — in whole or in part;
- acknowledge service and file a defence later; or
- file a defence.

Failure to do one of these things is likely to result in the claimant entering judgment in default.

If the claim is admitted then the defendant should complete the appropriate form, which will have been served with the claim form. The defendant can ask for time to pay.

If the defendant denies the claim, and it is not complex, it may be possible to draft a defence very quickly, in which case the defendant should send a copy of the defence to the court, and serve it on the claimant, within 14 days of service of the claim form.

In more complex cases, or where information needs to be obtained, the defendant can simply acknowledge service of the claim form by returning an acknowledgment of service form within 14 days of service of the claim form.

A full defence must then be filed and served within a further 14 days, that is to say, within 28 days of service of the claim form. The parties can agree to extend the time for service of the defence but only for a further 28 days. Beyond this period, or if the claimant does not agree to extend the time, then the defendant must apply to the court and will need to provide good reasons for the delay.

The defence must be more than a simple denial of the claim. It should deal with all allegations made in the claim form, otherwise the court may decide that the allegations have been admitted. For each allegation the defence should state whether it is admitted, denied or neither admitted nor denied but required to be proved. The reasons for any denial of an allegation must be set out as must the defendant's version of events if it differs from that in the claim form. The defence must be verified by a statement of truth.

Failure to set out a full defence may result in the claimant applying for it to be struck out and judgment awarded or the court may itself decide to strike it out.

Even if an inadequate defence is not struck out the claimant may apply for further information to be supplied, in other words for the court to make an order requiring the defendant to expand upon his defence. The costs of this are likely to be awarded in favour of the claimant.

## Offers of settlement

The majority of cases do not actually go to trial as the parties agree a settlement between themselves. Settlement can be achieved by straightforward negotiation or another form of ADR.

An offer to settle which is not accepted can have a major effect on the allocation of costs (the 'costs shifting' mentioned above), whether it is made before or after proceedings are issued. Either party can make an offer to settle the whole claim or a specific part of it.

A defendant who offers a sum of money must be able to pay that sum within 14 days of it being accepted. If it is not paid within that period the claimant is entitled to enter judgment against the defendant, so any defendant making such an offer must also be prepared to meet it straightaway if necessary.

In order to influence the ultimate award of costs, offers must be made in a particular way and as set out in Part 36 of the CPR. The person dealing with your case will advise you on the details, which include a rule that offers cannot be withdrawn within an initial time period, usually 21 days, without the permission of the court or by agreement. After that point an offer can still be accepted, with certain costs consequences, but it can also be withdrawn at any time until it is formally accepted.

The key cost implications of Part 36 offers to settle are as follows:

- if either party accepts an offer within the initial time limit the defendant will usually have to pay the claimant's costs incurred up to the date of the notice of acceptance;
- if either party accepts an offer outside the initial time limit the claimant will generally be entitled to their costs up to expiry of that period and the offeree will have to pay the offeror's costs incurred from that point until the offer was accepted;
- where a claimant does not accept a defendant's offer and then fails to do better at trial than the offer, the court will normally order the claimant to pay the defendant's costs incurred since the end of the initial time limit;
- if a defendant does not accept a claimant's offer and the claimant's award at trial equals or is better than the claimant's offer, the court can order the defendant to pay an extra 10% of damages or costs

awarded, up to £500,000 and 5% on amounts between £500,000 and £1million; interest on money awarded at a rate up to 10% above base rate for all or some of the period; indemnity costs; and interest on those costs.

As you can see, an offer to settle can give a large degree of costs protection to both claimants and defendants.

Failing to accept an offer can have serious costs consequences which encourages both parties to have a realistic assessment of the amounts at stake.

The person dealing with your case will need to discuss with you, in detail, any offer received and obtain your instructions as a matter of urgency.

## Allocation

The court will allocate your case to one of three 'tracks' depending upon the value or complexity of the case. The track will dictate the way in which the case must be handled. It will also affect the costs that may be recoverable if you are successful or are required to pay if you are unsuccessful.

Allocation is part of the process of active case management by the court. The parties to an action, particularly in the fast track, have little opportunity to control the pace and direction of the litigation. This is designed to prevent parties from employing delaying tactics or procedural 'tricks' to gain an unfair advantage. In its case management role the court has wide powers to make orders directing the progress of a case. It can also make costs management orders in any case.

