

Briefing Note: Guide to the Stages of a Commercial Claim

An Introduction to the Guide

This overview is intended to provide those involved in litigation with a broad understanding of the typical steps involved in Court proceedings. However the procedure applicable to each case will depend upon its facts, and this overview should not be treated as definitive. Please ask us for an explanation of any part of this overview which you would like to have explained in greater detail.

Stage One – Pre-Action

Formal “Pre-Action Protocols” govern the steps that all would-be litigants should take before issuing proceedings. Protocols are sets of procedures and timetables laid down by the Court when dealing with specific kinds of dispute. There are protocols for a wide range of disputes such as construction and defamation claims, and there is also a general protocol covering disputes where there is no specific protocol. Protocols are designed to ensure that parties establish what issues are in dispute, share information that is available concerning those issues and endeavour to resolve the claim. Failure to follow a relevant protocol, without good reason, will usually lead to a sanction being imposed by the court. For example, a successful claimant might be penalised by not being awarded its costs.

Ordinarily, after collecting sufficient evidence to substantiate a claim, the proposed claimant should send the other party a letter detailing the claim. This is called a letter of claim or a letter before action. The letter should give sufficient information about the claim to enable the defendant to understand and investigate the issues without needing to request further information. The Court’s Practice Direction on Pre-Action Conduct provides detailed instruction as to what a letter before claim should include.

The Practice Direction also regulates the content and format of the letter of response. The defendant should acknowledge a letter before claim in writing within 14 days of receiving it. When he replies he should state whether he accepts the claim in whole or in part, or that the claim is not accepted. If the claim is not accepted then the defendant should state why and whether he intends to pursue a counterclaim.

Parties are also obliged to enter into discussions, negotiations, mediation and/or arbitration prior to commencing proceedings (as well as throughout proceedings, if they have already commenced). Again, parties can be penalised when costs are assessed if attempts to negotiate have not been made, or if the parties have, for example, ignored contractual obligations to refer a dispute to arbitration or mediation.

Stage Two – Issue, Service and Pleadings

A party who wishes to start proceedings must complete a claim form, which should be filed with the court office. The proceedings are commenced when the court seals and issues the claim form. When completing the claim form the claimant is required to follow specific practice directions which regulate how a claim form should be drafted and what information it must provide.

Full details of the claim, called particulars, must also be sent to the defendant. After receiving the claim form and the particulars of claim the defendant has 14 days to file either an acknowledgement of service or a defence. If the defendant first files an acknowledgment he will have a further 14 days in which to file a defence. A defendant’s defence must comply with the Civil Procedure Rules.

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Summary:

An overview of the typical stages in a commercial dispute from letter before action to enforcement of a judgment, emphasising the mandatory nature of many of the procedural steps and the cost consequences of failing to comply.

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The particulars of claim and defence are referred to as 'pleadings'. Sometimes the claimant will file a reply (to the defence); however, he is under no obligation to do so. The claimant should only do this if he needs to allege facts in answer to the defence which were not included in the particulars of claim. Replies to a defence are most common where the defendant has made a counterclaim against the claimant.

A defendant cannot ignore the fact that the service of the claim triggers specific procedural steps which must be adhered to. If the defendant fails to carry out those steps the two most likely outcomes are:

- a) the entry of a default judgment; or
- b) if the claimant is also inactive for a prolonged period, a stay of the proceedings.

A default judgment can sometimes be set aside, but this can often be difficult and the defendant must satisfy one of the strict conditions in the Civil Procedure Rules. Ultimately, a judgment in default may have the same effect as a judgment after trial, in that it can be enforced against the defendant.

If a claimant does not apply for judgment in default, and the defendant fails to file a defence for six months, the claim will automatically be stayed. This can be unsatisfactory for a defendant as the matter could become 'active' again.

Stage Three – Allocation and Case Management

Where a claim is defended the court will serve each party with an allocation questionnaire. The questionnaire must be returned by the parties to the court by the date stipulated. The claimant must pay a fee when filing his allocation questionnaire. The parties are obliged to ask the Court to assign the case to a particular "track" depending on the value of the claim and its legal complexity. Allocation to a particular track has procedural and cost consequences.

The claim will be allocated to one of three tracks:

- A claim for £5,000 or less will usually be allocated to the small claims track;
- A claim with a value between £5,000 and £25,000 will generally be allocated to the fast track; and
- Claims exceeding £25,000 will ordinarily be allocated to the multi track.