### Small claims track

This is generally used for cases with a value of less than £10,000 (there are lower limits for personal injury and housing disrepair claims). The key points to note are:

- the proceedings and procedure are much less formal;
- it may be possible to deal with the case without a court hearing if both parties agree; and
- very limited costs are recoverable from the other party.

The limited ability to recover costs in the small claims track may make it uneconomic to instruct us to deal with the matter from start to finish. The most cost effective way to use our expertise may be to obtain our advice prior to issuing the claim (if you are a claimant) or on receipt of a claim (if you are the defendant) and then manage the case on your own with our assistance from time to time as required. Our small claims court guide (see reference above) and small claims fixed fee service may be of assistance. Please ask us if you would like more information.

### Fast track

The fast track provides a streamlined procedure to handle cases with a value between £10,000 and £25,000. The key points are:

- the court gives standard directions at the beginning of the case setting a timetable to take the case to trial;
- the court sets a trial date which will probably be within 30 weeks;
- no more than one day will be allowed for the trial;
- expert evidence is likely to be limited and only written expert evidence will normally be allowed at the

trial; and

- only fixed costs will be allowed for the trial itself. This means that regardless of what you pay us and/or a barrister you will only be entitled to recover a fixed sum for the costs of the trial if successful, or required to pay a fixed sum if unsuccessful. This fixed sum is set by the court and is unlikely to reflect the actual costs of the trial.

**Multi-track**

This provides a flexible regime for handling higher value (over £25,000) or more complex cases. It may also be the appropriate track if the case requires more than one expert for each party or where it is clear that the trial will take more than one day.

This multi-track does not have the same standard procedure as in the other tracks but is subject to active case and costs management by the court.

**Directions questionnaire**

When a defence has been filed the court will send out a Notice of Proposed Allocation to all parties, stating the proposed track for the matter and requiring each party to complete and return a directions questionnaire.

Among other things the questionnaire seeks information on:

- the parties' willingness to try ADR. Either party may request a one month stay of the proceedings to enable ADR to be explored, or the court can order a stay to encourage the parties to explore ADR;
- whether the parties agree to the proposed court track;
- whether pre-action protocols apply and have been complied with;
- the parties' views on the complexity of the law, facts and evidence relating to the case. This includes the number of witnesses likely to be involved, what expert evidence may be required, the value of any counterclaim, the potential involvement of third parties and the documents, both paper and electronic, that will need to be disclosed; and
- the likely cost of the action. In most multi-track cases each parties must supply a detailed budget, verified by a statement of truth, for the costs involved in taking the matter to trial. The costs will then be managed throughout the case according to those budgets, or as amended from time to time by the parties or at the court's request. The court may make a costs management order, effectively limiting the costs that can be recovered from the other side to those in the budgets.

It can be seen that the key issues in a case need to be identified at an early stage.

## Interim hearings

These are hearings during the course of the proceedings which deal with administrative matters. They may be conducted by conference telephone call to save costs.

There are a number of steps between issuing proceedings and trial. The court will monitor and control compliance with the timetable for these steps. An interim hearing may be required, for example, if one party does not comply with court directions and the other party applies to the court for an order forcing them to comply.

Interim hearings normally take place before a District Judge (in the County Court) or a Master (in the High

Court). Generally, the issues will be decided on written, not oral, evidence so the parties or witnesses will not need to attend to give evidence.

The written evidence normally consists of relevant documents and a written summary of the facts relied on, supported by a statement of truth.

The successful party in an application will normally be awarded the costs of that application. The amount of costs payable will usually be assessed at the hearing and must be paid within 14 days, failing which the action could be stayed or the other party may start enforcement proceedings to force payment of the costs.

These are some of the main types of interim hearings or applications:

**Summary judgment**

Summary judgment is available to both claimants and defendants. A party who feels that the other does not have a valid claim or defence can apply to the court for the claim or defence to be struck out and for judgment to be entered in their favour.

The applicant must satisfy the court that the other party has 'no reasonable prospect of success' and that 'there is no other reason why the case or issue should be dealt with at trial'.

Summary judgment can apply to the whole of the claim or defence, or to specific issues. The court can strike out the claim or defence and give judgment to the claimant or the defendant, or it can make a conditional order. A typical conditional order might be for the claimant or defendant to have to pay a sum of money into court before being allowed to continue the action.