For further details on track allocation please read our briefing note [Guide to Litigation in the County Court](#)

Once a case has been allocated to a track the court will manage the case. Directions will be given to the parties as to the steps that must be taken to prepare for trial. A strict timetable will be imposed as to when each step must be taken.

Sometimes the court will order that a case management conference is held to determine allocation and appropriate directions.

Stage Four – Offers of Settlement, Without Prejudice Negotiations and ADR

Parties involved in litigation should consider at each stage the possibility of negotiating a settlement.

The most effective and probably most common method of making a formal settlement proposal is through a Part 36 Offer. The key points to note regarding Part 36 Offers are that:

- Part 36 Offers constitute one of the most important tactical steps which parties can take during the course of legal proceedings.
- They provide a means of putting pressure on the other side to settle a case and of protecting, at least to some extent, your position on costs. If the other side does not accept a Part 36 Offer during the

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period for which it is expressed to be open (usually 21 days), they may be taking a significant risk as to costs and interest.

- A Part 36 Offer will be treated as 'without prejudice save as to costs'; therefore the trial judge must not be told about it until all questions of liability and quantum have been decided.
- A Part 36 Offer can be made before the commencement of proceedings.

It is also now a requirement of the court rules that parties to a claim must actively seek to resolve their dispute through alternative forms of dispute resolution ('ADR'), such as mediation. As noted above, if a party fails to do this, they can be penalised by the court whether or not they are the ultimate winner of the case.

A settlement can arise before legal proceedings have commenced, as well as after, and it is advisable to think about settlement options and proposals both before and during the claim. Where a settlement is reached prior to issuing proceedings the prospective claimant will not be entitled to recover his legal costs unless this is agreed.

Stage Five – Interim Applications

An interim application is made when a party asks the Court to make an order before the trial or substantive hearing of the claim. The party making the application is known as the applicant and the person against whom the order is sought is known as the respondent. An application may relate to either:

- Case management matters, such as standard disclosure of documents, exchange of evidence and trial directions; or
- Specific remedies, such as specific disclosure, interim injunctions, interim payments and striking out.

The detailed procedure for issuing an interim application is set out in the Civil Procedure Rules. At the end of any interim application, the judge may decide that one party should pay the other party's costs. The general costs rule applies, namely the loser will normally be ordered to pay the winner's costs e.g. if the application is granted, it is normal to order the respondent to pay the applicant's costs. If the court makes an order for costs in favour of one of the parties to the application then the court will usually make a summary assessment of costs there and then. Any such summary costs awards are payable within 14 days, unless the court orders otherwise.

Stage Six – Evidence

(a) Disclosure

The main purpose of the disclosure and inspection stage of the litigation process is to enable the parties to evaluate the strength of their opponent's case in advance of trial. The process is intended to promote settlements and therefore a saving in costs. Disclosure of documents is also governed by the Civil Procedure Rules. When a court makes an order for standard disclosure the parties must disclose;

- (a) the documents on which they rely; and
- (b) the documents which:
 - i. adversely affect their own case;
 - ii. adversely affect another party's case; or
 - iii. support another party's case; and

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(c) documents which they are required to disclose by a relevant Practice Direction.

For further guidance please see our briefing note "[Disclosure](#)".

(b) Witness statements

To succeed in litigation at an interim stage or at trial, a party will need to prove its case. Therefore a party must present evidence to support its claim or defence and this can be done by submitting witness evidence that tells the story behind the dispute and to fill in any gaps that the documents leave. The court will usually order when the witness statements are to be exchanged at a directions hearing.

(c) Expert Evidence

In many cases a party may wish to instruct an expert and rely upon expert evidence. This can be, and usually is to a large extent, based on opinion rather than fact. The expert can be called on to give evidence on issues of opinion in two forms:

1. An expert's written report, prepared before trial and made available to all the parties to the litigation; or by
2. Oral evidence given by the expert during the trial itself.

The expert witness's primary duty is to help the court, and this duty overrides any duty which he may have to those who are instructing or paying him. Sometimes it is appropriate for the parties jointly to instruct a single expert, and this is encouraged by the Court in order to save time and cost.

Stage Seven – Trial

A trial on the small claims track is informal and conducted at the discretion of the judge. Trials on the fast and multi tracks are more formal.