**Case and costs management conferences**

These are a key part of the court's active case and costs management role.

At a case management conference the court will review the steps taken so far, give directions about the future conduct of the case and ensure that all matters which can be agreed are explored and recorded. The court will consider:

- whether the claimant and defendant have made their case clear;
- whether any amendments are required to any statement of case;
- what disclosure of documents is required;
- what expert evidence is needed;
- what factual evidence should be disclosed;
- what further information is required from any party or the experts;
- whether the trial should be split, for example, first a trial on whether the defendant is liable and only if the answer is yes, a trial of how much the defendant should pay; and
- whether the parties' costs budgets are proportionate to the claim. If not, the court can set lower budgets. If the court makes a 'costs management order' that can effectively limit the winner's recoverable costs at the end of the claim to the budgeted amount. Even if the court does not make a costs management order, the budgets will be taken into account when the judge is assessing costs at the end of the case.

Costs issues may also be discussed at a case management conference, or the court may hold a separate costs

management conference to deal solely with costs. These will usually be by telephone or in writing.

**Specific disclosure**

In fast track cases the parties will usually be required to give standard disclosure (see below). In multi-track cases the extent of disclosure will be agreed by the parties and the court (see below). However, there may be occasions when one party believes that the other party has further documents which ought to be disclosed.

In such a case that party can apply to the court for an order requiring the other party to confirm whether documents of a certain type or within a certain class exist or requiring the party to make a search for such documents. Whether the court will make such an order depends upon all the circumstances of the case but the court will pay particular regard to the principles of the overriding objective.

**Requests for information**

The court can order any party to clarify any matter which is in dispute in the proceedings or to give additional information in relation to any matter. Any party can apply to the court for such an order but usually after they have made a formal request to the other party giving sufficient time to obtain the information. Such an application is most likely where a statement of case fails properly to set out the claim or defence or a particular part of it. Failure to comply with an order to supply further information may result in the claim or defence, or that part of it to which the request related, being struck out by the court.

**Pre-trial reviews**

The purpose of a pre-trial review (PTR) is to give the parties an opportunity to settle before the full costs of a trial are incurred and, where settlement is not possible, to prepare an agenda for the trial.

A PTR may not be required in simpler cases. When a PTR is held the trial advocate and somebody with authority to settle the case should normally attend.

## Disclosure

Disclosure means stating whether a document exists or has existed. This is done by the parties exchanging lists of documents which are, or have been, in their control. 'Control' means the documents are, or have been, in a party's physical possession or a party has, or has had, the right to possession or to take copies.

'Document' is given a very wide definition and means anything in which information of any description is recorded. It includes e-mails, tapes, disks or other mechanical methods of recording data as well as paper documents, and it is important that documents in these formats are preserved, e.g. by suspension of standard destruction policies, if litigation is a possibility.

If a document is disclosed then the other party has the right to inspect it except where the document is no longer in your control or if there is some right or duty to withhold inspection.

The normal type of disclosure for fast track cases is standard disclosure, which means that the parties have to disclose only the documents on which they will rely, those which adversely affect their case and those which support or adversely affect another party's case. The court can, either of its own accord or following an application by the parties, limit or expand this duty.

In multi-track cases (except personal injury) the parties must prepare a Disclosure Report, to send to court

before the first case management conference, outlining the types of documents likely to be required, their whereabouts and the cost of locating them. They must then discuss this with the other parties and propose suitable directions for the court to make about disclosure. The parties and/or the court may decide that disclosure should be limited in certain ways to keep the cost proportionate.

The parties are required to make a reasonable search for documents of the type which are required to be disclosed. The extent of the search required will depend upon the number of documents involved, the nature and complexity of the proceedings, the ease and expense of retrieval and the significance of any document likely to be located.

Having prepared a list of documents according to the directions given, each party must sign a disclosure statement detailing the extent of any searches made to locate documents, certifying that the party understands the disclosure duty and confirming that the duty has been complied with. We will ask you to sign the disclosure statement.

The duty of disclosure continues until the proceedings are concluded and relevant documents coming into your control during the course of the proceedings must be disclosed.

The duty to allow inspection does not cover documents that are privileged, which means they should be disclosed but the other side is not entitled to see them. There are various types of documents which are privileged, for example correspondence between you and us regarding the case. The person handling your case will advise you on whether or not a document is privileged.

The disclosure obligation is an important one and in order to comply fully you should ensure that all documents (in whatever format) relevant to the issues in dispute are preserved and delivered to us. We will then decide whether any particular document should be disclosed, having regard to the legal issues in the case.

## Witness statements

In a trial, if a fact needs to be proved by the evidence of a witness, that person will have to give oral evidence in public. Witness statements are written statements signed by a person which contain the evidence he or she will give orally. They must contain a statement that the evidence is true.

Normally, statements for all the witnesses who are going to give evidence must be exchanged between the parties and filed with the court before trial. All witnesses should therefore be identified at an early stage and it may be useful to obtain an outline statement of their evidence at the earliest opportunity which can be expanded later if necessary.

If you want someone to give evidence but they refuse to provide a witness statement then it is possible to serve on the other side a summary of the questions which will be asked of the witness and serve a notice on that witness requiring him or her to attend the trial.

As far as possible, witness statements should be in the words of the person making the statement. They should contain all the evidence which a witness will give. It is possible to apply for permission for a witness to expand upon their witness statement at trial but it is entirely up to the court's discretion whether to allow this.

Failure to comply with orders for exchange of witness statements can mean that the court will not allow the witnesses to give evidence at the trial. We will normally need to interview all witnesses and then draft the

witness statements in their own words as far as possible. It may be that this will need to be done within a fairly short timescale. Therefore it is important to clarify at an early stage whether witnesses are willing and able to assist.

## Experts

Expert evidence, written or oral, can only be used at trial with the court's permission.

Details of the proposed expert evidence, why it is needed and ideally the name of the expert, have to be given in the directions questionnaire (see above). So it is necessary to consider these issues at an early stage, and preferably before issuing the claim if you are the claimant.

In some cases the court will not allow each side to appoint their own expert but will insist that a single expert is instructed on behalf of both parties. Each party will send their own instructions to the expert and copy them to the other party. Each party then has the right to submit written questions to the expert.

The court rules make it clear that the duty of any expert is to help the court on matters within their expertise. This duty overrides any obligation to the person from whom they have received instructions or by whom they are paid. The substance of any instructions given to an expert must be set out in his report.

Normally we will not take on responsibility for payment of expert's fees and will require you to pay them directly, but we will usually prepare the instructions setting out what the expert is required to do.

## Counsel

While we will manage and direct your case as it goes to trial, on occasions it may be in your interests to instruct a barrister (counsel) to assist with the case.

The sort of things counsel may be instructed to do on your behalf are:

- the drafting of certain formal documents;
- advising on legal matters where the barrister has particular expertise. This advice can be in writing or in conference. Advice given in conference is provided at a meeting between the barrister, solicitor and client; and
- undertaking the advocacy at the trial, that is to say asking questions of the witnesses, and presenting legal argument and oral and written evidence to the court.

## The trial

This is the final hearing of a claim (subject to any appeal).

If a matter is on the small claims or fast track then a date for the trial will be fixed early on in the proceedings and all parties will need to work towards this date. In the fast track a 'trial period' will normally be set, not exceeding three weeks, within which the trial will take place. The court should give the parties at least 21 days' notice of the actual trial date.

In the multi-track the date may not be fixed until much later in the proceedings when the issues in the case and likely length of the trial become clearer.

As far as it can, the court will fix the trial date for the convenience of the parties, witnesses and lawyers but this

may not always be possible. We cannot actually choose a date but before fixing a date or a trial period the court will normally ask the parties for a list of dates to avoid.

Once a trial date has been fixed the court may be reluctant to allow an adjournment, even if both parties request one, in the absence of exceptional reasons. If an adjournment is granted at the request of one party then any costs wasted as a result of the adjournment will normally be awarded against that party.

At the trial the judge will hear the evidence of the claimant and then the defendant and will hear legal submissions from both parties. The person handling your case will explain the procedure in more detail.

At the conclusion of the trial the judge will give his judgment although in some cases it will be reserved. That is to say, the judgment will be delivered to the parties in writing at a later date or there may be a further short hearing when the judgment is read out.

If the judgment is for a sum of money then it is normally payable within 14 days.