At the end of the trial the judge will usually have resolved all the issues i.e. liability (whether the claimant has established that the defendant is liable), quantum (how much compensation is to be paid) and costs.

As to costs, the judge will decide if any party should pay the other's costs. On the fast track the judge will probably also determine how much should be paid; this is known as a summary assessment of costs. The parties must provide each other and the court with a detailed breakdown of their costs. If there is no summary assessment, and the parties cannot subsequently agree on the amount of costs to be paid, they are determined after the trial by a different judge called a costs judge, in a detailed assessment. See our briefing note "[Costs in Litigation](#)".

On all tracks a party may decide to appeal all or part of the trial judge's decision. Normally an application for permission to appeal must be made within 21 days of judgment.

Stage Eight – Enforcement

A party awarded damages and/or costs is called a "judgment creditor" and will expect to be paid by the date determined by the court. If this does not happen he will have to apply to the court to enforce the judgment against the loser in the case, called the "judgment debtor".

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1. Writ of fieri facias or warrant of execution

Seizing goods as a means of enforcing a judgment requires the issue of a court document (in the High Court, a writ of fieri facias) which commands an enforcement officer to seize and sell a judgment debtor's goods to raise funds to satisfy the judgment debt. Notice to the debtor is not required; however, the threat of this step may be enough, in some cases, to secure payment of the judgment debt.

2. Attachment of Earnings

Enforcing a judgment by payment taken directly from the judgment debtor's earnings is popular as it is inexpensive and fairly easy to do. The advantages are that it involves automatic deduction from wages and it does not rely on the debtor making payment. However, it can only be used to enforce debts of individuals who are in paid employment and it can take a long time to pay off a judgment debt by this method.

3. Third Party Debt Order

A third party debt order freezes money belonging to a judgment debtor held by a person, organisation or institution such as a bank or building society. A third party debt order will prevent the judgment debtor having access to the money until the court makes a decision about whether or not the money should be paid to the judgment creditor.

A judgment creditor should carefully consider when to apply for a third party debt order. When the order is sent to either a bank or building society it will only freeze money held in an account on the day it is received. If the order is received a couple of days before the debtor's salary is paid into the account the judgment creditor is likely to receive little or nothing as the freezing order does not apply to any money paid into the account after the order was received.

4. Charging order and order for sale

A charging order is a way of securing a judgment debt by imposing a charge over a judgment debtor's beneficial interest in land, securities or certain other assets.

There are in reality three stages:

1. Interim Charging Order.
2. Final Charging Order.
3. Order for Sale.

Charging orders are an effective method of enforcement when there is substantial equity in a property and the judgment debtor is the sole owner. In such a situation, enforcement by order for sale will be effective, and interest continues to run from date of judgment to final receipt of payment. The method is less satisfactory if there is limited equity in the property or it is jointly owned or used as a family home.

5. Bankruptcy/ Winding Up

If the amount you are owed by an individual or a company is in excess of £750, you can apply for an individual's bankruptcy or a company's winding up. Before applying to the court for this it is advisable to issue the judgment debtor with a statutory demand identifying the exact sum owed. If the judgment debtor does not pay within 21 days of receiving the statutory demand the creditor will be able to present a petition for bankruptcy/winding up to the court.

After a bankruptcy or winding up order is made, the judgment debtor's assets will be collected by a trustee in bankruptcy or liquidator and distributed among its creditors, providing there are any assets.

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This process can be expensive and time consuming. Also there is no guarantee that a creditor will recover all or any of its debts.

6. Judgment summons

A judgment creditor can make an application for a judgment summons. The summons requires the judgment debtor to appear personally in court, and be examined on oath as to the means he has, or has had, since the date of the order or judgment. The judgment debtor will have to show why he should not be committed to prison for his default.

7. Oral examination

An order to obtain information is not a form of enforcement but it is a way of getting information from the judgment debtor which will help the creditor to determine what method of enforcement will prove most beneficial. The judgment debtor will be summoned to court and questioned under oath regarding his employment status, details of any additional income and details of any property owned. From the information given by the judgment debtor the creditor will be able to make an informed decision as to how to enforce the judgment.

If you would like to know more about this topic or our other legal services, please contact Jeremy Laws on 01323 435900 or email jpl@gabyhardwicke.co.uk

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