If you are dissatisfied with the outcome of the trial then you should discuss with the person handling your case the possibility of making an appeal but it should be noted that the grounds on which an appeal can be made are limited. It is not sufficient that you disagree with the decision of the judge; it is necessary to show that there are specific grounds for reversing the judge's findings. These grounds must normally relate to points of law or procedure rather than decisions of fact by the judge or the exercise of judicial

## Costs

As explained above, the 'costs shifting' rule means that a successful party to a litigation action will normally be awarded their costs. In broad terms this means that the court will order the unsuccessful party to pay the costs of the successful party as well as their own costs. Note, however, that the paying party will not have to pay all of the receiving party's costs. Costs incurred dealing with matters between client and solicitor are not recoverable 'between the parties'; and only a 'proportionate' amount of the costs between the parties will be recoverable (see below).

Qualified one way costs shifting ('QOCS') varies the general rule in personal injury cases. A successful personal injury claimant will usually be awarded their costs. An unsuccessful personal injury claimant, or a successful one who nonetheless has been ordered to pay some or all of the defendant's costs, will not have to pay more towards the defendant's costs than the defendant has been ordered to pay to the claimant by way of damages and interest. This effectively protects the claimant from the usual costs rule. QOCS will apply unless the claim has been struck out as an abuse of process or because of the claimant's conduct, or where the claim is found to have been fundamentally dishonest.

Whether the normal rule, or QOCS, applies we cannot stress too much the importance of considering the potential costs consequences fully before you embark on litigation and of reviewing costs on a regular basis during the course of the case.

If the parties are unable to agree the amount of costs payable by one to the other they can ask the court to 'assess' the costs and make an order confirming the amount to be paid.

Costs payable by one party to another are normally awarded on the standard basis which means that the court will award those costs which were reasonably and proportionately incurred and which were reasonable and proportionate in amount. Doubts as to reasonableness will be decided in favour of the paying party. It is also

important to be aware that proportionality 'trumps' reasonableness. This means that even if all the costs were reasonable and necessary, if the total is disproportionate the court will only allow the winner to recover a proportionate amount which may, in some circumstances, be no more than a contribution to the winner's costs. When deciding what is proportionate, the court will consider the value of the claim; the value of any non-monetary element of the claim; the complexity of the claim; whether the other party's conduct created additional work; and any wider issues, such as reputation or the public importance of the claim.

Where the court has made a 'costs management order', as explained above, the recoverable costs are likely to be limited to the amount allowed in the winning party's budget. Even if no costs management order was made, the court will take budgets into account. If your actual costs exceed the budgeted amount, you will be responsible for the balance.

The court may sometimes order costs to be payable between the parties on an indemnity basis. It might do this, for example, if the party paying the costs has pursued a particular issue unreasonably or has forced the other party to incur unnecessary costs. On this basis of assessment there is no test of proportionality and the costs will be allowed unless they are unreasonable. This basis is obviously more favourable to the successful party and budgets are less important.

Within these broad principles the court has great flexibility to make orders about costs. In addition, you should note the following points:

- the conduct of each party before and after the issue of proceedings will be considered. Points which the court will take note of include whether it was reasonable for a party to pursue or defend a particular issue, the way in which the claim has been handled and whether or not a claim has been exaggerated;
- the conduct of the parties is relevant both to whether or not the court will award costs in one party's favour and to the amount of the costs that will be awarded;
- costs should be proportionate to the amounts or issues involved in the claim;
- the court will not allow costs which have been unreasonably incurred or are unreasonable in amount;
- our bill will still be payable in full regardless of any order for an opponent to pay our costs (unless agreed otherwise in writing with us);
- even if you are completely successful in your claim your opponent may not be ordered to pay or be capable of paying the full amount of your costs;
- if your opponent is in receipt of state funding then you may not recover costs even if entirely successful;
- in certain cases the costs which are recoverable are fixed by the court;
- if your claim is in the fast track then there is a limit on the costs which you can recover for the trial itself regardless of what you actually spend; and
- costs recoverable in the small claims track are very limited and it is not generally possible to recover the costs of legal representation.

In addition, as mentioned above, the costs of an interim hearing are generally assessed at the hearing itself and are payable within 14 days of the order.

## Enforcement

Obtaining a judgment against somebody does not automatically mean that they will be willing or able to pay or comply.

Set out below are some of the methods by which a judgment for a sum of money can be enforced. The person who is handling your case will advise you on which method is suitable for you.

**Orders to obtain information from judgment debtors**

These are not strictly a method of enforcement but a way to obtain further information. The person against whom the judgment is made (or, if the judgment is against a company, an officer of the company) can be ordered to attend before the court to give evidence under oath about their/the company's financial circumstances. If the person against whom the order is made fails to attend court, refuses to take the oath or refuses to answer any question, a judge can order that, unless they attend court on another date and answer the questions, they will be arrested.

**Warrant of control/writ of control**

An order can be obtained from the court which directs a bailiff (in the County Court) or a high court enforcement officer (in the High Court) to determine what goods of a debtor are available to be taken and if necessary seize them and sell them at auction. The proceeds of sale (less costs) will then be sent to you.

**Charging orders**

A charging order is similar to a mortgage. If the debtor has a house then the court can order that a charging order be registered against it and this will then rank behind any earlier mortgages but in front of any later ones. If the debtor sells the house then the amount of the charging order will have to be paid out of the proceeds of the sale. In certain circumstances the court will allow the holder of a charging order to apply for an order requiring the debtor to sell the property in question.

The value of a charging order is very much dependent upon whether there is any 'equity' in the property after any pre-existing mortgages are taken into account.

**Third party debt orders**

If a third party (including a bank or building society) owes money to your debtor then a claim can be brought against that third party to recover your debt directly from them. Generally this requires a fairly detailed knowledge of the debtor's circumstances.

**Attachment of earnings orders**

If your debtor is employed and you are able to obtain details of their employment it may be possible to obtain an order requiring payment of the debt from their salary over a specified period.

**Bankruptcy**

On being declared a bankrupt an individual's assets and liabilities are examined and, subject to certain exceptions, any surplus assets are distributed by a Trustee in Bankruptcy to all creditors. The effectiveness of this means of enforcement is very much dependent upon the nature of the defendant's assets and liabilities and in particular the number and type of other creditors. This is something which needs to be considered in some depth before such proceedings are embarked upon.

## Glossary of terms

**ADR**

Alternative dispute resolution — alternatives to litigation (for example mediation or arbitration)

**Advocate**

The lawyer attending a hearing or trial to put forward the party's case

**Allocation**

The process by which the court decides whether a case is a small claim, fast track or multi-track case

**Case management**

The pro-active management of the case by the court. Directions will be made to suit the circumstances of the particular case

**Case management (CMC)**

An interim hearing at which the court will decide how the case should proceed and will give directions

**Claimant**

The person bringing a legal claim

**Claim form**

The formal document which starts a claim and sets out the basic nature of the claim

**Costs**

Legal and other costs incurred by a party in pursuing or defending a claim generally or a particular issue in relation to that claim. These are normally ordered to be paid by the 'loser' of any claim to the 'winner'. See the section entitled Costs for further details

**Costs budget**

Schedule of costs incurred and to be incurred by a party for each phase of litigation in most multi-track cases. It must be filed at court and served on other parties and can limit the party's recoverable costs

**Costs management**

The pro-active management of the steps to be taken and the costs to be incurred in the case so as to further the overriding objective

**Costs management conference**

An interim hearing to consider costs and budgets

**Costs management order**

An order indicating that the court will control the parties' budgets in respect of recoverable costs

**Counsel**

A barrister

**County Court**

The appropriate court for claims worth less than £100,000, subject to certain exceptions (or for personal injury claims less than £50,000)

**CPR**

Civil Procedure Rules – the court rules that govern litigation

**Defence**

The document containing a detailed description of the response to and rebuttal of the claim

**Defendant**

The person defending a legal claim

**Directions**

Orders made by the court setting out how the case should proceed and setting a timetable for administrative matters

**Directions questionnaire**

A document that must be completed by both parties' legal advisers after a defence has been served; the information supplied forms the basis of the court's decisions about case management

**Disbursements**

Expenses incurred by a party's lawyer on their client's behalf

**Disclosure**

The process by which each party reveals to the other the documents they have that are relevant to the case

**Disclosure report**

A party's summary of documents likely to be disclosable, and the practicalities of locating them, filed before the first CMC (multi-track non personal injury cases only)

**District Judge**

The Judge who will deal with most interim applications in the County Court

**Enforcement proceedings**

The methods of enforcing a judgment or order

**Fast track**

The track to which most claims valued at between £10,000 and £25,000 will be allocated

**File/Filed**

Deliver[ed] to the court

**High Court**

The court which is appropriate for claims worth more than £100,000 (£50,000 if they are personal injury claims) or claims of a particular complexity or general importance

**Indemnity costs**

A basis for assessing costs by the court which is more favourable to the receiving party than the standard basis

**Interim hearing**

A hearing during the course of an action other than the trial itself which normally deals with administrative matters

**Issuing/Issued**

The process of formally starting proceedings by delivering a claim form to the court, paying the requisite fee and obtaining the court stamp

**Judgment**

The court's decision following a hearing or trial

**Judgment in default**

Judgment given by the court because the claim was not acknowledged or because no defence was put in

**List of documents**

The formal document complying with disclosure requirements

**Litigation**

The process of pursuing a claim by formal legal proceedings

**Master**

Equivalent to a District Judge but in the High Court in London

**Multi-track**

The track to which complex claims and those with a value greater than £25,000 will normally be allocated

**Order**

A decision of the court requiring a party to take some action.  Failure to comply with a court order can result in

serious penalties

**Overriding objective**

The basic statement of principle underlying the CPR

**Particulars of claim**

The document containing a detailed description of the claim

**Pre-action protocols/Practice Direction on Pre-Action Conduct and Protocols**

Steps which the court requires the parties to take before proceedings are issued. Failure to comply with pre-action protocols or the practice direction can result in costs penalties being imposed by the court

**Privileged documents**

Documents such as letters between a client and his lawyer which should not be shown to the court or disclosed to the other side

**Proceedings**

Another way of generally describing a legal claim or action which has been issued and is being dealt with by the court

**QOCS**

'Qualified one way costs shifting' which limits the enforcement of costs orders against personal injury claimants

**Service**

Formal delivery of a document to a party

**Settling a claim**

Reaching a binding agreement to end a dispute, either to avoid the need for proceedings or to bring proceedings to an end before trial

**Small claims**

Claims for less than £10,000

**Specialist proceedings**

Commercial actions dealt with by the Companies Court, Commercial Court, Technology and Construction Court or other special court. Separate rules apply in these cases which will need to be discussed with the person who is handling your case

**Standard basis**

The normal basis on which the court will assess what costs are payable by one party to the other

**Statement of case**

The formal document in which each party sets out their case

**Statement of truth**

A statement made by the party or his lawyer in a statement of case, witness statement and other documents confirming the truth of the contents of such documents. We will normally ask you to sign these rather than signing them on your behalf

**Stay**

A temporary halt on proceedings

**Struck out**

Deleted from a document or, when referring to a claim or defence itself, declared to have no validity or effect

**Summary judgment**

An application to the court for judgment to be given to either party without a full trial on the grounds that the other party has no real prospect of success and that there is no other reason why the case or issue should be dealt with at trial

**Trial**

The final hearing of a matter

**Without prejudice**

Applied to statements or discussions between the parties before or after commencement of proceedings which are in the course of genuine negotiations to reach settlement of a disputed matter. Such communications will be privileged and should not be shown to the court. Where such communications are 'without prejudice save as to costs' then they may be shown to the court at the end of the matter when the question of costs is addressed

**Witness statement**

A written version of the oral evidence which a person is intending to give at trial

## A summary of the litigation process

**Fast track and multi-track**

**Pre-action protocols/practice direction**

Procedure which should be followed before issuing proceedings

**Negotiations/offers of settlement**

Both claimant and defendant may make offers which have costs effects

**Alternative dispute resolution**

Alternatives to litigation

**Issue proceedings**

The claimant formally sets out the claim

**Defence/counterclaim**

The defendant responds to the claim / makes their own claim

**Reply/defence to counterclaim**

The claimant responds to the defence and/or counterclaim

**Allocation to court track**

The court determines which rules will apply to the claim

**Case / costs management conference**

The court decides a timetable for the progress of the claim and considers parties' budgets (multi-track only)

**Disclosure**

Each party discloses to the other documents which relate to the claim

**Exchange witness statements**

The parties exchange written statements of their witnesses' evidence

**Exchange expert reports**

The parties exchange reports of any experts they wish to rely on

**Pre-trial review**

The court checks if the matter is ready for trial

**Trial**

The final hearing of the matter

**Assessment of costs**

The court will assess what costs each party must pay the other

**Contacting a solicitor**

If you would like to discuss bringing a claim, or defending a claim made against you or your business, please email ed.weeks@crippspg.co.uk